



16 April 2010

Ministry for the Environment
PO Box 10362
Wellington 6143

By email: standards@mfe.govt.nz

Proposed National Environmental Standard for Assessing and Managing Contaminants in Soil – Discussion Document

The Society is grateful for the opportunity to comment on the discussion document above. This submission responds to the questions on pages 48 and 49 of the discussion document.

1. *Have the priority problems been defined correctly?*

The focus on the protection of public human health is appropriate but the document should also focus on nationally consistent standards to address wider environmental effects. Liability for contaminated land prior to 1991 (when the Resource Management Act 1991 (RMA) was enacted) is not addressed in the proposed National Environmental Standard (NES) and should form part of the Ministry's statutory focus for the management of contaminated land in New Zealand.

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

The liability for contamination in New Zealand pre-1991 should also be addressed as a priority. Much of the contaminated land in New Zealand is historical, arising from land uses that were common practice 40-50 years ago but were not subject to any statutory or regulatory standards at that time. When contaminated land is discovered, there is often a debate between the landowner, the relevant local authority and occasionally previous landowners, as to which party should incur the cost of cleaning up the site. Time and cost can be wasted on this debate, which often centres on what the local authority knew or ought to have known about the extent of contaminated land within its district or region at the time the land was purchased. Other countries have specific legislation to address liability issues and consideration should be given to how liability might be addressed through the RMA and any other relevant statutes or regulations.

3. *Do you agree with the policy objective?*

Yes, however the objective should extend to address wider environmental effects as well as the question of whether land is safe for human use. Protecting human health is a primary concern. See answer to question 4.

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

Wider environmental risks (for example, contaminants entering water sources) are important in the contaminated land framework and the standards for addressing these risks should also be consistent nationally.

5. *Do you agree with the preferred option?*

Yes, the NES is the best option to compel action at council level to address the matters of concern.

6. *Is there an alternative option that has not been considered?*

We have no comment to this make in answer to this question.

7. *Are you aware of any other costs or benefits of the alternative options?*

Option 1 – Change contaminated land function to a duty: As noted in the discussion document, the RMA already provides specific roles for regional councils and territorial authorities in relation to contaminated land. Elevating that function to a duty is likely to result in an improvement to steps being taken by those authorities to address the issues of concern. However, we agree with the comment at page 20 of the discussion document that the changes could be open to interpretation. There is already some confusion about the delineated functions of regional councils and territorial authorities. We would not expect that confusion to be resolved by this option.

Option 2 - Develop a national policy statement: We agree with the comments on page 20 of the discussion document. The evolution of a national policy statement is a lengthy and complex process and would not lead to consistent administration by councils throughout New Zealand. A standard provides a higher statutory rigour.

Option 3 - Minister to direct plan changes: We understand this proposed NES intends to lead to national consistency of controls for, and a more efficient manner of dealing with, contaminated land. As noted in the discussion document at page 21, the Minister's intervention under s25A of the RMA will not address either of those matters.

Option 4 - Non-regulatory national guideline approach: A national guideline would not sufficiently address the matters of concern. Guidelines are voluntary, and so this option would not make any advance in addressing problems concerning contaminated land in New Zealand.

8. *Do you see any problems complying with a proposed NES or with enforcing it?*

Compliance with the NES can be assured if the NES has its statutory base in the RMA, as this will require regional councils and territorial authorities to amend their regional and district plans to take account of the NES. For the same reason, councils should not face enforcement difficulties provided the regional and district plans are consistent with the NES.

However, some enforcement issues could arise due to the NES' reliance on site investigations being carried out on the basis that Hazardous Activities and Industries (HAI) List activities have occurred on the land in question. Many HAI activities listed on council registers, and the extent of contamination recorded there, are unverified. There is difficulty relying entirely on such information to initiate site investigations, when the base of that information may in fact be incorrect and the investigation may not be necessary.

9. *Are the thresholds for determining whether resource consent is required clear and appropriate?*

Yes.

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

The taking of soil samples to establish the presence, extent, and nature of contaminants in soil is a good starting point for investigations. A more technical view of soil investigations may be helpful.

Page 26 of the discussion document asks specific questions about incentives or disincentives to landowners to investigate land. Some landowners may strongly resist any suggestion that the land that they wish to develop should be the subject of a contaminated land report in circumstances where there is insufficient evidence of the potential for the contamination to exist.

Self-incrimination is also an issue if a soil investigation is undertaken at an early stage of development and contamination is found, so the development does not proceed. The landowner cannot then walk away from the land, and must address the contamination that exists, even if the landowner did not cause the contamination. If the contamination is not remediated, the landowner faces the possibility of enforcement action to remediate the land regardless.

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

Reliance on the HAI list may provide a false and misleading account of where contaminated land exists and the extent of contamination known.

The purpose of the information requirements set out at page 27 of the discussion document includes:

“a record of any investigation to the council so that they can add this information to property files and amend any land-use registers”.

The NES requires landowners to address statutory requirements that currently lie with regional and district councils under the RMA. This is an inappropriate shift of the costs arising from the RMA’s private landowners. The costs should remain with the councils as a public cost.

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

The matters outlined at pages 28 and 29 of the discussion document do adequately identify the areas that are not to be covered by the NES and the general reasons for that approach.

13. *How do you think the NES should ensure the adequacy of site investigation?*

A site investigation report should contain sufficient information to determine whether the land is acceptable for its intended use. Contaminated soil criteria should therefore be set at a national level so that the landowners and the councils are clear on the criteria that are to be met and, if the criteria are breached, how that is to be remedied. The involvement of qualified and experienced practitioners should assist in that process. Most levels and types of contamination are complex, and require technical expertise.

Consideration should be given as to whether prohibiting all activity on a site prior to a site investigation being carried out is necessary. Some development related activities may be able to occur on land without soil disturbance occurring and without soil contamination issues having to be addressed.

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

The permitted activity status supports the NES' intention that landowners be encouraged to investigate the state of the land that they wish to develop without having to seek any resource consent. A controlled activity consent requirement could result in landowners resisting preliminary soil investigations and would act as a disincentive.

The questions posed by the Ministry do not include the opportunity to comment on the restricted discretionary activity (RDA) matters set out in section 4.1.4 of the discussion document. The RDA is appropriate in these circumstances the criteria set should be clear so all parties are aware of the standards that are to be met. The grounds for refusing consent set out at page 32 of the discussion document are generally appropriate. However item 2, dealing with risk, needs to be more clearly defined so that debates about what does or does not meet the risk standard are avoided. This can be achieved by specifying the standard to be met, and avoiding an element of discretion is discussing a risk component.

An RDA consent should not be flatly refused for failing to meet the agreed soil contamination criteria. The default status could be a wider discretionary activity or a non-complying activity status.

15. *How should the NES address site-specific assessment for produce consumption?*

We have no comment to this make in answer to this question

16. *How should the NES address naturally occurring elements in soil?*

We have no comment to this make in answer to this 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?*

Much of the analysis of the costs and benefits of the proposed NES relate to protecting councils from ongoing insurance litigation because of their past failures to disclose information about known contaminated land or the potential for contaminated land. Shifting the burden of obtaining the necessary contaminated land information from councils to landowners should be reconsidered. In some cases, the parties responsible for the contamination at issue are (historical) local authorities throughout New Zealand.

The potential cost to landowners of ongoing liability for contaminated once the extent of contamination is known and whether or not any development proceeds is not addressed here. These factors should be considered.

18. *Are there any costs and benefits we have overlooked?*

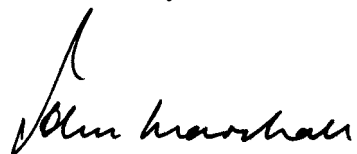
See our answer to question 17.

19. *Do you have information that you would like to see included in the cost-benefit analysis that will be carried out after submissions are received and analysed?*

No.

This submission has been prepared by the Society's Environmental Law Committee, the convener of which is Camilla Owen. If you have any queries regarding this submission please contact Diana Brown, the committee secretary, by telephone (04) 463 2967 or email diana.brown@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Marshall". The signature is written in a cursive style with a large initial 'J'.

John Marshall QC
President