

19 April 2010

By Email: standards@mfe.govt.nz

The Chief Executive
Ministry for the Environment
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Dear Chief Executive

**Submission on Discussion Document:
Proposed National Environmental Standard for Assessing and Managing Contaminants in Soil**

This letter is Carter Holt Harvey's submission on the Discussion Document published in February 2010 on the proposal for a National Environmental Standard for Assessing and Managing Contaminants in Soil.

Carter Holt Harvey appreciates the opportunity to make this submission and to give its views on a matter with which it has significant experience and ongoing involvement.

This submission generally adopts the structure suggested by the questions posed in the Discussion Document. I found the Discussion Document to be a useful basis for considering the issues and appreciate the effort made to explain the details of the proposal.

The ministerial announcement on 5 February 2010 of the release of the Discussion Document and various references to a draft national environmental standard in the Discussion Document suggest that a draft standard has already been prepared. I assume that you did not include the draft standard in the Discussion Document to avoid the possibility of confusion between the discussion material and the draft standard. However, being able to refer to the wording likely to be proposed would have eliminated some uncertainty in the Discussion Document. I suggest that the draft standard, if one has been prepared, could usefully have been incorporated in the Discussion Document as an appendix.

Question 1: Have the priority problems been defined correctly?

Carter Holt Harvey accepts that the Discussion Document defines an important issue arising from the range of planning procedures used now by city and district councils for dealing with contaminated soils and accepts also the possibility that some may not always be achieving safe outcomes. However, no linkage is given between the inconsistency of the procedures and any undesirable outcomes. Also no analysis is given about why the current situation has developed,

and Carter Holt Harvey declines to accept the possible inference that councils are significantly either incompetent or uncaring. Councils will have their reasons for taking advantage of being able to act in the way that they think best suits their individual circumstances, rather than simply adopting the MfE guidelines or some other council's solution. Carter Holt Harvey expects that submissions from councils will give information about this, and urges MfE to give weight to those submissions when giving advice on the next steps for the planned national standard, to avoid any risk that a standard, should one eventuate, may have the same barriers to implementation as the guidelines appear to have.

But, against that background, Carter Holt Harvey accepts that the proposed standard could bring some efficiency and consistency that would be worthwhile.

Nevertheless, Carter Holt Harvey notes that the proposed standard would address just one element of dealing with some situations involving potentially contaminated soil and that the appropriate procedures for dealing with the other aspects remain the responsibility of the land-occupiers, the land-owners (where the land-owner has the responsibility) and the councils. Those other aspects may be more local in impact and best dealt with on a local basis. But where efficiency would clearly be improved by seeking, as a later stage of the development of the regulatory regime, that all councils use a consistent approach in the ways those other aspects are managed, Carter Holt Harvey believes that guidance rather than regulation will be the more effective approach.

Question 2: Are there other problems you can think of that need to be addressed as a priority?

Carter Holt Harvey is satisfied that no other issue should be addressed by regulation at the moment.

Question 3: Do you agree with the policy objective?

Carter Holt Harvey believes that, for the avoidance of doubt, the words "for the purposes for which it is being developed" must be added to the end of the policy objective. The policy objective will then be:

Ensuring that land affected by contaminants in soil is appropriately identified and assessed at the time of being developed and if necessary remediated, or the contaminants contained, to make the land safe for human use for the purposes for which it is being developed.

Otherwise Carter Holt Harvey agrees with the policy objective.

Question 4: Should the objective be limited to ensuring that the land is safe for human use? If not, why not?

The reasons for being so limited are purely pragmatic. Dealing with any other environmental effects would be a significant escalation of complexity and the evidence for doing so is even scarcer than the evidence for the present scope. Carter Holt Harvey considers that the scope presently proposed should not be expanded.

Question 5: Do you agree with the preferred option?

In the absence of information that explains why the previous approach using guidelines has not been more widely followed, and accepting that some change is sought promptly, Carter Holt Harvey agrees that the preferred option is the one to implement.

Question 6: Is there an alternative option that has not been considered?

Carter Holt Harvey is not aware of an alternative.

Question 7: Are you aware of any other costs or benefits of the alternative options?

Carter Holt Harvey has nothing to add to the material provided in the Discussion Document and the comments elsewhere in this submission about other costs and benefits of the alternative options.

Question 8: Do you see any problems complying with the proposed NES or with enforcing it?

Carter Holt Harvey envisages no insurmountable problems complying with the planned standard or with enforcing it. However, some practical considerations appear to need more development.

The responsibility for implementing the standard would fall mostly on the city and district councils, consistent with their role in relation to land-use. However, up until now regional councils have collected most of the background information on contaminated soils in accordance with their role in relation to land-use, and can be expected to continue to do so. If the standard is promulgated, city and district councils will receive information in reports on potentially contaminated land. The proposed standard therefore should contain a general provision relating to sharing and co-ordinating efficiently the holding and accessing of the information by the regional councils and the territorial authorities for their mutual benefit. The objective should be to avoid duplication of information records. Ready public access to much of the information

regarding specific contamination is also necessary, and provision for confidentiality is needed in appropriate circumstances of commercial sensitivity. An example of commercially sensitive information would be the type of development being considered. The standard would need to address each of these points.

The Discussion Document proposes, in the situations where a standard would have application, that a condition for an activity to be a permitted activity is the receipt by the council of a report and the high-level auditing of the report by the council. The standard would need to prescribe time-frames for this audit and a procedure to be used in case of disagreement about its outcome, since this decision-making is not covered by the provisions in the Resource Management Act 1991 for council decision-making on similar matters.

Other points about the implementation are covered in the answers to later questions.

Question 9: Are the thresholds for determining whether resource consent is required clear and appropriate?

Except as stated elsewhere in this submission, Carter Holt Harvey considers that the thresholds for determining whether resource consent is required are clear and appropriate.

Question 10: Is the *permitted activity – subsurface investigation* requirement to provide a site investigation report appropriate?

Carter Holt Harvey considers that the *permitted activity – subsurface investigation* requirement to provide a site investigation report is appropriate.

However, sub-surface investigations will continue to be done for assessing environmental effects other than health effects. These will not be covered by the standard if it is promulgated (unless, presumably, health effects are being investigated at the same time), and will not trigger a need for an investigation report. Carter Holt Harvey considers that this distinction is significant both from a process perspective and for ensuring that impediments, even perceived impediments, are not created that impact on the willingness of land-occupiers to monitor suspect sites. Any standard will have to be framed carefully to avoid any confusion about this aspect.

Question 11: Have we adequately defined the land that should be subject to a condition requiring site investigation?

Carter Holt Harvey is concerned about some aspects of the proposed definition of land that should be subject to a condition requiring site investigation.

First, many examples exist where land has been used for activities on the Hazardous Activities and Industries List but the land is known not to have contaminated soil. Councils, particularly regional councils, already have records of this, and such records can be expected to increase over time if the standard is introduced. A solution to this would be for the council to be able to waive the provision of the report where it is not necessary because of existing information.

Second, situations may arise where work done under the permitted activity provisions could find evidence of contamination that was not expected. Such a find should trigger re-consideration of the activity.

Third, the first paragraph of Section 4.2 of the Discussion Document says:

Soil guidance values (SGVs_(health)) have been developed for 12 priority contaminants to determine the acceptability of contamination, and therefore whether or not resource consent is required.

Carter Holt Harvey interprets this as a clear statement that the standard, if it proceeds, would apply only in situations involving some or all of those twelve contaminants. The Discussion Document does not discuss the situation, if the standard is introduced, in relation to land with contaminants other than those twelve. Carter Holt Harvey assumes that such land would not be covered by the standard and existing procedures would continue to apply. The standard, if it proceeds, would need to avoid doubt on this point. Asbestos is an example of such a contaminant and is a contaminant of some public interest.

Question 12: Have we adequately provided for activities that should not be caught by the requirements of this NES?

Land-owners often prefer to remove or contain contaminants in the soil when a land-use change or sub-division is not contemplated at the time. This could be in preparation for seeking to sell the land, for example. Carter Holt Harvey does not think that this activity comes within the meaning of “development” as the expression is used in the Discussion Document, and therefore it would not be covered by the standard. This suggests that clarification would be desirable to remove any doubt on this point.

Otherwise, except for the points made elsewhere in this submission, Carter Holt Harvey considers that the provisions for activities that should not be caught by the requirements of this planned standard are adequate.

Question 13: How do you think the NES should ensure the adequacy of site investigation?

Carter Holt Harvey considers that the concept of having a suitably qualified person undertake the investigation is sound and will result in adequate investigations. The only concern is that discussion will arise over who is a suitably qualified person. Carter Holt Harvey agrees with the statement in the Discussion Document that says, in effect, that defining this in the standard is impractical. Because defining a suitably qualified person is impractical, Carter Holt Harvey also believes that providing in the standard for sanctions against a person who improperly claims to be adequately qualified for the purposes of undertaking an investigation would also be impractical as a mechanism for ensuring that unsuitable people do not claim to be suitably qualified.

The investigatory task typically requires the exercise of judgement, about how much sampling is desirable, what analysis is appropriate, the significance of variable results, and the relevance to the planned usage. At the start of the investigation, the outcome is unknown, so the investigator must often be chosen with the possibility in mind of the investigator having to give advice on remedial actions instead of simply declaring the land safe for the planned use. Judgements may also be needed about the potential for other uses in the future and whether prudence dictates that provision is made in anticipation. Despite the availability of regulated soil guidance values, the wider task would remain one with a fundamental risk-assessment focus, requiring a degree of professional judgement.

Carter Holt Harvey's experience is that most of the suitably qualified people are professional engineers, so the assurance of being suitably qualified is achieved if the person has suitable professional standing as an engineer (not necessarily by being a Chartered Professional Engineer). This ensures that the person is acting in accordance with a code of conduct backed by disciplinary provisions. However, Carter Holt Harvey is confident that this practice will continue regardless of whether it is included in any standard that may come.

Question 14: Is the *permitted activity – use, development and subdivision* better provided as a *controlled activity* or another alternative?

Carter Holt Harvey agrees with the logic in the Discussion Document and that the *permitted activity – use, development and subdivision* should be a permitted activity. Any approach other than using permitted status involves a resource consent application and all of the complications that follow. In all but a few cases, the activity has negligible risk of involving contamination, so requiring a resource consent under regulations dealing with contaminated soils would be clearly a pointless exercise and is likely to undermine the acceptance of the regulations. Carter Holt

Harvey is particularly mindful of the aversion, typical of current consent staff, to any risk or responsibility, and the potential for this to lead to the staff processing an application for the resource consent deciding to seek independent peer review reports when the risk does not justify that step.

Council costs in administering the permitted activity provisions should be small and, in principle, should not be a consideration in deciding the appropriate regulatory mechanism. The only situation where specific costs could arise is when a report is provided for auditing and for recording of the information. If this cost is a significant concern, the standard could include provision for a fee for lodging a report, notionally based on the typical cost of one hour of staff time perhaps.

Question 15: How should the NES address site-specific assessment for produce consumption?

Carter Holt Harvey finds that the proposals in the Discussion Document for the treatment of land-use scenarios where the produce consumption is greater than 10% are not clear. If one or more of the twelve “priority contaminants” are involved, the intention that the standard would apply to the situation seems clear. Yet the guideline values in the standard would not apply, because the land-use does not fit any of the categories described. Therefore the activity cannot be a permitted activity and presumably becomes a restricted discretionary activity. A resource consent application is then needed, and an assessment of environmental effects. That assessment would have to be site-specific and include a comparison with appropriate guideline values derived without the use of the standard, and be undertaken by an appropriately qualified person. Whatever distinction is being attempted in the Discussion Document between that process and a “non-regulatory method” is not obvious.

Question 16: How should the NES address naturally occurring elements in the soil?

The policy objective for the standard relates to contaminants in the soil and any risk they pose to human health. The objective does not relate in any way to how or when the contaminants entered the soil. Carter Holt Harvey considers the purpose of the standard and its focus on human health would be undermined if some distinction was attempted based on the origins of the contaminants.

The corollary is that the standard would have to be structured throughout to include appropriate references to the fact that the contaminants in the soil can be the result of either natural processes or previous human activity.

Carter Holt Harvey believes that if the standard is not reasonable when applied to natural contamination, it will not be reasonable when applied to other contamination.

Question 17: Have we accurately reflected the range of costs and benefits arising from the proposals for an NES, and who might bear the costs or receive the benefits?

The only outcome that the policy objective seeks relates to human health. However, the public health benefit from implementing a standard is un-quantified in the Discussion Document. The discussion in the Discussion Document may shed some light on whether a national environmental standard is the least-cost way to achieve some public health benefit, but this does not answer the question about whether more regulation is actually justified on public health improvement grounds.

Carter Holt Harvey accepts that quantifying the public health benefits of a standard is not practically achievable. This means that the assessment of the benefit to public health must be done on a purely comparative basis. Therefore, a comparison has to be made between the costs arising if a standard is introduced and the costs of other public health risk management initiatives of a similar nature. Carter Holt Harvey believes that this must be the basis for the justification of the proposal if a decision is made to advance to the proposal stage, and that the treatment in the Discussion Document is therefore quite inadequate.

Carter Holt Harvey is disturbed to see in the analysis in the Discussion Document that additional remediation costs are included in the costs arising if the proposal proceeds. As a general statement, Carter Holt Harvey believes that a prudent and responsible land-occupier or, where applicable, land-owner, or other person responsible for remediation, operating in a sensitised community with vigilant council staff, will undertake remediation to the appropriate extent regardless of any regulatory process that assists the assessment of when human health may be at risk. If the remediation costs increase because a standard is implemented, that strongly suggests that the standard is flawed and results in excessive remediation. Carter Holt Harvey does not agree that outcome will occur, in the expectation that any standard will be carefully considered during preparation.

Question 18: Are there any costs and benefits we have overlooked?

Carter Holt Harvey considers that a significant effort would be required to establish the databases that would be necessary to ensure that duplication of information about contaminated land did not occur and that both regional councils and territorial authorities were comfortable

with the accuracy of the information held for their joint use. Carter Holt Harvey believes that this cost should be quantified in the cost-benefit analysis.

Another concern is that the envisaged standard would create a regime for assessing health effects that would be separate from the regime for assessing wider environmental effects. Even if the coverage of a health-based standard is well defined, inevitably some duplication of assessment effort and reporting will arise. This is a real cost of having a standard and Carter Holt Harvey considers that it should be assessed and included in the cost-benefit analysis.

Otherwise, Carter Holt Harvey has nothing to add to the answer to Question 17.

Question 19: Do you have any 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?

Carter Holt Harvey has nothing to add to the answers to Question 17 and Question 18.

Concluding Comments:

I look forward to providing any elaboration requested on the points made in this submission.

If any of the assumptions in this submission about the meaning of the Discussion Document are incorrect, Carter Holt Harvey would appreciate the opportunity to reconsider the related comments.

I also look forward to being involved in further consultation as the work on the possible standard advances.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Jim Newfield", is written over a light blue rectangular background.

Jim Newfield
National Environment Manager