

Submission by the Whangarei District Council
on the
Proposed National Environmental Standard for Assessing and Managing Contaminants in Soil

Whangarei District Council welcomes the national initiative on the proposed NES, and generally supports what the NES is trying to achieve. However, we believe there is scope for some issues to be clarified and/or expanded upon in order to make the proposal more effective.

This submission addresses those questions posed within the proposed NES document that are of greatest concern to Whangarei District Council. Questions, and associated numbers, are repeated within this document for ease of reference.

Q1 – Have the priority problems been defined correctly ?

Q2 – Are there other problems you can think of that need to be addressed as a priority ?

The proposed NES notes that a lack of specificity within controls of district plans has resulted in ad hoc processes that run the risk of affected sites not being identified at the time of development. However, WDC does not believe that the process proposed in the NES will fully address this issue.

Section 4.1.3 of the proposed NES discusses ways of ensuring that not all land is required to go through a site investigation. In principle, Whangarei District Council agrees that such a requirement would be too onerous. The proposed NES therefore suggests that land subjected to specific site investigations should be limited to land with a **'known'** history of land uses and activities as identified in the HAIL list; or land that is registered as (potentially) affected on the district or regional council's land use information registers.

For any land identified within the district or regional council's register, the proposed process is considered to be appropriate, as there is likely to be a clear record of the land. Nevertheless, concerns still remain as to the completeness of council registers. In Northland's case the register is very much in its infancy. The proposed NES may perhaps regulate the advancement of such registers.

The process of identifying whether site investigations are necessary appears to fall down when trying to assess whether a site has been subject to any activities on the HAIL list. Clearly, there should be little difficulty in assessing any current activities taking place on the site. However, if the history of a site is not **'known'** (i.e. it is not on the council register), it becomes difficult to assess whether any HAIL activity may have been carried out on that site in the past. The end result may again be ad-hoc decisions as to whether a site investigation is required, with the associated risk of the non-identification of a potentially contaminated site.

A further associated issue relates to potential liability should land not identified at the development stage, be identified later on. The proposed NES is silent on this matter.

Section 7.3.1. of the proposed NES outlines Step 1 of the process to determine whether land is potentially affected by soil contaminants. Reference is made to the use of the HAIL list and to council land-use information registers. However, this section also advises that landowners and developers should consider land to be potentially contaminated if it exhibits '**any other evidence**' of the land being affected by contaminants. It is not clear, though, what is intended with 'any other evidence', and what council officers might be looking for when assessing an application for resource consent. It is believed that this other evidence may not become clear to council officers until a site visit, as part of the normal consent process, is undertaken. At this point, the process has progressed past the initial identification stage. In relation to building consents, in cases where a resource consent is not required, a site visit is typically not carried out until the project is in the initial building stages.

WDC understands and sees merit in the use of a 'catch-all' phrase such as 'any other evidence'. However, due to its general nature, the phrase is left open to interpretation and could be easily contested if no clear guidelines are established to outline the type of evidence that would fit the bill.

Q 8 – Do you see any problems complying with the proposed NES or with enforcing it ?

WDC perceives a number of issues that may inhibit the effective enforcement of the proposed NES. As touched upon above, the wording used in the HAIL list is open to interpretation. For instance, activity 32 of the HAIL list identifies motor vehicle workshops. Does this activity also apply to residential sites where the landowner/occupier carries out mechanical repairs on their personal vehicles, and perhaps those of friends or family; as they are likely to be storing oil, brake fluid and other potentially hazardous materials, or is it intended to apply only to commercial sites ?

Activity 52 of the HAIL list refers to any site that has been, or could be, subject to the migration of hazardous substances from hazardous substances present in soil or water on adjacent sites. However, there is no guidance for council officers to assist in assessing whether a particular site may indeed be subject to contaminants that have migrated from an adjacent site that meets the requirements of the HAIL list. For instance, what distances can or do contaminants travel; and is the word 'adjacent' limited to immediately adjacent sites or to sites that are slightly further afield ? And if so, how much further ?

The statement in activity 52¹of the HAIL list seems to suggest that for **every** application received, there should be an automatic response of checking the history of any adjacent site for its inclusion on council registers and/or the HAIL list in order to make an assessment of the site for which development is proposed. Is this what is intended, and if so, this needs to be clarified.

Should a proposal for development proceed to the notification stage, after having determined that a site investigation was not required, and a member of the public submits that the subject site is contaminated, what would be the process to follow at that stage ? The proposed NES does not appear to have a procedure

¹ Activity 52 of the HAIL list reads "Any site that has been, or could be, subject to the migration of hazardous substances from hazardous substances present in soil or water on adjacent sites."

for such situations. This scenario also raises the issue of potential liability mentioned earlier, given the possibility for huge gaps in information (or misinformation).

'Best practice' or guideline material on when to carry out further investigation or peer review would be desirable. This will go some way to mitigating the liability risk of acting or not acting upon unverified information, and may reduce the risk of facing potential court decisions.

The use of the HAIL list also brings to mind issues of natural justice, as identifying that a property may have been subject to a historical activity recognised on the HAIL list, can change the status of this property overnight, and its resource consent requirements. Usually, the resource management status of an activity (for consent purposes) can only be changed through a 1st Schedule public participation process, which includes a right to contest the Plan provisions. A similar consultation/verification process needs to be considered.

Q 9 – Are the thresholds for determining whether resource consent is required clear and appropriate ?

WDC believes that, overall, the thresholds are not clear, nor appropriate. It is not particularly clear whether the 3 step process to determine resource consent requirements sits completely outside of the resource consent process or whether processing days start counting as a proposal is received, or somewhere further along the 3 step process. For example, a proposal is received and an initial assessment determines that a site investigation for contamination is required. It is not clear whether the resource consent process starts at this point or at the time the results are received (or some other time ?). Clearly, the status of the application is undecided as long as results are unknown. However, if processing days start, presumably council officers would assume a Restricted Discretionary Activity status for processing purposes. However, once results are received, they may determine that the application is a Permitted Activity, in which case the processing of a resource consent is not required; and time may have been spent on an application that was not required. It seems counter-productive to spend time on an application for which costs may not be recoverable. The

Controlled Activity status may be more appropriate in these instances.

On occasion, an application for a building consent may identify the need for a resource consent. However, the issuing of a building consent cannot be stopped on these grounds, even though the building process cannot be started until the resource consent has been obtained. It is left up to the applicant to decide whether to proceed with the building consent, or whether to wait on the impact from the resource consent. Somewhere amongst all of this, the thresholds will need to be determined.

It would seem that some important administration difficulties are being created, which require further clarification, particularly in relation to timeframes and potentially associated costs. The perceived non-consistency of timeframes will also have implications for reporting on Councils' performance, as the activity status of applications may change i.e. there is no reporting duty on permitted activities. Furthermore, the

proposed timeframes do not align either with the timeframes for issuing building consents, a process that will also be affected by the proposed NES.

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

WDC perceives ambiguity with the use of the word 'land'. It is unclear whether 'land' refers to a title, a site, a property or some other concept of land ? The ambiguity particularly arises where Section 7.3.1 of the proposed NES stipulates that a resource consent may not be required where 'historical photos show that the location of a sheep dip is remote from the land being developed.' The statement appears to allow the resource consent process for the development of 'land' that forms part of a bigger 'title' upon which a (former) sheep dip is present.

If land is to be developed in this way, WDC contends that an infinite number of smaller contaminated sites will be created as a result; which will not be able to be put to any use. This would appear contrary to the policy objective outlined in the proposed NES. The proposed process may well benefit from the requirement that identified contamination is dealt with at the first available opportunity.

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

For reasons as outlined earlier, the controlled activity status may be preferable.

WDC would also like to note that the wording used around the permitted activity for subdivision is somewhat open to interpretation as subdivision of any land is not a permitted activity under the Resource Management Act. This issue may require some clarification, particularly for the public at large.

Q 15 – How should the NES address site-specific assessment for produce consumption ?

WDC would like to express its reservations relating to the low, 10%, threshold to be used for the purposes of lifestyle blocks. Clarification around this issue was sought at one of the workshops held by MfE, and it was identified that the 10% threshold was chosen based upon historic trends of produce consumption on lifestyle blocks. The use of historic trends may not be appropriate in this instance, especially given the increased popularity of home gardens, and increased sales of produce in farmers markets.

Both internationally and within New Zealand, the demand for locally produced food has been increasing, as has the trend towards establishing farmers' or growers' markets. Whangarei is one such place where the growers' market is proving to be very successful. A variety of produce sold at this market originates from lifestyle blocks. In addition, free range eggs and chickens are gaining in popularity. The potential exists for soil contaminants to concentrate in these animals, which creates the possibility for these toxins to be taken up by humans.

It was suggested at the MfE workshop that best practice guidelines, to be published in conjunction with the NES, would likely recommend that a consent notice be placed on the title of such lifestyle blocks, outlining the limitations of the level of contamination present on the site. This idea is deserving of some contemplation, but may need to be produced in conjunction with further implementation measures.

It would seem, from general observations and experience, that many potential buyers of a lifestyle block, often have the intention of growing some kind of produce on the site, whether this intention eventuates or not. However, placing a consent notice, of the kind outlined above, on the title may deter potential buyers from purchasing a particular site. It is also likely to be contested by developers.

In the event, however, where such land is subdivided and sold, and the new landowners follow through on their intention to grow fruit and vegetables, either for own consumption, barter or for sale at a market, this land will need to go through another process of decontamination before it can be considered 'safe' for such activity. This seems to imply a rather inefficient and ineffective way of dealing with a problem that would be more suitably addressed at the first available opportunity.

WDC understands that historic data to support a higher threshold may be lacking at present. However, historic trends are not always a good indication of future activities and behaviour, particularly in light of likely climate changes. Planning is increasingly occupied with setting policy for future oriented issues such as climate change and peak oil, and how to create communities that are more resilient. Being able to sustain communities in terms of food provisions is very much considered to be part of future proofing. It is in this light that WDC would like to express its concerns over the low threshold adopted in the proposed NES. However, should MfE decide to retain the low 10% threshold, WDC would suggest that a robust regime is implemented to track consumption patterns, so that sufficient data may be obtained to inform a future review.

General comments

WDC submits it should be made clear that the NES also applies to plan changes given the fact that these can change the zoning and land use of properties to allow for more sensitive activities. This will avoid inappropriate rezoning of potentially contaminated land to more sensitive uses without consideration of human health impacts.

Conclusion

WDC generally supports the proposed NES and its intention to create a nationally consistent approach to a longstanding and widespread problem. However, further clarification is required on a number of issues as outlined above. This clarification should assist with issues of interpretation and avoid the need for court proceedings to make decisions on behalf of local authorities. Notwithstanding this, WDC is confident the document can be developed into an effective and practical standard.