
Contaminated Land: Pass the Parcel

Submission to the Local Government and Environment Select Committee:
Resource Management and Electricity Legislation Amendment Bill

May 2005



Contents

1	Introduction:	1
2	The Meek Will Inherit ... contaminated sites	4
3	Pass the Poison Parcel	10
4	Ducking the Hard Stuff	15
	Appendix 1 – Overseas Approaches to Liability for Contaminated Sites	16

Sustainability Council
P.O. Box 24304, Wellington
Tel: 04-9133655, Fax: 04-9133760
Email: council@sustainabilitynz.org

1. Introduction

The Sustainability Council of New Zealand is an incorporated charitable trust whose overall objective is to assist the evolution of a sustainable New Zealand. One of the concerns of the Council is the potential effects on the economy, the environment, and human health of the use of hazardous substances. The Sustainability Council is pro-science and recognises the importance of scientific research and the use of best technology in raising welfare and wealth for New Zealand. However, it seeks to ensure that development, use and disposal of hazardous substances is consistent with the highest standards of care and with a sustainable New Zealand. We welcome this opportunity to contribute through this submission to improving the regulatory regime governing contaminated sites.

This supplementary submission focuses exclusively on the proposal contained in the Bill to assign responsibility for the cleanup of contaminated sites to regional councils.

This proposal is linked to other proposed reforms to hazardous substances regulation and for further background please see the Sustainability Council's research report entitled *Financial Accountability for Hazardous Substances*,¹ and another bill before Parliament, the HSNO (Approvals and Enforcement) Amendment Bill.

¹ Available from www.sustainabilitynz.org

2. The Meek Will Inherit ... contaminated sites

Problem Recognition

The appalling state of New Zealand's laws governing hazardous substances in the late 1980s was clearly recognised in an inter-departmental report completed in 1988.² In the aftermath of the ICI fire, there was a willingness to confront the problems and this document laid out clear objectives, principles and analysis of alternatives for reform. By 1996, HSNO had been passed and at least the promise of a vastly improved regime was in place.

What to do about the historical mismanagement of substances and resultant pollution was, however, to be dealt with under separate legislation. Then Environment Minister, Simon Upton, was driving MFE to provide a solution and the minister's resolve was expressed in a foreword to a 1995 discussion document as follows:

The Government is committed to ensuring that the management of contaminated sites is addressed in a timely and appropriate manner. It is recognised that any clean-up will not happen overnight. However, **what is certain is that the liabilities of past and present generations cannot continue to be transferred to future generations.**³ [Emphasis added]

By then, the ministry had the following take on the dimensions of the problem:

Preliminary studies of the likely extent of potentially contaminated sites indicates that there may be over 8000 potentially contaminated sites in New Zealand. These are made up of the 7200 identified in the 1992 report, approximately 800 timber treatment sites, and a number of agricultural sites such a sheep and cattle dip sites. Of the 8000, approximately 1500 are thought to be high risk sites.⁴

Cleanup costs were estimated in a 1992 consultant report to be \$600 million and in August 2004 MFE stated the cost "is estimated to be in the order of a billion dollars".⁵ The true scale of the problem is still uncertain.

What is clear however is that although in some cases the parties that caused the contamination can be held legally accountable for cleanup costs, under current law a significant proportion of the total bill cannot be recovered from the original polluters. The main reason the polluter cannot be held liable is if the contamination took place prior to the introduction of the RMA in 1991. Crown Law reported in 1995 that the

² Pesticides, animal remedies, toxic substances, explosives and radioactive materials were each subject to different assessment criteria and under at least three different government departments. *Pollution and Hazardous Substances Management*, Final report of the Inter-agency Co-ordination Committee, Ministry for the Environment, November 1988, p20.

³ Discussion document on proposals for law reform relating to contaminated sites, Ministry for the Environment, 1995, Foreword.

⁴ Discussion document on proposals for law reform relating to contaminated sites, Ministry for the Environment, 1995, section 1.3.

⁵ *The Contaminated Sites Remediation Fund: Guide to Regional Council Applicants*, Ministry for the Environment, August 2004, p3, and Discussion document on proposals for law reform relating to contaminated sites, Ministry for the Environment, 1995, section 3.5.

RMA cannot be used retrospectively to enforce cleanup and this was effectively confirmed by a subsequent Environment Court decision in 1997.⁶

The ability to make the polluter pay for historical contamination was thus one of the key reforms Upton targeted. Though it took some time for proposals to be developed, the Sustainability Council has obtained the official papers showing that by August 1999 Cabinet had approved the following set of reforms:⁷

- f “agreed that the Resource Management Act be amended to provide that:
 - i. the polluter should be included as a potential liable party for the pre-1991 contaminated sites to ensure that the party responsible for the contamination can be directly liable;
 - ii. there be an innocent landowner defence to provide additional protection for such parties and to place emphasis on the responsible party;

- g agreed that the innocent landowner defence referred to ... above requires that the landowner:
 - i. is not a related party to the polluter of the site;
 - ii. has no knowledge or likely knowledge of contamination at the time of purchase;
 - iii. undertook appropriate investigations at the time of purchase.

- h noted that the innocent landowner defence applies only to sites contaminated prior to 1991.”

What did not follow through from the 1995 discussion paper was a seriously resourced fund for cleanup work. MFE suggested by way of example that clean up costs may end up being split equally in three ways: central and local government liabilities, other liable parties, and orphaned costs.⁸ Of the then estimated \$600 million, under this example \$200 million would be provisioned for as orphaned costs to be raised over 10 years by means of levies, rates or taxes. The Cabinet did however make a start in allocating \$2.59 million for the first significant cleanup project, Mapua:

Following Cabinet’s approval, the intended arrival of the reforms was announced in October 1999 and it was noted that:

In allowing enforcement action to be taken against the owner and/or the polluter (depending on the circumstances and the existence of an innocent landowner defence) we have opted for a solution that will minimise the socialisation of risk through orphan sites. **It also ensures that the Crown (as one of the biggest polluters of old when it used to run half the economy) will face its responsibilities.**⁹ [Emphasis added]

⁶ See *Financial Accountability for Hazardous Substances*, Sustainability Council, December 2004, p 20.

⁷ Cabinet minute CAB (99) M 17/7A & B, August 9 1999, p 2. These and the other Cabinet papers cited from this period were obtained under the Official Information Act.

⁸ Discussion document on proposals for law reform relating to contaminated sites, Ministry for the Environment, 1995, section 3.5.2.

⁹ *Contaminated Sites Liability Regime*, Simon Upton, Environet 36, 14 October 1999.

Stalled Reform

For reasons that have yet to be adequately explained, when there was a change of Government a month later, the incoming Government did not pick up the policy package or present an alternative package. In the five subsequent years, no national solution to the problem has come forward. Meanwhile, time has made it more difficult to secure recompense from those polluters the reforms targeted – due to companies being deregistered, properties changing hands to parties less well resourced, and so forth.¹⁰ Thus the situation remains as described in the 1999 paper to the Cabinet Economic Committee:

A present lack of clarity about liability is limiting both action towards clean-up and enforcement to achieve clean-up of sites known to be contaminated.¹¹

The highly publicised Mapua project is one of only two significant sites to which the Crown has committed funds for cleanup since 1999 from the remediation fund.¹² Other than for these, the national fund for orphaned sites receives only \$1 million a year and this is essentially devoted to assisting councils simply investigate contaminated sites. The gross inadequacy of such a level of funding is apparent when set against the hundreds of millions of dollars in cleanup costs unlikely to be recovered from polluters.

But it gets worse. In order to know what constitutes a contaminated site, there has to be a standard against which a particular level of contamination can be measured. It is generally accepted that at some level of contamination, it will not be worth cleaning up. The question is, for each toxic substance, what is the appropriate standard to insist on.

Section 43 of the RMA provides for Government (via MFE) to set national standards but to date there are none for soil or any land-based activities. The single national standard so far issued concerns air quality.

HSNO also provides for national standards or exposure limits to be set with respect to the use of toxic substances. At present, there are very few such legal standards in relation to the thousands of toxic substances HSNO is designed to regulate. To date, three have had specific exposure limits set for their concentrations in soil or sediments, while some others are covered by default standards.¹³ MFE cites a range of

¹⁰ In the 1999 paper to Cabinet Economic Committee it is noted (p. 3) that a sample study of 50 contaminated sites in the Wellington region had found that only about were at that time still occupied by the original polluter.

¹¹ *Proposed Liability Regime for Historical Contaminated Sites*, paper to Cabinet Economic Committee, Minister for the Environment, June 1999, p.3.

¹² The other site the Crown has committed to funding is the former Tui mine. The Crown has provided funding for investigation or cleanup of a total of 13 sites, according to the Minister for the Environment in answer to a Parliamentary oral question, 7 December 2004. While the period this covers is unclear, a written answer provided on 7 December 2001 indicated at least 8 sites were cleaned up prior to 2002.

¹³ ERMA's website register of EELs of 15 April 2005 lists 3 substances that have values assigned to them for soil or sediment concentrations, while 30 substances are covered for water concentrations. The three covered for soil are: imidacloprid, iodosulfuron-methyl-sodium, and metsulfuron-methyl. Some others are covered by default values set under the

reasons – mainly procedural difficulties – for the slow progress in these being established and has reforms to HSNO before the House that are designed to address this.

MFE has sponsored others to undertake research that has resulted in guidelines that also look at the question of what is an appropriate standard. However there are a number of limitations with these. The first is that they are incomplete and do not cover some of the most important substances including pesticides and lead.¹⁴ The second is questionmarks over whether some of the existing and proposed guidelines are strict enough. However, even if they were comprehensive and strict, they are not legally binding. The following caveat stated in the MFE document advising on the application of guideline values gives some indication of the scope for legal disagreement as to an appropriate value:

The process of deriving environmental guideline values is highly complex Most guideline values (especially for soil) are derived using standard default assumptions, and these may or may not reflect actual site conditions. Also, the *purpose* of the guideline values derived for soil (eg, whether for site investigation or remediation) will influence the protectiveness of the derived values in different countries.¹⁵

With respect to the above reference to the “purpose” of a standard, the range of international values can be quite broad depending on that purpose. For DDT (not covered by the guidelines), Canadians set the soil standard at 0.7 mg/kg whereas the US EPA sets it at 17 mg/kg, due to different levels of protection being sought from a standard and different assumptions.¹⁶

This does not mean the Environment Court would be unable to determine what an appropriate standard is and the principles that should be adopted to derive it in this country. It simply underlines how far New Zealand has still to go to achieve a remotely “efficient” regulatory framework that might actually bite on polluters without exposing the enforcement agency to unreasonable cost. (This issue is further discussed later in the submission.)

No National Register of Sites

A similar fundamental issue is the need to determine the number of contaminated sites and the forms of contamination present. MFE was requested over a decade ago to prepare a national register of contaminated sites.¹⁷ This does not yet exist. MFE has

regulations. ERMA did not have immediately at hand the number covered in this way. See <http://www.ermanz.govt.nz/hs/hs-comp-eels.asp>.

¹⁴ *Contaminated Land Management Guidelines No. 2: Hierarchy and Application in New Zealand of Environmental Guideline Values*, Ministry for the Environment, November 2003, p 13.

¹⁵ *Contaminated Land Management Guidelines No. 2: Hierarchy and Application in New Zealand of Environmental Guideline Values*, Ministry for the Environment, November 2003, p 6.

¹⁶ *Auckland's Contaminated Soil Problem*, Jan Caunter and Murray Wallis, Address to the 7th Annual Public Law Forum, 31 March 2005, p 10 and 11.

¹⁷ *Secrecy keeps lid on toxic cesspits*, James Gardiner and Warren Gamble, NZ Herald, 24 February 2001.

recently issued a draft guideline¹⁸ that is an important step forward in assisting local bodies to prepare their own lists in a consistent fashion. However the time taken to get this far and the continued absence of a national register remain a matter of concern, for reasons such as the following. After blood sampling recently revealed that dioxin levels in a group of New Plymouth residents were well above background concentrations, and ministers were seeking advice as to where other dioxin contaminated sites were located, MFE stated that this was a question for local government.

Just what is actually known is very difficult to assess from the public record, as there are significant barriers to accessing the information. The New Zealand Herald reported the following picture:

Your home may be sitting on a site contaminated by toxic chemicals without your knowledge and you may be forced to pay for the clean-up. Yet councils and the Government are deliberately obstructing the public release of details of thousands of locations known to be - or suspected of being - poisoned.

...

Taxpayers' and ratepayers' money is being spent gathering information that councils and Government departments refuse to give out, except site by site and often only to owners or others with a legitimate interest in the property.

...

Officials of regional councils, fearful of lawsuits from landowners, refuse to identify contaminated sites. One reason is that when they advised landowners their properties had been tagged as potentially contaminated, they promised not to release that information for fear it could prejudice future identification of contaminated sites. In other words, the councils feel their best hope of getting compliance with the Resource Management Act is through co-operation with landowners. The price of that is secrecy. Landowners fear their livelihoods or the value of their investments will suffer if their land becomes publicly known as contaminated, however minor the contamination.¹⁹

Since concern arose about contamination of Auckland residential properties late last year, MFE senior management have attempted to play down the only estimates it has published on the number of sites and the cost of cleanup. Yet it has provided no alternative estimates, nor cited any new study as the basis for a change of view. Even if the toxicity of a proportion of previously identified sites is discounted, the Cabinet was informed that "There will also continue to be new unknown sites identified"²⁰ for as an MFE policy analyst has stated, "Illegal dumping has probably been a way of life for New Zealanders".²¹ The Minister for the Environment's recent advice to Parliament on the cost of contaminated site cleanup was as follows:

¹⁸ Contaminated Land Management Guidelines No. 4: Classification and Information Management Protocols, Consultation Draft, Ministry for the Environment, June 2004.

¹⁹ *Secrecy keeps lid on toxic cesspits*, James Gardiner and Warren Gamble, NZ Herald, 24 February 2001.

²⁰ *Proposed Liability Regime for Historical Contaminated Sites*, paper to Cabinet Economic Committee, Minister for the Environment, June 1999, p.3.

²¹ *Secrecy keeps lid on toxic cesspits*, James Gardiner and Warren Gamble, NZ Herald, 24 February 2001

PETER BROWN: Will the Minister be precise: how much will it cost, when will it be started, and when will it finish?

Hon MARIAN HOBBS: The cost is not known, because the amount is not known. The work has started. That is, the work being done by local government with support from the Ministry for the Environment.²²

²²

Answer to Parliamentary oral question, 7 December 2004.

3. Pass the Poison Parcel

Assigning Responsibility to Regional Councils

In absence of central government taking responsibility for the actual cleanup work, local government faced duties under the RMA that meant it had to nonetheless begin to grapple with contaminated site issues. Territorial authorities had to consider what standards to set for contamination when assessing applications for subdivision²³ or a change of land use, and regional councils had to consider issues surrounding discharges that were toxic.²⁴ Local government also began to develop registers of contaminated land. More recently, MFE began to discuss with local government how it could undertake enforcement roles under HSNO.

Then comes the one line bombshell in the bill to amend the Resource Management Act.²⁵ Section 9 of that bill proposes to extend the functions of regional councils by inserting into Section 30(1) of the act the following duties:

(ca) the location, monitoring, investigation, and remediation of contaminated land:

It is the last of the proposed four tasks, “remediation”, that is the standout feature. This covers responsibility for the cleanup of historical as well as future contaminated land.

The Government has given no reason to believe that it intends to provide special funding to regional councils for the remediation work the bill covers. Councils would simply be assigned the onerous responsibility, and in particular that of ensuring funding was available.

There are three reasons why this is unfair in respect of historic contamination:

1. Regional councils were not in existence at the time the most severely contaminated sites were created. It was central governments failure to set up competent regulatory regimes that caused the historic contamination. It is not fair to simply pass the parcel to local bodies.
2. The Crown was the owner of entities that were directly responsible for some severely contaminated sites and has very rarely entered into arrangements with councils that would bind it to pay for cleanup of pre-1991 sites.²⁶ Regional

²³ “If further investigations show that local authorities have been processing subdivision applications with knowledge of the presence of hazardous contaminants on the land being subdivided, and with knowledge that those contaminants posed a health and/or environmental risk, then those local authorities could be liable for the losses to landowners in remediating that land.” Source: *Dirty Dirt – An Overview of Liability Issues Arising From Contaminated Land*, Jan Caunter, Presentation to The New Zealand Property Institute, 8 December 2004.

²⁴ For details on the different functions regional councils and territorial authorities have adopted to date, see submission by LGNZ with respect to RMA Amendment Bill, p 6.

²⁵ The Resource Management and Electricity Amendment Bill.

²⁶ Certain sites were transferred to CRIs with guarantees the Crown would meet any contingent cleanup costs and similar arrangements were made with respect to certain Crown asset sales.

councils cannot compel this under existing law if the polluter is not the current landowner.

3. The Government in a number of cases set laws that required practices that resulted in the contamination. As MFE noted in 1988:

Site contamination has, in some cases resulted from the use of chemicals required, and at times promoted by Government agencies. The Government therefore, shares some historical responsibility as a regulator to ensure that the problems of past use of some chemicals are cleaned-up.²⁷

Pursuit of the Landowner

If the responsibility was assigned, it is clear that a significant proportion of the cleanup cost will not be able to be recovered from the polluters. Where the polluter is no longer the current landowner, this leaves regional councils facing two choices: raise rates or force current property owners to pay.

If a council chose to absorb the costs entirely, the extent of any rates increase would depend on the size of the problems ultimately discovered in each regional council's area, and to an extent on the timeframe the council proposes for cleanup.

If the council instead chose to fully pass the costs through to the current landowner, it can achieve this through an enforcement order under RMA s314(da) which states that the court may:

(da) Require a person to do something that, in the opinion of the Environment Court, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier:

While the Environment Court has ruled against retrospective use of s314, in the *Voullaire* case it indicated that the above provisions can be used to compel a current landowner to pay for remediation regardless of whether the pollution arose prior to the RMA coming in to force in 1991. It also applies regardless of whether the current owner caused the pollution. Most importantly, it applies regardless of whether they even knew the land was contaminated at the time of purchase.²⁸

While the current owner or occupier can be pursued in this way, the fact remains that the basis of their liability for historic contamination arises from past acts that in some cases were actually lawful at the time they occurred.²⁹

It is this scenario that makes clear the import of the innocent landowner defence that Cabinet approved in 1999 but has yet to be enacted. With such a defence in place,

However, contamination that took place before 1991 is still outside the reach of an enforcement order unless the polluter remains the landowner.

²⁷ Discussion document on proposals for law reform relating to contaminated sites, Ministry for the Environment, 1995, section 3.6.2

²⁸ See for example summary in *Proposed Liability Regime for Historical Contaminated Sites*, paper to Cabinet Economic Committee, Minister for the Environment, June 1999, p.3.

²⁹ *Auckland's Contaminated Soil Problem*, Jan Caunter and Murray Wallis, Address to the 7th Annual Public Law Forum, 31 March 2005, p 4.

current owners would not be exposed to a sudden expropriation of their wealth when contamination is newly discovered. What the proposed reform thus sets up is the prospect of precisely this expropriation.³⁰ One regional council representative spoken to conceded that if the funding were not available, it would tend to be the landowner that would be sought to meet the costs, and another implied this outcome.

While there are also options for councils and landowners to share the burden to varying degrees, this serves only to ensure that both types of unfairness are inflicted - and dilution does not rate as a countervailing principle. It also sets up incentives for “inside” players with influence over councils to lobby for special deals. This could include less strict environmental standards as the proposed amendment to the RMA would allow a regional council to set its own standards to which a cleanup would be required.³¹ If these were less than best practice, the costs would then be transferred to affected people and the environment and measured in terms of higher health bills and degraded potential for the use of land.

The problems referred to earlier that create legal uncertainty for any enforcement agent are exacerbated when a landowner feels he or she is subject to an unfair request. This would lead to higher costs for councils to take enforcement actions and in turn would slow down cleanup programmes in general and potentially stall some parts. MFE stated to Cabinet in 1999 that:

Strict liability on the landowner is inequitable and contrary to natural justice if the current owner has to bear liability for effects they did not cause and which they could not reasonably have been expected to know about. Experience internationally and in New Zealand has shown that residential owners are unwilling to accept liability they did not cause. This triggers costly litigation and other action to assign responsibility to other parties.³²

The profound absence of fairness in the current package stems from the Government’s position as:

1. The party that was responsible for regulating hazardous substances at the time and failed;
2. The party that required or encouraged inappropriate use of certain substances; and
3. The only party that can set in statute the innocent landowner defence that was set to become law five years ago.

So how has MFE justified the proposed RMA amendment? It hasn’t.

³⁰ It is of course true that since the time it was proposed to introduce an innocent landowner defence, some property owners will have discovered their land is contaminated, and been forced to sell it to buyers who also knew and traded on that property at a discount reflecting the expected cleanup cost. It can be argued that a law passed now means they would then be unfairly treated but that is not a sufficient reason for inaction, even if the cases were numerous.

³¹ The Bill carries the following definition: “contaminated land means land to which both the following apply:
(a) a hazardous substance has been discharged into or onto it; and
(b) because of the discharge, it poses, or is likely to pose, an immediate or long-term risk to human health or the environment, **as determined by an assessment by the relevant regional council.**” [Emphasis added]

³² *Proposed Liability Regime for Historical Contaminated Sites*, paper to Cabinet Economic Committee, Minister for the Environment, June 1999, p.5.

The explanatory notes to the Resource Management and Electricity Legislation Amendment Bill provide literally no argument in support of this proposal. Not one jot.³³ Similarly, an unusually long Cabinet paper again provides no justification at all for the move. There is thus no public presentation of:

- The expected cost to regional councils and ratepayers of executing the assigned responsibility;
- The capacity of councils to muster the required personnel and financial resources; nor
- Any analysis of alternatives.

In stunning ironic contrast, the same Cabinet paper is rich with new requirements for local government to satisfy RMA s32 tests. These are tests of whether a new policy is optimal, especially with respect to consideration of alternatives. Thus the general disciplines MFE seeks to bind local government to, the ministry will flagrantly ignore itself in the same paper.

Should MFE argue that the clause 9(1) obligation to remediate does not represent a significant change and that Councils have been responsible all along for historic contaminated sites, it needs to answer the following:

- Why is a change of statute then required;
- In particular, has there been a change in the legal status since 1999 when MFE told the Cabinet in paragraph one of the paper that the problem was “Who is responsible for contaminated sites that were contaminated prior to the passing of the Resource Management Act 1991 (RMA)” and devoted half that paper to a discussion of options?

In summary, the reform proposal as it currently stands is:

- Unprincipled;
- Unfair;
- Unexplained; and
- Unworthy of the care due to New Zealanders and their environment.

A Way Forward

There are at least two quite separate issues to resolve here. One is about who pays, and the other is about who manages the cleanup and how. The Bill bundles the two unnecessarily, which tends to mask the funding issue.

Some local authorities have had their eye more on the ability to exercise local control in the management of cleanups than the question of who pays. That is partly a result of past central government inaction which has seen local government get on with the job to an extent, and a preference for a future structure it can rely on. It also reflects the reality that at the end of the day, a council’s key financial concern is that there is sufficient equity in a piece of contaminated land such that the cleanup cost can be passed to the owner and not become a ratepayer liability.

³³ The only reference is “Clause 9 amends section 30 to clarify and expand the functions of regional councils.

However, a number of regional councils have noted in their submissions the following general point made by the Taranaki Regional Council:

“the Bill implies that regional councils are responsible for actively undertaking all work in locating, investigating, monitoring and remediating contaminated land. The Council considers that this is not appropriate as in many instances a liable party exists who can be expected to undertake investigation and remediation of sites.”³⁴

It is clear that whatever the ultimate arrangement for cleanup management, local government and central government will need to work in co-ordination as local government has the people on the ground and central government has required resources. A key issue however will be making best use of scarce expert resources, as Environment Waikato notes in its submission on the RM Amendment bill:

Regional Councils generally do not have expertise to deal with the full range of hazardous substances. ... We are aware that the expertise necessary to give effect to the function under this definition is not easily accessible in New Zealand. The costs implications need to be considered carefully, some regional councils will find they are unable to give effect to this function as a consequence of lack of expertise and the costs of obtaining it.³⁵

Two of the leading legal and soil remediation experts in the country echo this concern and jointly propose the following general formula for change:

In our view, New Zealand does not have the population to support the current network of environmental managers resident in our regional councils and TLAs. The technical complexities and specialisation required to manage, review and control contaminated land (and other environmental issues) present an imperative for the adoption of a centralised Environment Protection Agency. The functions of an EPA could be assimilated within the Environmental Risk Management Authority (ERMA).³⁶

That is just the “who” question. The wider concern of local government is that the issues around contaminated sites be comprehensively addressed.

LGNZ notes in its submission that:

Local Government New Zealand would urge the government to take a comprehensive look at contaminated land management rather than “papering over the cracks”. If contaminated land is not addressed once and for all, issues such as those that arose in Auckland last year will continue to come to the fore with increasing frequency and controversy.

³⁴ Taranaki Regional Council submission, p. 4. See also Northland Regional Council and Environment Waikato submissions.

³⁵ Environment Waikato submission to RM Amendment Bill, page 6.

³⁶ *Contaminated Land Management Guidelines No. 2: Hierarchy and Application in New Zealand of Environmental Guideline Values*, Ministry for the Environment, November 2003, p 13.

While Environment Waikato states:

We also remain concerned that this piece of legislation provides yet another set of partial solutions to issues with hazardous waste and contaminated sites. We request, yet again, that the government develop and implement a coherent strategy for responding to these issues that addresses the legislative and policy gaps and provides funding for implementation.³⁷

As noted in 1999, key to a resolution is establishment of a clear liability framework. A first step that can be taken with the bill before the House is the enactment of an innocent landowner defence. Officials have fully debated it and this would at least put in place one much-needed piece of the ultimate liability framework.

Similarly, the retrospective powers approved to compel historic polluters to pay should be enacted. Here however, there is a risk that the measures previously approved will be insufficient to fully meet the task at hand and some further work is required to review international precedents so as to also provide for:

- A clear hierarchy of parties to be sought for the payment of cleanup costs;
- A wider definition of the parties that could be deemed to be “the polluter” and thus held liable (particularly in light of the additional time that has lapsed since the reforms were proposed.) This should include for example parties whose pollution leached or in some other way transferred to neighbouring properties.

Appendix 1 of the this submission provides a guide to relevant international legislation showing the extent to which original polluters are targeted and how fallback options are specified.

Beyond this, the two big issues are central government funding and which entity should manage the cleanup. These require serious research and analysis before legislators can take them further.

Recommendations

1. Clause 9(1) of the RMA Amendment Bill should be amended as follows:

The existing wording is deleted and replaced with text that will fulfill the intent of the Cabinet minute of 9 August 1999 which states:

“agreed that the Resource Management Act be amended to provide that:

- i) the polluter should be included as a potential liable party for the pre-1991 contaminated sites to ensure that the party responsible for the contamination can be directly liable;
- ii) there be an innocent landowner defence to provide additional protection for such parties and to place emphasis on the responsible party;

³⁷ Submission on the Bill from Environment Waikato, p. 2.

agreed that the innocent landowner defence referred to ... above requires that the landowner:

- i) is not a related party to the polluter of the site;
- ii) has no knowledge or likely knowledge of contamination at the time of purchase;
- iii) undertook appropriate investigations at the time of purchase.

noted that the innocent landowner defence applies only to sites contaminated prior to 1991.”

2. The definition of contaminated land in the Bill should be deleted.

3. No provision to assign any new responsibility for investigation and remediation of contaminated sites should be accepted by Parliament until such time as the following has been completed:

a) Government has undertaken and published an investigation of historic contaminated sites and the extent to which each could be attributed to:

- i) Entities which, at the time the pollution took place, were Crown owned or controlled;
- ii) Statutes that, at the time the pollution took place, made legal such levels of pollution;
- iii) Statutes that, at the time the pollution took place, required use of particular pollutants without appropriate controls; and
- iv) Government subsidy arrangements that not only artificially expanded demand, but provided tacit approval for the additional quantities used.

b) Government has determined the principles by which **all** orphaned contaminated sites are to be funded. This includes:

- i) The minimum level of funding the national Contaminated Sites Remediation Fund is to receive over the next decade, year by year;
- ii) How much of that funding is to be from Government and how much from any other identified source;
- iii) If the fund is to be contributed to by a dedicated tax (as envisaged in the MFE 1995 discussion paper), what level of tax is to be collected, on what items, by whom, and when.

c) Government has presented a full analysis of the options for management of the investigation and remediation of contaminated sites. This should include a comparison of the ability of central government and local government to access the required skilled personnel and the efficiency of any duplication of these resources and other expected impacts. It will also need to report on the options for structuring a central government responsibility.

4. Ducking the Hard Stuff

Substances that are hazardous have the capacity to significantly compromise the health of New Zealanders and the ecology that supports them and the wider environment. In recognition of this, the primary Act covering these, HSNO, s4 states:

"The purpose of this act is to protect the environment and health and safety of people and communities by preventing or managing the adverse effects of hazardous substances and new organisms."

Further, New Zealand's clean green image underpins an economy that depends on food exports for 50% of the value of its overseas earnings, as recognised by MFE:

New Zealand's international image, in marketing and selling many of our exports, is highly dependent upon our "clean green" environment. ... Clean-up of orphan sites is a significant step towards ensuring the "clean green" image is matched by the reality of our environment.³⁸

This Bill presents a proposal to assign responsibility for the cleanup of contaminated sites to regional councils without addressing key questions surrounding this assignment.

In the process of researching the submission, we have too often heard stories of disbelief at the inadequacy of the current regulatory regime from people working in the field. This landscape is not solely the result of MFE or wider Government failings. There are many who could have done more irrespective of whether they were required to by law, and a number within Government who have made solid efforts irrespective of the current tide. However it is Government that has easily the greatest ability and duty to lead in this matter. MFE is the agency of Government charged with this work and with the following mission statement:

Treasure and nurture our environment with protection for ecosystems so that New Zealand maintains a clean, green environment and rebuilds our reputation as a world leader in environmental issues.³⁹

MFE has failed its mission statement with respect to contaminated sites. Sixteen years after Government first determined to bring together coherent regulations for hazardous substances, New Zealand has yet to set an adequate framework for facilitating cleanup of past damage and is remote from being a "world leader" in this. New Zealand has yet to take on board some lessons from its own past, let alone international experience.

Part of the review of this Bill should thus be a calling to account for the failure to bring forward reform proposals to address critical gaps. A select committee inquiry directed at establishing principles for addressing those gaps that can not be immediately filled would appear to be well justified given the performance thus far.

³⁸ Discussion document on proposals for law reform relating to contaminated sites, Ministry for the Environment, 1995, section 3.6.2..

³⁹ Estimates, The Treasury, p 577, 2004.

Overseas Approaches to Liability for Contaminated Sites

The following is extracted from *Auckland's Contaminated Soil Problem*⁴⁰ by Jan Caunter and Murray Wallis and reproduced with their permission.

England and a number of Australian and Canadian states have passed legislation specifically concerned with providing certainty and consistency in dealing with contaminated land. Such legislation is generally based around three methods of allocating liability for remediation- polluter pays, owner pays (sometimes called the “beneficiary pays” principle) or State pays - which are used in combination and applied retrospectively to historical contamination.

Legislation that has adopted the principle of “polluter pays” employs it as the starting point for identifying the appropriate person to whom liability should be assigned. Examples of legislation that use this approach include the Contaminated Land Management Act 1997 (New South Wales, Australia) “CLMA”, the Environmental Management Act 2003 (British Columbia, Canada) “EMA” and the Environmental Protection Act 1990 (England) “EPA”.

Given the practical problems that can arise in trying to locate the person(s) originally responsible for contamination, particularly where it is historical, application of the polluter pays principle may be the ideal but is not always possible. Contaminated sites legislation needs to take a pragmatic approach and provide for a number of parties to be potentially liable, generally in a hierarchy of culpability.

In New South Wales (NSW), remediation orders can be served on “appropriate persons” who should assume liability for the cost of remediation.⁴¹ Section 12(2) lists the “interested persons” from which an “appropriate person” can be chosen, and places them in the following hierarchy:

A person who had principal responsibility for the contamination.

An owner of the land.

A notional owner of the land.

As such, an owner will only be liable for remediation where it is not practicable to choose the polluter, and so on. The CLMA provides guidance as to when it will not be practicable to choose a person.⁴² In addition to the somewhat obvious situations where there “*is no such person*” or “*the identity or location of the person cannot be found after reasonable enquiry*”, the CLMA provides that it is not practicable to choose a person where they are “*unable to pay their debts or would become unable to*

⁴⁰ *Auckland's Contaminated Soil Problem*, Jan Caunter and Murray Wallis, Address to the 7th Annual Public Law Forum, 31 March 2005.

⁴¹ See section 23 of the CLMA.

⁴² See section 12(6) of the CLMA.

pay their debts if they complied with a remediation order". Therefore, potentially, if the original polluter was located but was deemed by the Environment Protection Agency to be unable to meet its debts, the owner could be liable.

The EMA system of British Columbia⁴³ provides a wider net of potential liability than the CLMA of New South Wales. Section 45 EMA sets out the "persons responsible for remediation at a contaminated site", which include:

- (a) *A current owner or operator of a site.*
- (b) *A previous owner or operator of a site.*
- (c) *A producer or transporter of a substance that caused contamination.*
- (d) *The above persons where a site was contaminated by migration of a substance from an adjacent site.*

While section 45 does not in itself provide a hierarchy of liability, the polluter pays principle is central to the remediation provisions of the EMA⁴⁴.

In the United Kingdom, unlike the CMLA and the EMA, the EPA⁴⁵ does not specify a list of liable persons. Rather, the "appropriate person" to bear responsibility for remediation is determined by a test of whether they "*caused or knowingly permitted*" the contamination⁴⁶. The EPA essentially provides two tiers of liability. In the first instance, liability rests with the person(s) who meet the above test ("Class A persons").⁴⁷ If a "reasonable inquiry" fails to identify a Class A person, liability passes to the owner or occupier of the contaminated land ("Class B persons").

The groups of persons who may be "responsible" or "appropriate" to assume liability varies between the statutes. The extent to which a statute will expressly set out the scope of that liability also varies. For example, the EMA provides that "*a person who is responsible for remediation of a site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site ...*".⁴⁸ In addition, liability applies where the

⁴³ The EMA is administered by "directors", who are defined as "a person employed by the government and designated in writing by the minister as a director of waste management ...".

⁴⁴ See section 48(4)(b), which requires a director, in deciding who will be ordered to contribute to or undertake remediation, to name a person(s) "whose activities directly or indirectly, contributed most substantially to the site becoming contaminated...". See also *British Columbia (Hydro and Power Authority) v British Columbia (Environmental Appeal Board)* [2003] BCJ No. 1773; 2003 BCCA 436. This case was decided under the Waste Management Act, which has subsequently been repealed. However, the provisions of the Environmental Management Act essentially continue the same regime.

⁴⁵ The EPA is administered by the Environment Agency, and the local authority in whose area contaminated land is located.

⁴⁶ See section 78F of the EPA.

⁴⁷ For a discussion on how this test is applied see Lawrence & Lee, "Permitting Liability: Owners, Occupiers and Responsibility for Remediation", the *Modern Law Review* Vol 66 (2003) p261.

⁴⁸ See section 47 of the EMA.

introduction of a substance into the environment was not prohibited by legislation, and regardless of whether it was authorised at the time.

Where a statute makes provision to hold a landowner or occupier who has not caused or contributed to the contamination potentially liable, it will usually attempt to limit this liability. For example, by providing an “innocent landowner” defence, or through provision of a list of exclusions.