

Our Ref: 12/2/1

6 April 2010

Ministry for the Environment  
PO Box 10362  
**WELLINGTON 6143**

By email: [standards@mfe.govt.nz](mailto:standards@mfe.govt.nz)

Dear Sir/Madam

## **SUBMISSION ON PROPOSED NATIONAL ENVIRONMENTAL STANDARD FOR ASSESSING AND MANAGING CONTAMINANTS IN SOIL**

### **1. Introduction**

The following submission has been prepared by the Hawke's Bay Regional Council (the Council) in response to the Proposed National Environmental Standard for Assessing and Managing Contaminants in Soil (the Proposed NES).

The Council wishes to thank the Minister for the Environment for the opportunity to comment on the Proposed NES. The draft of this submission was formally considered by the Council's Environmental Management Committee on 10 March. Subsequent minor amendments to the Council's submission, following the MfE workshop on 23 March, were agreed by the Chairman and Councillor holding the Land Use Change portfolio.

### **2. General statement**

The Council supports in general the Proposed NES and its stated policy objective of:

'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 land **safe for human use**.'

The Council accepts that an adequate and nationally consistent approach to addressing soil contamination risks to human health, prior to development, subdivision or change of use of land has been lacking. The Proposed NES addresses this issue by requiring territorial authorities to apply consistent controls and risk assessment, consistent application of Soil Guideline Values and staged reporting requirements for landowners / developers. The Proposed NES is considered the most appropriate option to achieve the stated objective above.

### 3. Qualification to Council's support for the Proposed NES

The Council wishes to qualify its general statement of support with reference to a number of key issues relating to scope and detail. Responses to the specific questions set out in the Ministry's discussion document are included as Appendix 1 to this submission.

#### 3.1 Ecological effects of soil contamination

It is the Council's view that there is insufficient justification of the Ministry's decision to limit the scope of the Proposed NES to human health, rather than tackling broader ecological protection. An ecological scope is considered of value to this Council in carrying out its regional council functions under the Resource Management Act (RMA) and would also better reflect the purposes of the Act.

While this Council agrees that the focus on human health is a pragmatic and useful step, this should not preclude further consideration of the benefits of addressing ecological effects in a future NES.

#### 3.2 Controlled or permitted activity status

Under the Proposed NES, where a developer proposes a change of use, development or subdivision of land that is actually or potentially affected by soil contaminants (i.e. on the HAIL list or flagged on a local authority land use information register) the developer is required to provide one or more investigation reports to the TA confirming that the site is acceptable for the intended use. If TA auditing of these reports concludes that any contamination is acceptable for the intended land use (i.e. below the relevant Soil Guideline Value), then permitted activity status applies in relation to soil contaminants.

Council submits that controlled activity status would be more appropriate than permitted status, as the latter should only be applied to low risk situations, which are likely to require low local authority input. In contrast, TA processing of one or more site investigation reports on soil contaminants may give rise to considerable TA workloads and associated costs. Unless the RMA is amended to allow charging of developers / landowners for processing permitted activity applications these costs will have to be borne by the TA and their general ratepayers. This has significant implications especially for TAs with limited resources.

From a Regional Council perspective cost recovery is less of an issue. Firstly, the Proposed NES places the onus firmly on TA's to administer its requirements. Secondly, this Council's *Ten Year Plan 2009-19* (LTCCP) makes provision for '*actual and reasonable charges*' to be applied where a party requests Council to review and comment on contaminated site investigation and remediation reports. These charges are set in accordance with section 150 of the Local Government Act 2002.

#### 3.3 Earthworks prior to subdivision

The Proposed NES would allow earthworks, involving the movement of contaminated soil, to take place without TA knowledge prior to any application for subdivision, change of use or development.

One example is the removal of sheep dip contaminated soil to an unknown location prior to land being sold to a developer intending to apply for future subdivision. This omission could undermine the effectiveness of this proposed standard. The Proposed NES needs to effectively 'capture' movement of contaminated soil on or off property prior to an application being made to a TA for subdivision, land use change or development.

### 3.4 Duty to report contamination

At present there is no “duty to report” contamination embedded in New Zealand legislation. Inclusion of a broader duty to report within the RMA would assist “capture” of the type of activity outlined in 3.3 above (or, for example, the burying of drums of chemicals), that is not connected to subdivision, land use change or development. This would assist the effectiveness of the Proposed NES as part of a comprehensive framework for assessing and managing contaminants in soils.

### 3.5 Practitioners

Council agrees that a requirement for reports to be prepared by appropriately qualified and experienced practitioners will be key to ensuring reliable and robust assessment/reporting and hence the overall effectiveness of the NES. Ideally there is a need for a national register of practitioners to be established to enable local government to access qualified people in the various professional disciplines required. A register is likely to be particularly important for TAs remote from the main consultancies. At very least, accompanying guidance to the Proposed NES could include criteria for assessing whether a practitioner is appropriately qualified and experienced.

Australia is moving towards creating a register of appropriate consultants. It is suggested that New Zealand either adopt a similar scheme driven by central government/and or industry, or join Australia in adopting a joint scheme for recognising appropriate experience and/or qualifications in the industry.

A requirement for practitioners to carry a minimum Public and Professional Indemnity (e.g. not less than \$1,000,000 valid for seven years after the implementation of an individual project) could also be used to catalyse industry/practitioner standards through pressure from the insurance companies.

### 3.6 Territorial authority and regional council roles

Effective implementation of the Proposed NES is likely to require increased coordination of TA and regional council roles with regard to contaminated land. This priority is made clear in the executive summary of the discussion document:

*‘This ‘duty of care’ sequence applies to all parties but depends in particular on collaboration, coordination and integrated information management between regional and city / district councils. It requires councils to accord this work a priority until the information systems and decision-making procedures are in place and functioning effectively.’*

Despite this requirement, the demarcation of local government roles remains unclarified by the Proposed NES beyond the respective contaminated land functions of regional councils and territorial local authorities set out in RMA sections 30 and 31.

Council submits that the demarcation and coordination of TA and regional council roles should be clarified either formally in a revised NES, or through supporting guidance. This is necessary to assist effective implementation.

## 4. Guidance material for implementing NES

Successful implementation of the Proposed NES will require the support of effective guidance material available at the time it takes effect. In addition to the guidance on TA and regional council roles (see 3.6 above) the following guidance, or reference to guidance, is required:

- 4.1 Direct reference, within the standard, to MfE's Contaminated Land Management Guidelines in order to give these increased weight
- 4.2 Nationally consistent guidelines on the mixing of contaminated soils
- 4.3 Developer guidelines on procedures for subdivision, change of use or development of HAIL listed land (e.g. a pastoral farm with possible soil contamination from a sheep dip site, farm tip, offal pit, fuel storage or pesticide use/storage)
- 4.4 Guidance on appropriately qualified and experienced practitioners.

## 5. Summary

Council supports the Proposed NES, subject to the qualifications outlined above and in Appendix 1 to this submission.

Once again, thank you for the opportunity to make this submission.

Yours faithfully



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## APPENDIX 1

MfE Discussion Document: Questions	HBRC Submission Point(s)
<b>SECTION 2 THE PROBLEM</b>	
1. Have the priority problems been defined correctly?	<b>Yes.</b> Support in general (see Question 2).
2. Are there other problems you can think of that need to be addressed as a priority?	<b>Additional problems which might be covered:</b> <ul style="list-style-type: none"> <li>• Refer to main body of HBRC's submission (sections 3.1-3.7)</li> <li>• Old, privately-owned hydrocarbon storage tanks on farms or industrial sites, which are being removed off property and where no change of land use is not taking place, do not currently need to be notified the local authority.</li> </ul>
3. Do you agree with the policy objective?	<b>Yes.</b> The policy objective is clear, focussed on the key issues and practical. It addresses the key, issues relating to soil contamination in a timely manner.  Additional requirements may be identified from future monitoring of the NES.
4. Should the objective be limited to ensuring that land is safe for human use? If not, why not?	<b>Yes.</b> Consistent and appropriate protection of human health is a realistic and pragmatic response to a key soil contamination issue. Extension of the Proposed NES' scope to ecological effects would be more complex, but should be considered as a subject for future NES development. The decision to exclude protection of ecology from the Proposed NES requires more detailed justification.
<b>SECTION 3 THE OPTIONS</b>	
5. Do you agree with the preferred option?	<b>Yes.</b> A NES is the most appropriate option (regulatory and non-regulatory) for addressing the problems defined in section 2. Agree with the advantages of the Proposed NES option outlined in section 3.1.5. Agree with the assessment of options against the criteria in Table 2 (section 3.2).
6. Is there an alternative option that has not been considered?	<b>No.</b>

MfE Discussion Document: Questions	HBRC Submission Point(s)
7. Are you aware of any other costs or benefits of the alternative options?	<b>No.</b>
<b>SECTION 4 THE PROPOSED NES</b>	
8. Do you see any problems complying with the proposed NES or with enforcing it?	<p><b>No</b>, from a regional council point-of-view as:</p> <ul style="list-style-type: none"> <li>• complying and enforcing the Proposed NES will primarily be an issue for territorial authorities and developers</li> <li>• the standard will only impact on new decisions and resource consents</li> </ul> <p>See also Question 14 below.</p>
9. Are the thresholds for determining whether resource consent is required clear and appropriate?	<p><b>Yes.</b> Council understands that the Ministry's Toxicological and Technical Advisory Groups included adequate expertise. Council agrees with generic SGV<sub>(health)</sub> and methodology for determining use of site-specific SGV<sub>(health)</sub>. Council agrees with the view that there is insufficient evidence to justify regulation for an SGV<sub>(health)</sub> based on a 50 per cent produce consumption exposure scenario.</p>
<b>Questions 10–16 are supported by discussion and more specific questions in the text of section 4.</b>	
10. Is the <i>permitted activity – subsurface investigation</i> requirement to provide a site investigation report appropriate?	<p><b>Yes</b>, for the reasons given in section 4.1.2</p> <p>Responses to additional questions on page 26:</p> <ul style="list-style-type: none"> <li>• Permitting of subsurface investigations subject to reporting may provide some disincentive to investigate land, but this will be offset by the benefits of improved information supply to councils</li> <li>• Concerns that a subsurface investigation reports could be used for enforcement action is a risk for only a small number of cases and is outweighed by the benefits of reporting. Enforcement action likely to be either issuing of an abatement notice or enforcement order.</li> <li>• Monitoring and enforcement of this permitted activity will create difficulties for territorial authorities</li> </ul>

MfE Discussion Document: Questions	HBRC Submission Point(s)
11. Have we adequately defined the land that should be subject to a condition requiring site investigation?	<p><b>No.</b> The bulleted list on page 28, paragraph 2 should include:</p> <ul style="list-style-type: none"> <li>• Sites on the Environmental Risk Management Authority's Location Test Certificate Database.</li> </ul> <p>This ERMA database provides site-specific information.</p>
12. Have we adequately provided for activities that should not be caught by the requirements of this NES?	<p><b>Yes.</b></p>
13. How do you think the NES should ensure the adequacy of site investigation?	<p>Refer to main body of HBRC submission (section 3.4).</p> <p>Hawke's Bay Regional Council's general approach to selecting practitioners includes reference to:</p> <ul style="list-style-type: none"> <li>• Qualifications</li> <li>• Experience and past record</li> <li>• Size of operation (generally prefer major consultancies)</li> <li>• New practitioners prove dependability before workload increased</li> <li>• Importance of peer review if reports raise doubts (note: it is Council's experience that the use of appropriately qualified and experienced practitioners for site investigation reports does not necessarily remove the need for peer review)</li> </ul>
14. Is the <i>permitted activity – use, development and subdivision</i> better provided as a <i>controlled activity</i> or another alternative?	<p><b>Controlled activity status is preferred.</b> Refer to main body of HBRC submission (section 3.2).</p>
15. How should the NES address site-specific assessment for produce consumption?	<p><b>As detailed on page 35, paragraph 1</b></p>
16. How should the NES address naturally occurring elements in soil?	<p><b>As detailed on page 35</b></p> <p>Agree with statement:</p> <p>'To be consistent with our objective of ensuring safe human use, our current position is that these <i>natural hazards</i> should be controlled as if they were a contaminant under this NES.'</p>

MfE Discussion Document: Questions	HBRC Submission Point(s)
<b>SECTION 5 COSTS &amp; BENEFITS</b>	
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?	<p><b>Territorial authorities incur the majority of costs.</b> Changing <i>permitted activity – use, development and subdivision</i> to <i>controlled activity</i> would reduce this cost burden by enabling cost recovery.</p> <p>While regional council costs and benefits not specifically covered by the analysis, the ‘duty of care’ will require improved collaboration, coordination and integrated management between regional and city / district councils. As stated on page iv the Proposed NES will make this area a priority.</p> <p>Regional council costs associated with:</p> <ul style="list-style-type: none"> <li>• Continual upgrading of Council’s land use database (already ongoing with HAIL requirements)</li> <li>• Dealing with greater transfer of information from territorial authorities</li> </ul> <p>Regional council benefits:</p> <ul style="list-style-type: none"> <li>• Selected land use database more up-to-date, enabling: <ul style="list-style-type: none"> <li>○ more accurate information to the public when purchasing land</li> <li>○ reduced liability risk</li> <li>○ improved civil defence planning</li> </ul> </li> </ul>
18. Are there any costs and benefits we have overlooked?	<b>No</b> , although no breakdown of territorial authority / regional council costs and benefits.
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?	<b>No.</b>