

WasteMINZ Contaminated Land Management Sector Group Steering Committee submission on Natural and Built Environment Bill

WasteMINZ is the largest representative body for the waste, resource recovery and contaminated land management sectors within Aotearoa New Zealand. The Contaminated Land Management Sector Group represents over 450 members from commercial, local government, and consultancy sectors within the contaminated land industry across Aotearoa New Zealand.

Introduction

The Contaminated Land Management Sector Group Steering Committee (the Steering Committee) thanks the Environmental Select Committee for the opportunity to submit on the Natural and Built Environment (NBE) Bill. The Steering Committee broadly supports good resource management in Aotearoa New Zealand.

This submission focusses on issues directly relating to contaminated land where there is ambiguity and/or the potential for serious unintended consequences.

Overarching issues

The use of the word ‘soil’ in relation to contaminated land is highly problematic as it is not defined within the Bill and does not have an accepted definition across government. The lack of agreement on a definition of soil within science and industry further compounds this issue. A definition of soil could potentially include any of the following:

- Only topsoil,
- Gravel, sand, silt, clay and peat, wherever they may be found,
- Engineered fill materials,
- Biosolids, or
- Any of these materials when they are underwater, such as the beds of lake, rivers and estuaries.

Note that none of this encapsulates the Ministry of Primary Industries’ position that:

“Soil is vitally important to the New Zealand economy and environment. Our use of land and soil requires careful management to maintain soil health and prevent soil-related issues – including erosion, excess nutrients and contamination”.¹

¹ <https://www.mpi.govt.nz/funding-rural-support/environment-and-natural-resources/land-and-soil-health/>

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Recommendation:

Replace 'soil' with 'land' whenever it is used in relation to contaminants or contaminated land throughout the Bill. This has the additional benefit of enabling contamination assessment to consider groundwater and sediments in addition to soil.

Section 7: Interpretation - Definition of contaminant

In the Bill, a contaminant is a substance that changes the physical, chemical or biological condition of land or water. The Bill does not specify whether the change has to be a bad one, or whether it includes good outcomes as well.

Because the definition of contaminant feeds into the definition of contaminated land there is a potential unintended consequence that a variety of beneficial activities may be interpreted as creating contaminated land. Examples of this include:

- Adding fertiliser or organic material to soil is intended to change its biological condition, making it more fertile.
- Similarly, adding lime to soil is intended to change its chemical and physical condition.
- Civil works often place sand or gravel to make a firm base for construction or to allow water to drain away. That changes the physical condition of land.
- Conversely civil works may place clay to form an impermeable barrier, or soil that plants can grow in, again changing the physical condition of land.

No doubt these situations need regulating, but we do not recommend doing that through contaminated land rules, and we presume the Government did not intend to.

Suggested amendment:

Contaminant includes any substance (including gases, odorous compounds, liquids, solids, and micro-organisms) or energy (excluding noise) or heat that either by itself or in combination with the same, similar, or other substances, energy, or heat,

- a) when discharged into water, **adversely** changes or is likely to **adversely** change the physical, chemical, or biological condition of the water; or*
- b) when discharged onto or into land or into air, **adversely** changes or is likely to **adversely** change the physical, chemical, or biological condition of the land or air onto or into which it is discharged.*

Section 7: Interpretation - Definition of contaminated land

The Steering Committee generally supports the new definition of contaminated land, which is land where contaminants exceed environmental limits or pose unacceptable risks to human health or the environment.

However, the success of this legislation must depend on how those environmental limits are set, and what is deemed an unacceptable risk.

Section 7: Interpretation - Definition of natural hazard

The Steering Committee notes two critical issues within the definition of natural hazard. Firstly, the use of the term 'naturally occurring contaminants' in paragraph 2 of the definition creates a logical inconsistency as contaminant is defined within the Bill as '*any substance....when discharged into water...or when discharged onto or into land or into air*'. Naturally hazardous substances are already present in land, so they are not necessarily being discharged, so they cannot be 'naturally occurring contaminants'.

Secondly, the natural hazard definition only considers soils which pose risks to human health. Naturally hazardous substances in other media may also present very significant environmental risks: for example, arsenic, sulphide or fluoride in geothermal waters can be toxic to stock and aquatic life. For another example, acid sulphate soils can be very damaging to concrete. Asbestos and other mineral rock fibres, "marsh" and radon gases also present risks to humans and the environment, all of these are present in appreciable quantities in New Zealand. The overall focus should be on the risk posed by its presence and/or discharge, not merely its form.

Recommendations:

1. Replace 'contaminants' with 'substances' or 'chemical or mineral' in the definition of natural hazard.
2. Consider adding 'or the environment' to the end of paragraph 2.
3. Replace any reference to soil with reference to land.

Subpart 2 – Sections 37 through 46: Environmental limits

Currently, we take a risk-based approach to contaminated land. Contaminants can do much more harm in sensitive environments such as preschools, food production areas or conservation areas, than in commercial or industrial areas, mines or quarries. Thus, we need ranges of limits and targets for different scenarios. It is important that this is encouraged by the Bill.

With regards to setting limits and targets for contaminants in soils, the National Planning Framework (NPF) must introduce default or generic acceptance criteria that are only to be used when site specific risk assessments have not been completed. If the limits and targets for contaminated land are set too low, and cannot be adjusted for a site's particular circumstances, there will be very adverse unintended consequences. While the chemical

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legacies of fertiliser application and urban life are very widespread, we cannot dig up half the country and put it into landfills, and in our professional opinion there is no need to. Otherwise, an unintended consequence could be excessive cost, effort and further environmental damage chasing a limit which poses no risk.

Recommendations:

The NPF should allow for site specific risk assessments to override hard limits. Alternatively, limits should be outcomes based, for example commonly accepted risk thresholds of less than 1 in 100,000 additional cancers or protection of 90% of aquatic species, rather than on contaminant specific numbers.

Section 404: Freshwater farm plans

We believe it is important for rural Hazardous Activities and Industries List (HAIL) activities (such as farm dumps, sheep and cattle dips, fuel storage, spray storage and mixing areas, bulk fertiliser storage, fertiliser and pesticide use, rural application of sewage sludges and other biosolids, etc.) to be included in freshwater farm plans for the following reasons:

- Rural HAIL activities have significant potential to impact freshwater quality and also human and environmental health; so, they should be an important consideration in farm management.
- Farmers and rural landowners know their properties and their histories better than anyone else.
- Many rural HAIL activities are, and have been, permitted activities so there are no council records of them.
- Most rural HAIL activities are indiscernible, or difficult to identify, using historic aerial images.

Overall, it is almost impossible for regional councils to identify rural HAIL activities, as required in section 420 of the Bill, without the cooperation of the farmer/landowner. Requiring HAIL activities to be included in freshwater farm plans is a simple and cost-effective means of identifying these activities.

Recommendation:

Add 'identify any Hazardous Activities and Industries List (HAIL) activities carried out on the farm' to this section.

Sections 416 to 427: Polluter pays principle

The NBE Bill is unclear whether the polluter pays principle will be effective from the date the legislation takes effect or if it will apply retroactively.

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We are concerned that a purely forward-looking polluter pays scheme will have the following unintended consequences:

- It will be nearly meaningless if it does not apply to any of the polluters who have already contaminated our land. The Bill already has provisions to take action against those who discharge contaminants after it comes into effect.
- Limiting the principle to pollution after the date on which the Act would come into effect will create an unwieldy and complex dual system, based on the purchase date of a piece of land, which will be difficult for local authorities and regional councils to administer and to fulfil their obligations and duties under the act.
- It may incentivise pollution of sites prior to the legislation coming into effect.
- There is potential for owners of currently polluted land to argue that they are not required to manage or remediate contamination which occurred prior to the legislation coming into effect.

While there are notable issues with retrospective liability regimes there is also clear international precedent for them.

Recommendation: Amend section 417 to clearly make liability for pollution retrospective.

We are concerned that the NBE Bill does not provide an adequate framework which will enable local and central government to hold polluters to account.

The NBE Bill says that the purpose of this subpart is to provide a framework so that those who cause or allow contamination to occur bear the costs of managing the contamination (section 416, paragraph (a)). However:

- Section 416, paragraph (b) states that *'the owner of the land is responsible for managing the contamination...'*.
- Sections 418 to 419 outline the landowner's obligations.
- Section 420 outlines regional council obligations.
- Section 421 outlines territorial authority duties.
- There is no section which outlines the obligations or duties of polluters.

Given this, there appears to be an inherent assumption written into the Bill that the polluter is always the landowner. We can think of numerous examples of sites where this is not the case, rather a tenant is the polluter. For example, contractors operating bitumen plants on port land. Equally a previous owner may have been the polluter. For example, a closed petrol station redeveloped for residential use.

Recommendations:

1. Amend the NBE Bill to include clear obligations and/or duties for polluters. At a minimum these should be the same as those of the landowner. We would think the polluter's obligations and duties should explicitly take precedence over the landowner's obligations and duties.

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2. Consider including provision for landowners to seek private resolution for a polluter selling contaminated land without informing the purchaser.

Sections 418 to 419: Landowners' obligations

The obligations for landowners hinge on whether the land is used for an activity or industry listed in the HAIL. The HAIL is a brief document promulgated by the Ministry for the Environment as an indicative screening tool. It is not fit for this purpose, nor was it intended for it. Use of the HAIL in this manner is problematic for the following reasons:

- The HAIL has not been subject to legislative review.
- The HAIL is a brief guidance document, not a regulation.
- The HAIL is not evidence-based: for almost all categories there is no published consensus on the nature, likelihood or extent of the anticipated contamination.
- Some known sources of contamination do not appear on the current HAIL. Therefore, not all contaminated, potentially hazardous, sites will be required to be notified, managed or remediated. This is particularly notable given that humanity is continuously innovating new materials and substances, which usually take decades to be identified as contaminants. Most recently this has included the PFAS group of contaminants which began widespread use in the 1950s but were not subject to significant environmental interest until the 2010s after 60 years of widespread use.
- The HAIL is subject to interpretation, particularly categories H and I, by regulatory authorities and contaminated land practitioners, with wide variations in those interpretations across the country.

The duty of landowners to notify regional councils if their land is used for a HAIL is onerous and impractical. In addition, it is likely unworkable as it requires a level of knowledge and understanding of contamination that few landowners are likely to possess. A current landowner may have no idea what HAILs have taken place on their land in the past.

Furthermore, there is no trigger or timeframe for landowners' reporting obligations specified in section 418. Nor are there triggers or a mechanism to require landowners to investigate potentially contaminated land or land with known current or historical HAIL activities in section 419. Given this, it is highly likely landowners will avoid investigating potential contamination as it triggers obligations. The system will then rely on a regional council identifying HAIL correctly, then requesting the site be investigated to find out if the land is contaminated. At which point there are no enforcement mechanisms provided if a landowner declines to investigate on the basis of HAIL alone because HAIL does not equal contaminated.

Without further clarification of the roles and timeframes around landowners' obligations, along with suitable enforcement provisions, we see this framework as unworkable and anticipate a multitude of perverse outcomes.

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Recommendations:

1. Either significant revision to the HAIL will be required to make it fit for this purpose, or a separate document should be produced as a standard not as guidance.
2. Clarify the triggers and timeframes for landowners' obligations.

Section 420: Obligations of regional councils

A regional council must identify all HAIL land within its boundaries and use available information to determine which land is contaminated. This sounds aspirational, especially as no timeframe is set, available information is scant, and there are no apparent consequences should a council neglect its obligation. In addition, new HAIL activities are occurring all the time so regional councils will never be able to achieve 100% HAIL identification.

Paragraph (1)(e)(ii) requires regional councils to identify all contaminated land. Again, this sounds aspirational and challenging for regional councils, especially given that new contaminated land is being created all the time.

Recommendations:

1. Amend paragraph (1)(e)(ii) to reflect the wording in (1)(b) which is that councils need to use available information to identify contaminated land.
2. Clarify that identification of contaminated land is the responsibility of the polluter or landowner, as indicated in s419, but it will be the regional council's responsibility to use this information to classify land within the council's boundaries.

Section 421: Territorial authority duties

The new duty of territorial authorities to consider the environmental effects of proposed development in s421 potentially creates even further overlap between territorial authorities and regional councils than under the current system. In addition, the proposed duties add a level of complexity that, because of under-resourcing and a national shortage of suitably experienced technical staff, mean that the purposes of the Act will not be able to be met.

Recommendations:

- Local Government reform, or the NBE Bill, should provide consistent and easily enacted means of territorial authorities and regional councils sharing services and transferring functions, and removing liability issues.
- Either:
 - Recognise and provide for the resourcing requirements for territorial authorities to perform these duties within the Bill, or
 - Transfer the duties of territorial authorities to regional councils as they will be better managed at this level, and this will reduce the number of qualified professionals required to deliver these functions. The need for additional funding for regional councils to perform these duties should also be considered.

Section 422: Classification of significantly contaminated land

We see the following notable issues with this section:

- Significantly contaminated land is not defined in the Bill.
- The relationship between significantly contaminated land and contaminated land sites of national significance, referred to under section 423, is unclear.
- There is no detail on what elements might trigger contaminated sites to be reclassified as 'significantly contaminated'. This could be environmental risk, risk to human health, societal risk, risk to the 100% pure brand, etc.

Recommendations:

1. Include a definition of significantly contaminated land.
2. Clarify the relationship between significantly contaminated land and contaminated land sites of national significance.
3. Provide detail on what elements trigger contaminated sites to be reclassified as 'significantly contaminated'.

Section 423: EPA's role in relation to contaminated land sites of national significance

'Contaminated land sites of national significance' is not defined nor are any triggers given. In addition, as noted above, the relationship between contaminated land sites of national significance and significantly contaminated land is unclear.

We are also concerned that the EPA is currently unequipped and under-resourced to undertake this role. Whilst provision could be made to resource the EPA to carry out these functions, given the current talent shortage it will likely be at the cost of regional councils.

Recommendations:

1. Include a definition of contaminated land sites of national significance.
2. Clarify the relationship between significantly contaminated land and contaminated land sites of national significance.
3. Central government should give careful consideration to how the EPA will be resourced, and the impacts such resourcing may have on local government.

Section 427: EPA may recover costs from local authority

We can see a need for a mechanism to hold local authorities to account in instances where they have not adequately performed their duties in regard to contaminated land. However, so far as we are aware, the Bill would not give the EPA the ability to recover costs from local authorities that fail to perform other environmental duties, or from regional councils or other central government agencies.

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We see numerous perverse outcomes of these provisions, which include:

- This is potentially a quite litigious approach which may result in more cases going to Environment Court rather than more sites being remediated.
- Local government are unlikely to be resourced sufficiently and at short notice (e.g., Fox River) for the immediate management or intervention for contaminated land.

Recommendations:

Consider alternative provisions for funding remediation of sites where the EPA is unable to recover costs from the polluter. This could be in the form a new centrally managed remediation fund, potentially funded from a rate targeted to industrial and production land, or by expanding and adequately funding the Contaminated Site Remediation Fund.

Offer of Support

In reviewing the Natural and Built Environment (NBE) Bill, the Steering Committee has noted that greater detail will be required to implement some portions of the legislation (e.g., developing the methodology for setting environmental limits and targets). The Steering Committee offers its support to Government, in whatever form is useful, to develop those details as they relate to contaminated land.