Fertiliser Association
Shaping profitable and sustainable farming

SUBMISSION

on

Natural and Built Environment Bill

To

Environment Select Committee

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About the Fertiliser Association of New Zealand

1. The Fertiliser Association of New Zealand (the Association) is an industry association funded by member companies to address issues of common public good. Member companies include Ballance Agri-Nutrients Ltd and Ravensdown Ltd. Both are farmer co-operatives with some 40,000 farmer shareholders. Between them, our members supply the majority of all fertiliser used in New Zealand. As co-operatives, they are not driven by maximising the value of product sales, but by delivering best value to farmer shareholders.
2. Our members currently have extensive teams of on-farm advisers – around200. Their staff are well trained, assisting farmers and growers to make informed, evidence-based decisions for their farm systems.
3. The Association member companies have invested significantly in products, systems and procedures which support responsible nutrient management to enable a viable primary industry within environmental limits.
4. The Association submits on national policy and proposed regulation to support environmental management, with the view that policy and regulation should be enabling, and that controls are both appropriate and necessary while providing for sustainable primary production within environmental limits.

Key submission points

We have focused on the provisions relating to soils in the Bill in the context that farming and food production are critically dependent on New Zealand's soils both now and for the future.

The Association shares Parliament's desire to create an environmental system that works. The Association supports:

- the provision of certainty to users of the system by creating a code of contaminated site provisions in the Bill and establishing public processes that set environmental limits for soil contaminants to protect the environment and human health;
- introduction of concentration-based and risk-based approaches to contamination (in the definition of contaminated land and the standard for landowner clean up) as these are practical approaches that people understand and can work with.

The Association has identified the following issues in the contaminated land provisions in the Natural and Built Environment Bill:

- the approach to assessing unacceptable risk to human health and the environment is under-developed which will cause uncertainty and may identify land as contaminated that is not intended by Parliament to be captured;
- the mandatory provision of any investigation of contamination to regulators, as this will discourage even preliminary, responsible investigations and result in perverse outcomes of having less information and poorer management of sites with contaminants
- the choice of language used in Part 6, Subpart 4-Contaminated Land requires some assumptions and is open to interpretation.

The Association considers the Bill would be more workable if the Select Committee were to:

- better distinguish between managing contaminants for soil health and identification and remediation of contaminated sites
- include more detail to make the risk-based approach in the contaminated land definition workable;
- set out detail about the approach of the risk framework through the NPF or regulations and an amendment to the definition of contaminated land;
- connect the commencement of Part 6, Subpart 4-Contaminated Land to the availability of statutory direction about the risk framework;
- create positive incentives for disclosures relating to contaminated land, similar to those used in Australia;
- specify in more detail the nature of contamination information that a landowner must disclose;
- update the rationale for Part 6, Subpart 4-Contaminated Land to guide the courts in interpreting provisions.

Below we expand on these matters.

The Association trusts that these suggestions are constructive and would be pleased to speak to the Select Committee about this submission.

Suggestions to improve the workability of Part 6 subpart 4

Include more detail to make the risk-based approach in the contaminated land definition workable

The Bill has detailed processes about setting and reviewing environmental limits but there is no guidance concerning how unacceptable risk to the environment and human health will be determined. As a result, landowners, polluters and councils will use different consultants who might each take different approaches to risk assessments, which could result in wildly different conclusions.

A lack of guidance about the approach to what is unacceptable risk will impact the sale and purchase of land, stymie remediation plans and increase the amount of time and cost involved in responding to administration of provisions rather than focusing on managing contamination. There is a danger that the proposed definition for contaminated land could unintentionally categorise much of New Zealand's land as contaminated.

Set out detail about the approach of the risk framework through the NPF or regulations or an amendment to the definition of contaminated land

The Association considers that statutory direction is needed to reduce uncertainty. Litigation will take time and be fact-specific and not helpful to all users of the system. Non-statutory guidance documents will not be sufficient to reduce disputes and will not pose obligations on regulators to act consistently across the country.

The Association considers the Bill could empower the creation of a statutory framework for risk assessment that could be developed further through the NPF, regulations or a change to the definition of contaminated land.

- The Association considers that the NPF could be an appropriate vehicle given such a framework is a matter where "national consistency" is required and it would help with "resolving conflicts about environmental matters" (matters within the scope of the NPF). If the NPF was the intended approach to providing a risk framework then the Bill ought to be more explicit about that and make the creation of a risk framework a mandatory matter to be addressed in the NPF.

- Regulations outside of the NPF may be an appropriate method of addressing practical issues associated with the management of contaminated land. Part 6, Subpart 4-Contaminated Land refers to compliance with regulations in several places but the location and extent of regulation-making powers for contamination is unclear. It may be that there is an expectation that such matters will be included in provisions in the NPF, but the scope of regulation-making empowering provisions for the NPF or other regulations does not seem to explicitly incorporate such matters. This is a problem if, when it comes time to making regulations, a view is taken that the powers are insufficient. Even if there were a regulation-making provision that were relevant, the Association considers that there needs to be a provision in the Bill that makes it a mandatory requirement to establish and update a risk framework.

The Bill defines contaminated land as

> *land where a contaminant is present—*
> *(a) in any physical state in, on, or under the land; and*

(b) in concentrations that—
(i) exceed an environmental limit; or
(ii) pose an unacceptable risk to human health or the environment

Under the Bill, an environmental limit must be expressed as relating to the ecological integrity of the natural environment or to human health.

Internationally there is limited experience in defining ecological integrity for soils. In the scientific literature, ecological integrity is often described in terms of the ability of an ecological system to support and maintain a community of organisms that has species composition, diversity, and functional organization comparable to those of natural habitats within a region.

For soils this will be particularly challenging as many of the organisms present in soils are not identified, with poor understanding of the roles and functions that each organism plays. This could mean that any approach to identifying ecological integrity in soils would likely be based around the presence and concentrations of contaminants (e.g. departure from natural background levels).

The consequence of such an approach is that even any mild exceedance beyond background conditions could define the land as contaminated land, in the absence of any significant risk of harm to human health or the environment.

Given large areas of rural, urban and industrial land have contaminants above background levels, but below levels which present any significant risk of harm, there is likelihood of large areas of New Zealand land being unnecessarily defined as "contaminated land".

This could have significant reputation risk to New Zealand, with domestic commercial and international trade implications.

Internationally the threshold for the definition of 'Contaminated Land' is generally set at a level where there is risk of significant adverse effects to the environment or human health. Contaminated land is not typically associated with a low threshold which defines ecological integrity as described in the Bill. Conversely if the value for ecological integrity is set at a very high threshold, defining significant risk of harm, then the Bill is failing to implement appropriate management of contamination.

Traditionally soil contamination is managed with a hierarchy of guideline values, not a single value representing ecological integrity. For example, contamination of land under various land use activities may recognise:

i) threshold for natural background levels (this may equate to a level set for ecological integrity)
ii) threshold for no observable effects
iii) threshold for minor adverse effect. (This may also serve as a remediation target if the trade-off between social benefit of an activity and the minor adverse effects is warranted. This value may also serve as an investigation level, to establish the risk of more significant adverse effects).
iv) threshold for less than minor adverse effects. (This may serve as a threshold for mandatory intervention, to prevent land becoming a 'contaminated site')
v) threshold for significant adverse effects on the environment or human health.

We seek amendment of the proposed definition of contaminated land so it requires that contaminated land is defined in terms of significant adverse effects on human health or on the environment (and is not simply a mild exceedance of a limit which reflects ecological integrity).

This approach would be consistent with the practical effect of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 and the National Policy Statement for Highly Productive Land. Together these national instruments implicitly acknowledge the nature of productive land and recognise that the Food Act and regulations that apply to highly productive land are focused on ensuring food that is produced on land does not pose a risk to human health. This would also meet the intent of the contaminated land provisions in the Bill to be targeted at individual sites.

If there is a process introduced for establishing and updating a risk framework:

- The Bill should provide for public input so that the numerous experts in this area can work collaboratively to deliver a useful framework. The Association expects there would be iterations of such a framework as the practices of risk assessments mature. So the Association considers that the Bill also ought to allow for the public to initiate a change or update to the risk framework.
- The content in the NES on contaminated soil is similar, but different, to the guidance required about the approach to identifying what is an unacceptable risk in the definition of contaminated land. There are a broad range of factors that could be in a risk framework to provide certainty to expert consultants undertaking a risk assessment. These include the point at which land is considered contaminated - before or after risk factors are addressed, and the weight to be put on various risks so a logical conclusion of "unacceptable" risk is made. This also should include the weight to assign to risk when there is a relevant environmental limit that is satisfied and refer to international standards or methods that apply when calculating unacceptable risk.
- In other jurisdictions, like England, there is a great deal of detail about the approach to be taken to contaminated land set out in secondary legislation. It is needed to impose obligations on councils and the EPA when undertaking their functions and provides certainty to landowners, polluters and insurance companies. For example, such a framework can address the approach a regulator must take if there are multiple polluters or some polluters can be found but not others and distinguish between approaches relating to sudden and accidental incidents compared to gradual contamination.

Specific changes sought:

the second half of the definition of contaminated land be amended so that contaminated land means "land where a contaminant is present—(a) in any physical state in, on, or under the land; and (b) in concentrations that pose an unacceptable risk to human health or the environment";

update the purpose and scope of the NPF to include a risk framework for contaminated land (and require it to be a mandatory matter) or add a risk framework to regulation-making powers under the Bill.

Connect the commencement of Part 6 subpart 4 to the availability of statutory direction about the risk framework

The Association is concerned that the definition of contaminated land is not sufficiently certain for subpart 4 to be operative when the Bill commences. The Association recognises environmental limits may take time and the risk assessment approach will mostly apply. Consequently, if there is no amendment to the definition of contaminated land, the Association considers that subpart 4 ought to commence once a risk framework is established (through the NPF or regulations).

***Specific changes sought**:*

if the definition of contaminated land is not amended to reduce uncertainty around the assessment of unacceptable risk, as sought above, then add Part 6 subpart 4 to the matters in section 2 that have matters that commencement is contingent on.

Create positive incentives for disclosures relating to contaminated land

The Bill creates a strong compliance regime supported by a wide range of enforcement measures to regulators, which is commendable. However, the package of provisions shifts the relationship between regulators and people working with the environment from partnership, proactive risk management, and responsible stewardship to one of compliance-focus and fear of enforcement. The Association has observed that over time people working within the RMA system have matured their approach towards investigating risks and working with regulators, particularly with recent ESG risk evaluations being undertaken. The Association is concerned that the approach taken in the Bill may be a step backwards: reducing communication and increasing litigation between all of those involved in the system.

There are no protections in the Bill against self-incrimination despite the potential for civil and criminal penalties. Such provisions typically exist in common law systems to protect against the undermining of the human right not to incriminate oneself. These protections exist in other jurisdictions and enable people to be able to distinguish themselves as a responsible, proactive citizen with a pollution incident from others with more nefarious intentions. Such protections would require a level of prescription around the timing and sharing of information.

The Association considers that there is value for a regulator, a person working to manage the environment, and the environment, if people were able to talk and share information freely and frankly without fear of self-incrimination. This enables people to explore and understand all of their risks and take responsibility for managing them, without constant fear of consequences. Consequently the Association considers it appropriate that the Bill be amended so that there are some protections in the legislation against self-incrimination and incentivise people to disclose information. It is understood that such provisions exist in a contamination context in New South Wales, Australia.

***Specific changes sought**:*

add into the Bill some protections against self-incrimination and incentivise people to disclose information in a contamination context.

Specify in more detail the nature of contamination information that a landowner must disclose

Sections 418 and 419 place notification obligations on landowners when a site is a HAIL site and when managing, investigating and monitoring contaminated land. These provisions are not targeted to understanding the concentration of contaminants in breaching limits or presenting unacceptable risk to human health or the environment. The Association is aware that there are all manner of investigations that might be undertaken on land which might arguably be considered to be environmental investigations, particularly on modern farms.

The breadth of these obligations is unreasonable given the apparent focus is on understanding and managing contaminated land. If applied as it is then councils may receive huge amounts of irrelevant information until there is case law establishing the nature of information that is intended to be captured by these requirements. The Association considers that a focus on information relating to concentrations of contamination is a more relevant focus.

***Specific changes sought**:*

amend 418 and 419 so they are focused on providing information that is relevant to understanding concentrations of contamination on contaminated land.

Update the rationale for Part 6 subpart 4 to guide the courts in interpreting provisions

Finally, the Association expects significant litigation about the contaminated land provisions. So it asks that any changes to the body of subpart 4 made by the Select Committee are updated in the purpose section (section 416) and commentary is added to the Explanatory Note to the Bill regarding Parliament's intentions about the practices expected when applying all of these codified provisions.

In addition, the Association considers that it would be useful if the Explanatory Note could address the following matters:

- the extent that unacceptable risk to the environment and human health ought to play when environmental limits are set for the same parameter, even if that is that both tests apply
- the logic for local versus national regulators of contaminated land and how significantly contaminated land / contaminated land sites of national significance is different from land where there is an unacceptable risk to human health or the environment
- an explanation for why different language is used in section 417 (like "produce" pollution; "damage" to human health and the environment) to other provisions in subpart 4 and the Bill.

***Specific changes sought**:*

update the purpose of Part 6 subpart 4 and add more text to the Explanatory Note in the Bill about subpart 4.

End.