

Your Ref:
Our Ref: 7.00151



13 April 2010

Ministry for the Environment
PO Box 10362
Wellington 6143

Dear Sir/Madam,

Environment Bay of Plenty's submission to the proposed National Environmental Standard for Assessing and Managing Contaminants in Soil

Thank you for the opportunity to comment on the *proposed National Environmental Standard for Assessing and Managing Contaminants in Soil*. Environment Bay of Plenty wishes to reserve the right to present our submission in person. For matters relating to this submission, please contact Fiona Badenhorst at fiona.badenhorst@envbop.govt or 0800 368 288 ext. 9328.

Environment Bay of Plenty Regional Council is responsible for the sustainable management of resources within the Bay of Plenty region. Our Council works to manage the effects of people's use of freshwater, land, air and coastal water under the Resource Management Act (RMA) 1991. We note that it is the function of regional councils under Section 30 of the RMA to investigate land for the purpose of identifying and monitoring contaminated soil.

We also have a broader responsibility working with territorial authorities (TA's) in the area, for the economic, social and cultural well-being of communities in the Bay of Plenty region.

Environment Bay of Plenty agrees with the policy objective of the proposed standard in general; however we consider that the scope of the National Environmental Standard (NES) needs to be expanded further to cover for environmental protection.

We note that the NES is restricted to contamination of land by hazardous substances, however we would also like to ensure the NES considers how other potential contaminants that are not included on the Hazardous Activities and Industries List (HAIL) and are not covered by the Environmental Risk Management Authority (ERMA) or the Food Safety Authority are dealt with (such as antibiotic resistance, GMO contamination and nano-technology).

We have provided answers to your discussion questions and made comments on various sections of the discussion document in the table attached. We hope that you find our comments constructive.

Yours faithfully

A handwritten signature in black ink that reads "M Macleod".

Mary-Anne Macleod
Group Manager Strategic Development

ENVIRONMENT BAY OF PLENTY REGIONAL COUNCIL SUBMISSION TO THE PROPOSED NATIONAL ENVIRONMENTAL STANDARD FOR ASSESSING AND MANAGING CONTAMINANTS IN SOIL

Reference to the document	EnvBOP's Comments
Discussion Questions p49	
Question 1. Have the priority problems been defined correctly?	Environment Bay of Plenty does not consider that the priority problems have been defined correctly (see comment below).
Question 2. Are there other problems you can think of that need to be addressed as a priority?	<p>Environment Bay of Plenty is concerned that the proposed National Environmental Standard (NES) does not take into consideration environmental protection when a site is being redeveloped, and that the majority of the proposed Soil Guideline Values (SGV's) do not always address environmental protection.</p> <p>We are concerned that if a site is not on the Hazardous Activities and Industries List (HAIL) Register (and a regional council has not yet identified the site) it may not get picked up for further assessment at the redevelopment stage. Therefore we recommend MfE give consideration as to how to ensure all sites that have the potential to cause contamination are identified and recorded on the HAIL Register.</p> <p>We note that the scope of the NES focuses on hazardous substances and legacy contamination sources. However, we think that there is a need to be more forward-thinking and all-encompassing in addressing land contamination issues. we would like to see that contaminants and emerging contaminants to land are addressed for example:</p> <ul style="list-style-type: none"> • Genetically modified organisms (GMOs) • Nano-technology • Antibiotic resistance in the soil • New and emerging substances that are yet to be developed <p>We question whether the NES is flexible and adaptable enough to deal with new and emerging sources of land contamination. If this NES doesn't cover these, we recommend that MfE create a process or programme of work that will address these sources of contamination.</p>

Reference to the document	EnvBOP's Comments
Question 3. Do you agree with the policy objective?	<p>Environment Bay of Plenty considers that the policy objective of the NES needs to provide for further matters.</p> <p>We recommend that the policy objective provides for the identification of all potentially contaminated sites, and also addresses environmental protection.</p>
Question 4. Should the objective be limited to ensuring that land is safe for human use? If not, why not?	<p>Environment Bay of Plenty considers that environmental protection should also be included in the objective. If environmental protection matters are not addressed at redevelopment stage, it is very difficult for regional councils to require additional site investigations once the site is redeveloped. Additionally, if health only guidelines are developed without the complimentary environmental guidelines, we are concerned that the guidelines may be perceived as a “you may pollute up to...” benchmark.</p> <p>Under Section 30 of the RMA 1991, regional councils are responsible for the investigation of land for the purposes of identifying and monitoring (generally this process is managed through a regional register of HAIL sites). It is important that regional councils are involved during the redevelopment stage, so they can assess site investigations; remediation; and validation plans to ensure sites are correctly recorded on the register of HAIL sites.</p> <p>Environment Bay of Plenty recommends that the NES needs to either develop environmental guidelines to sit along side the health only guidelines; or; we recommend that the NES clearly states that it only attempts to manage health effects from contaminants in soil; it does not cover effects to humans from contaminant vapours in soil and/or groundwater, or contact/ingestion of contaminated surface or ground water; neither does it cover environmental protection. In this case we suggest the NES title be reworded to:</p> <p><i>National Environmental Standard for Assessing and Managing Contaminants in Soil for the Protection of Human Health.</i></p> <p>We recommend the Ministry for the Environment (MfE) develop a user's guide clearly explaining that the NES is for the protection of human health. For the majority of sites the NES will not protect the environment, therefore resource consents are still likely to be required from the regional council.</p>
Question 5. Do you agree with the preferred option?	<p>Yes we agree with the preferred option of a National Environmental Standard and that it is the most appropriate way of achieving the policy objective.</p>

Reference to the document	EnvBOP's Comments
Question 6. Is there an alternative option that has not been considered?	Environment Bay of Plenty considers that an alternative option that hasn't been considered is having one agency responsible for overseeing contaminated land management at a national level. Perhaps this could be a function for the newly established Environmental Protection Agency (EPA). The EPA would also be appropriate as they would have the technical expertise for such a function.
Question 7. Are you aware of any other costs or benefits of the alternative options?	Environment Bay of Plenty considers a benefit of the alternative option (suggested above) would be a more consistent assessment and management of contaminated land.
Question 8. Do you see any problems complying with the proposed NES or with enforcing it?	Our experience is that some TA's are unlikely to have the in house expertise to assess the sites. Considering the large number of councils across the country and the lack of qualified expertise the result may be an inconsistent application of the NES in different TA regions.
Question 9. Are the thresholds for determining whether resource consent is required clear and appropriate?	Environment Bay of Plenty does not consider that the thresholds for determining whether resource consent is required clear and appropriate. Please refer to our comments on section 4.1.3 Discussion – A permitted or a controlled activity?
Question 10. Is the <i>permitted activity – subsurface investigation</i> requirement to provide a site investigation report appropriate?	Yes, we consider that the <i>permitted activity – subsurface investigation</i> requirement to provide a site investigation report is appropriate.

Reference to the document	EnvBOP's Comments
Question 11. Have we adequately defined the land that should be subject to a condition requiring site investigation?	Please refer to Question 4.
Question 12. Have we adequately provided for activities that should not be caught by the requirements of this NES?	<p>Environment Bay of Plenty recommends that the NES include a volume of soil disturbance that is allowed before the NES is triggered; so that activities such as fencing and landscaping can be carried out without investigation being necessary.</p> <p>We also recommend that there be a clear definition of what constitutes "soil disturbance".</p>
Question 13. How do you think the NES should ensure the adequacy of site investigation?	Environment Bay of Plenty recommends that the NES ensure the adequacy of site investigation by ensuring consultants are appropriately qualified and investigations are undertaken in accordance with MfE Guideline 5.
Question 14. Is the <i>permitted activity – use, development and subdivision</i> better provided as a controlled activity or another alternative?	<p>Environment Bay of Plenty recommends that if soil above environmental guidelines is removed from a site, then remediation/ soil removal be undertaken as a <u>controlled activity</u>.</p> <p>This is because councils need to be able to track where contaminated soil is being removed to as part of the consenting process.</p>
Question 15. How should the NES address site-specific assessment for produce consumption?	Environment Bay of Plenty recommends that there should be clear guidelines in the NES for contamination levels acceptable in commercial food production areas.

Reference to the document	EnvBOP's Comments
Question 16. How should the NES address naturally occurring elements in soil?	Environment Bay of Plenty recommends leaving this to the discretion of the relevant council to develop guidelines that are appropriate to the local soil conditions, taking into consideration naturally occurring element background levels.
Question 17. Have we accurately reflected the range of costs and benefits arising from the proposals for an NES, who might bear the costs or receive the benefits?	Please refer to comment below (Question 18).
Question 18. Are there any costs and benefits we have overlooked?	Environment Bay of Plenty considers that the proposed NES discussion document has not addressed additional council costs for reviewing permitted activities and potential increase of costs to regional councils.
Question 19. Do you have information that you would like to see included in the cost-benefit analysis that will be carried out after the submissions are received and analysed?	Yes. We would like costs for councils calculated in the cost-benefit analysis that will be carried out after submissions are received and analysed (refer comment above, Question 18).

Reference to the document	EnvBOP's Comments
Part 1 Section 4: The Proposed NES for Assessing and Managing Soil Contaminants	
<p>Section 4.1.1 Scope of the NES p25</p>	<p>Environment Bay of Plenty considers the scope of the NES regarding site investigations only addresses soils, and recommends that investigations also cover surface water and groundwater for both human health and environmental protection.</p> <p>We consider that if the effect of soil contamination on human health is solely assessed then there are many risk pathways that have not been covered. Groundwater contamination in particular could cause indoor vapor issues which should be addressed at the time of redevelopment.</p> <p>We suggest a condition of the permitted activity is that the regional council is informed and site investigation reports are signed off by the regional council as well as the TA.</p>
<p>Section 4.1.2 Permitted activity – subsurface investigations p26 Discussion – Is the requirement to provide information appropriate?</p>	<p>Yes. In general, we support the requirement to provide information in the form of subsurface investigations for the purpose of assisting councils to identify land affected by soil contamination.</p> <p>In terms of the requirement being 'difficult to monitor and enforce', Environment Bay of Plenty considers that mandatory reporting is essential, and site investigation reports must be forwarded to regional councils. If necessary, councils can take enforcement action for an activity that has already been undertaken.</p> <p>If a site is on the selected land use register, site investigations will help the site move through the register process (possibly changing the site category on the register). Requiring investigations on a site creates an even playing field for all owners of sites with potential for contamination.</p> <p>Environment Bay of Plenty suggests that the NES look at mandatory disclosure of investigations into contamination undertaken as part of due diligence. We consider that incentives could be provided for the release of this information.</p>
<p>Section 4.1.3 Permitted activity – use, development or subdivision p27</p>	<p>Environment Bay of Plenty considers that investigation is fine as a permitted activity, but as discussed elsewhere, we recommend that any remediation/soil removal should be a controlled activity. Allowing remediation/soil removal to occur through a permitted activity is a concern due to the following issues:</p> <p>1) If concentrations of contaminants are above background levels, soil will not meet the cleanfill definition; therefore can not be disposed of at a cleanfill. The soil will need to be disposed of at a licensed facility, and tracking and management of disposal is better undertaken through consent.</p>

Reference to the document	EnvBOP's Comments
	<p>2) The potential for contaminated material (exceeding environmental guidelines) to be disposed of to unauthorised disposal sites (farms, residential and or industrial sites); which could cause these sites to become contaminated and also encourages the dispersal of contaminated soil across the region.</p> <p>3) The potential for discharges on site to occur during the remediation. Controls (such as sediment control measures) should be required through conditions of consent to minimise the effect to the environment.</p>
<p>Section 4.1.3 Permitted activity – use, development or subdivision Discussion p28 – How do we ensure that not <i>all land</i> is required to go through a site investigation?</p> <p>Have we adequately defined the land that should be subject to a condition requiring site investigation?</p>	<p>Environment Bay of Plenty considers there is the potential for sites that have not yet been identified as contaminated to be redeveloped without any assessment. Therefore we recommend that during the permitted activity/consent assessment, applicants are asked to include information on site history and all activities that have occurred, or are occurring, on the site to ensure capture of all potentially contaminated sites.</p> <p>We would expect redevelopment of brownfields sites to provide, as a minimum, a desk-top study. This need not be an onerous or expensive exercise. The study would be used to determine if further site investigation was warranted.</p> <p>Yes, if the comments in the row above this are addressed.</p>
<p>Section 4.1.3 Discussion p28– How do we ensure that not <i>all activities</i> will require a site investigation?</p> <p>Do you think it is appropriate for the NES to permit the above activities</p>	<p>In permitting activity 3: “<i>landscaping, fencing (but not retaining walls), and other minor actions which involves a minimum level of soil disturbance</i>” we suggest a required volume of soil disturbance and a definition of disturbance is included here.</p> <p>To avoid general small scale activity unnecessarily requiring investigation, Environment Bay of Plenty recommends setting a threshold for soil disturbance – where a disturbance falls below the set threshold a desktop study may be sufficient.</p> <p>Environment Bay of Plenty considers it is appropriate; under a permitted activity; for the NES to require site investigation reports for activities on affected land and land with a known land use and activities history. The requirements for site investigation reports provide sufficient certainty for a person to know whether they comply if the report covers all potential contamination issues onsite.</p>

Reference to the document	EnvBOP's Comments
without requiring site investigation reports?	The requirements for site investigation reports will also provide sufficient certainty for councils to audit and confirm whether the activity meets the conditions of the permitted activity if investigations have been completed to an adequate standard.
Section 4.1.3 Who is an appropriately qualified and experienced practitioner? p30	Environment Bay of Plenty agrees that there are benefits of requiring an <i>appropriately qualified and experienced practitioner</i> to prepare the site investigation report. We recommend that MfE hold a register of suitably qualified people.
Section 4.1.3 Discussion – A permitted or a controlled activity? p30	Environment Bay of Plenty recommends that initial sub-surface soil investigations pre site redevelopment should be a permitted activity. If after initial soil sampling the site is found to be below human health criteria, but above environmental protection guidelines, and it is proposed to remove soil from the site, then we recommend that this should be a controlled activity so the soil removed can be traced and monitored.
Section 4.1.4 Restricted discretionary activity – use, development or subdivision Consent conditions p33	<p>Environment Bay of Plenty recommends that long-term consent conditions are developed to provide for the management/monitoring of contaminants that remain on a site and need to be managed on an ongoing basis (for example earthworks or subdivision sites).</p> <p>Longer term effects of contaminated land (such as leaching of contaminants) can occur outside the life of an earthworks consent and therefore these discharges might not be controlled.</p>
Section 4.2 Discussion - How should the NES address site-specific assessment for produce consumption? p34 & 35	<p>Environment Bay of Plenty agrees with the NES addressing site specific assessment for produce consumption when greater than 10% of land use produce is expected.</p> <p>We recommend that the SGVs provided in Appendix 2 for 50% home grown produce consumption should remain outside the scope of the NES and be for reference purposes only.</p>

Reference to the document	EnvBOP's Comments
Section 4.2 Discussion –How should the NES address naturally occurring elements in soil? p35	Environment Bay of Plenty recommends controls on these <i>natural hazards</i> be left to the discretion of the regional council and that they should not be treated as if they are a soil contaminant. We suggest that this could be accounted for in the Costs and Benefits section of the Proposed NES.
Section 5.0 Costs and Benefits of the Proposed NES – Costs borne by councils p44	We consider that providing site investigation reports as a requirement of the permitted activity is a good idea, however the issue for TA's is the inability to charge for the review of the report. Our experience is that some TA's do not have the in-house expertise to review these reports, and would need to contract a consultant to undertake these reviews (the cost of which would have to be covered by the rate-payer). An ability to charge for any work undertaken by the TA would assist in this matter.
Section 7.3 Figure 5 p52	Environment Bay of Plenty recommends including within the flowchart a requirement for a copy of the desktop and/or site investigation report to be forwarded to the regional council as well as the TA where required.
Section 7.3.3 p54 Step 3: Does the site exceed the SGVs _(health)	Environment Bay of Plenty recommends that this section states that if soil contaminant concentrations don't exceed the Soil Guideline Values (SGVs) for human health, but still exceed the environmental guideline; a regional council consent may still be required.
Section 8.3 p65 Table 10 Industry Specific Guidelines	Environment Bay of Plenty notes the numerical criteria in the <i>Guideline for Assessing and Managing Petroleum Hydrocarbon Contaminated Sites in New Zealand</i> (MfE, 1999) is not superseded by the SGVs _(health) numbers.
Appendix 4 Hazardous Activities and Industries List p89	We agree that illicit drug manufacture should be included in the HAIL, especially in rural areas without reticulated sewage, as it is possible that contaminants may have entered into a septic tank or soakhole system, or been disposed of directly on to land.

Reference to the document	EnvBOP's Comments
	Environment Bay of Plenty would like to recommend that in the future when a new contaminant is added to the HAIL, that regional councils are notified and given the reasons as to why the substance has been considered appropriate to be included in the HAIL.