FORM 3:

Submission on Proposal for National Environmental Standard for Assessing and Managing Contaminants in Soil


To: Ministry for the Environment, PO Box 10362, Wellington, 6143
standards@mfe.govt.nz

This is a submission on the following proposed national policy statement (the proposal):

Proposed National Environmental Standard
for Assessing and Managing Contaminants in Soil

Southland District Council’s submission relates to the entire NES:

The submission is attached, and is broadly in support of the NES, but raises some concerns about the detail.

Local Government New Zealand has also made a submission in regard to the NES. Southland District Council supports this submission also.

Southland District Council does not wish to be heard in support of its submission.

16 April 2010.................................
Date

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SUBMISSION TO THE MINISTRY FOR THE ENVIRONMENT ON THE PROPOSED NATIONAL ENVIRONMENTAL STANDARD FOR ASSESSING AND MANAGING CONTAMINATION IN SOIL 2010

Introduction

1. The Southland District Council thanks the Ministry for the Environment (MfE) for the opportunity to comment on the Proposed National Environmental Standard for Assessing and Managing Contaminants in Soil (2010), hereafter referred to as “the proposed NES”.

This submission was endorsed under delegated authority by:

- Mr Bruce Halligan, Group Manager - Environment and Community - Southland District Council

This submission outlines Southland District Council’s view on the proposed NES.

Brief Overview

2. Southland District Council does not support the NES as proposed. However, the Council does support a national framework for assessing and managing contaminated land. The proposal is supported in part, as it would simplify the current system and improve consistency in decision making.

3. The proposed NES contains a permitted activity requirement that site investigations must be provided to the relevant Territorial Authority (TA). Southland District Council has concerns about the legality of this requirement within a permitted activity status.

4. The proposed NES focus on Human Health is supported in part as this is a key function for the Southland District Council under Section 31 of the Resource Management Act. It is apparent that it is much easier to develop a ‘toolbox’ of Soil Guideline Values (SGV) measures limited to human health, than the more problematic and complicated “eco-toxicity” type measures.

5. The proposed NES should cover petro-chemical contamination, an increasingly common soil contamination type in the Southland context, the draft does not.

6. Dangerous goods licensing registers held by Councils are becoming outdated, and in time some may be lost due to structural institutional change or the departure, or loss of individuals with considerable institutional knowledge.

For example, the Environmental Risk Management Agency (ERMA) currently holds data on current test certificates (the replacement of the Dangerous Goods licences); unfortunately this data is not available in a form that is useful to Southland District Council. ERMA does not currently maintain a register of sites, i.e. a list of sites and their current status. Rather, ERMA holds a list of certificates issued, meaning that in time data will be lost (e.g. if certificate holders do not renew their certificates). Ideally, this data should be freely accessible to Southland District Council, TAs and RCs to assist with Section 31 functions, currently it is not available to Council.
7. In order to ensure that regulation is effective, either a Council officer accreditation system is required or there needs to be a national register of qualified and registered practitioners. Council officer training is critical in the Southland context due to our geographical separation from known laboratories and persons with the requisite skills. By requiring reports from appropriately experienced and qualified practitioners the MfE will be creating a new industry, and if HSNO test certification is anything to go by, a significant increase in compliance costs for an applicant is likely.

8. Soil sampling is an expensive exercise, and there is no existing laboratory capacity in Southland at the time of writing to complete such testing; Council considers that the MfE should explore options for reducing this cost.

9. Southland District Council is concerned that the consistency associated with the testing and testing review process has been an issue and that the NES needs to provide guidance on who (qualifications /experience) are suitable as experts for conducting testing and verifying remediation. There also needs to be guidance on when it is appropriate for Council to undertake a peer review/technical review of the testing validation done by an applicant.

10. Southland District Council is concerned that cost recovery is not provided for with the proposed rule structure which allows (as a Permitted Activity) development of land which is potentially contaminated. Council urges the Ministry to further examine alternative rule frameworks, which would permit the recovery of staff inputs, investigations and associated disbursements.

**General**

**Scope of Proposed NES**

11. The proposed NES does not address the environmental effects of the use, development and subdivision of land. Under its current title it is not clear in its intention to restrict its focus to human health and, as a result, it could become the default for all contaminated land. Even if the title changes the NES could still become the default for all contaminated land.

12. As proposed the measure of acceptability for an intended land use is assessment under the Soil Guideline Values (SGVs) for human health only. If a developer or prospective land owner is not aware of the implications of this caveat, change of land use could be allowed for on a site which still has major restrictions on use. The SGVs as proposed do not give any guidance on concentrations that would affect the life supporting capacity of the soil and therefore the system relies on Southland District Council and developer knowledge to determine whether there are other restrictions on its use. The Southland region and its dominant economic drivers are primary production, energy production and exploration. To protect both its environment and the economy ideally the NES should be more holistic by demonstrating much clearer linkages between SGV’s and environmental measures or limits that might affect the life supporting capacity of soil.

“**Appropriately Qualified and Experienced Practitioner**”

13. The proposed NES will require a site investigation report to be carried out by an “appropriately qualified and experienced practitioner”. The purpose of this requirement, as stated in the discussion document, is “mainly to flag to landowners and developers to engage appropriate expertise at the outset…It is envisaged that developers who had concerns whether a particular practitioner meets the description would be ascertained through discussions with the Council.”
14. *Southland District Council* notes that there is an inherent problem with a Council effectively recommending whether a practitioner meets the description of being an “appropriately qualified and experienced practitioner” and *Southland District Council* would be unwilling to take on that role. The NES imposes obligations of judgement on the Council to determine whether a site assessment has been conducted by an “appropriately qualified and experienced practitioner”. *Southland District Council* expects clear guidance on this matter from the MfE.

15. *Southland District Council* agrees that an appropriate level of qualifications and experience should be developed, ideally with an accreditation scheme, or at a minimum with a national register of suitably qualified practitioners maintained by MfE. Some guidance should be given to sit alongside the NES as to what this term means so that a Council has reference to it and so that it is available for practitioners. *Southland District Council* has specific concerns around accessibility to these accredited persons or practitioners given that the Council administers approximately 11% of New Zealand’s land area, much of which is rural and often remote and difficult to access.

**Liability**

16. A site assessment is always a balance between costs and completeness; yet, the proposed NES would require *Southland District Council* to sign off on-site assessments. Council considers that such a matter will be finely balanced and most likely, highly contentious. There is no discussion about liability in the document and there will need to be an agreed protocol about how this is to be managed.

17. Liability claims are identified as a driver for the NES yet it is not explained how the NES would offer protection for Councils against liability. As the NES (and associated SGVs) are being set by MfE there is an expectation that some liability should rest with MfE rather than be passed entirely onto the TAs.

18. *Southland District Council* is also concerned that the discussion document contains no information as to how it is intended to indemnify the legitimate actions of past landowners and authorities, or if any alternative action is recommended.

**Costs**

19. As per the *Local Government New Zealand* Submission the proposed permitted activity Rule (4.1.3) allows land-use change, development or subdivision of land which is potentially contaminated but where the proven levels are acceptable for the intended land use as defined by the relevant SGV. The site investigation report to determine whether the SGVs are appropriate will need to be prepared by an *appropriately experienced and qualified practitioner* and Council staff will need to assess the report to determine its adequacy and to determine whether the contaminants are at a level acceptable for the intended land use.

20. Notwithstanding, the legality of such an approach, this proposed rule raises a number of issues with respect to cost recovery, as previously mentioned. As it is the Council which has responsibility to (a) accept a site investigation report as adequate and (b) determine that the contaminants are at a level acceptable for the intended land use, thus the actual cost of this rests with Council. When a Council reviews a site investigation report there is a cost associated with that.
If Council decides to have a report externally peer reviewed there is a cost associated with that process. It is not clear from the discussion document when this technical review should be undertaken, or if the preparation of the report by an “appropriately qualified and experienced practitioner” is intended to protect the Council and remove the onus from the Council. Southland District Council anticipates further clarification or guidance is required from MfE.

21. Either a guideline could be prepared or the NES could require a report to be prepared in a standard format by the “appropriately qualified and experienced practitioner”. As there is no ability for cost recovery, a Council should have no role other than accepting the report. This does, however, raise the matter of liability and whether it sits with a Council (which accepts a report) or with the practitioner who prepared the report.

22. Alternatively, the proposed NES could include best practice guidelines for common issues such as sheep dips or petroleum contamination. Simple guides would eliminate the need for consultants in many cases and will thus significantly reduce compliance costs for applicants or landowners.

23. Southland District Council suggests that strict regulation will drive the issue underground, i.e. if a person or applicant voluntarily advises an enforcement agency of an issue, and that agency requires compliance at some cost to the person, this will discourage others. A solution is issuing codes of practice not unlike the ERMA one for the removal of underground tanks on farms; a very costly exercise usually but the Code of Practice is less stringent for farms, thus less costly and thereby encouraging compliance.

24. In principle, Southland District Council supports simplifying some of the processes associated with the RMA; however, we are concerned about the liability issue, especially when technical review of reports is indicated with no prospect to recover associated costs.

25. Ideally, an accreditation system needs to be established to remove any uncertainty; however such a system will most likely lead to additional costs being borne by Southland District Council.

**HAIL**

26. Southland District Council is fortunate to enjoy a robust collaborative relationship with its Regional Council - Environment Southland and the regions HAIL list is currently under review by the Regional Council.

27. The proposed NES does not discuss the method and frequency of review of HAIL and Southland District Council along with Local Government New Zealand considers this need to be addressed. As HAIL is a trigger in the proposed NES, this is an important matter for consideration. There is concern that HAIL is outdated because it was developed as a desk top survey in the early 1990s. An assessment of HAIL should be undertaken prior to implementation of the NES to determine its accuracy and to determine the extent that review and additions are necessary. Reliable information records and databases need to be in place prior to the NES having any effect. The quality of this information is continually improving.

28. Southland District Council considers that the proposed NES must inevitably accept regional variations despite the universal application of HAIL. Regional Councils need to have the discretion to include other land uses on their registers and this approach is supported.
Notification

29. *Southland District Council* notes the inherent presumption towards non-notification because the NES has not prescribed otherwise. The usual tests under the RMA should therefore be applied when a specific application is being considered. It is assumed that a Council cannot, when reviewing its plan and incorporating the NES, include a notification statement because, arguably that provision of the District Plan would as a consequence be more stringent than the provisions of the NES.

Response to specific questions asked in the MfE discussion document

What is the problem?

a) *Have the priority problems been defined correctly?*

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

The discussion document identifies that there is clear inconsistency between Councils providing for the management of contaminated land. *Southland District Council* agrees with the identification of the priority problems but considers that a broader policy framework is required to address the management of contaminated land. In the interim however, as a smaller territorial authority with limited resources, *Southland District Council* considers that the proposed NES could be useful in the short term by improving guidance and streamlining the process. However, ideally an NES (with a focus on human health) could sit within a wider policy framework.

c) *Do you agree with the policy objective?*

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

As discussed above, and adopting comments made in the *Local Government New Zealand* submission, *Southland District Council* have identified problems with the policy objective as defined because it:

- does not reflect the broader environmental effects of contaminated land
- is likely to become a default “permitted baseline”
- does not enable *Southland District Council* to meet the purpose and principles of the RMA with respect to contaminated land

What are the options?

e) *Do you agree with the preferred option?*

A specific NES on human health could be part of the national policy framework. Consideration should also be given however, to an NES on wider environmental effects as discussed above. This would require the development of another set of guideline values for eco-toxicity, which *Southland District Council* understands would be very difficult to develop in a scientifically robust, appropriate technical manner, which would be readily understood and in an easily implementable form.

f) *Is there an alternative option that has not been considered?*

g) *Are you aware of any other costs or benefits of the alternative options?*

As the focus of the NES is human health, consideration could be given to developing regulations under the Health Act. This would remove the potential for the proposed NES to become the default for all effects related to contaminated land. *Southland*
District Council endorses this approach and the Health Act already considers contaminated land.

The proposed NES

h) Do you see any problems complying with the proposed NES or with enforcing it?

The discussion document has identified as a problem that TA's will not know if and where site investigations are being carried out. We agree with this as Southland District Council administers a large district, being approximately 11% of New Zealand's land area.

There is also a question over whether there are sufficient qualified, experienced contaminated land experts in New Zealand to undertake site assessments or investigations for land owners and to support TAs in the review of reports. This is likely to be an issue for Councils remote from metropolitan centres. Southland District Council has expressed concerns above as to access to suitably qualified persons to conduct assessments, but also access to laboratory facilities outside the region/district, as well as the costs associated with visiting remote sites, for example Milford Sound - Cleddau Village, Fiordland National Park.

There should be a statement in the NES about the need to check with other regional Council rules which may overlap with the NES.

Southland District Council considers that the adequacy of HAIL needs to be assessed prior to the implementation of an NES. In addition, MfE should take a proactive role to work with regional Councils to assess the adequacy of existing databases and to determine whether work needs to be done. The effective implementation of the proposed NES is dependent upon the adequacy of the databases and their ongoing development. The accuracy of and thus quality of the information contained within the regional HAIL list will be vital to implementation.

i) Are the thresholds for determining whether resource consent is required clear and appropriate?

Southland District Council considers that the thresholds need to be reconsidered. Council does not consider it is appropriate to provide for the development of contaminated/potentially contaminated land as a Permitted Activity

Southland District Council submits that subdivision creates the potential for new development or changes in land use even though no works are potentially proposed at the time of subdivision that would disturb the ground and no change of use may be identified at that time. Without the ability to properly consider contamination at the time of subdivision an opportunity to mitigate future effects through the use of consent notices, conditions, bonds or appropriate site works would be lost. It could also mean that new lots would be sold to unsuspecting new owners who would be caught later when they sought to use their land. Subdivision is the correct process to assess and plan to address, or restore, or avoid contaminated land.

The problems with the proposed NES rule framework are that:

- there is not sufficient certainty provided. Definitions of the terms are required;
- the rules do not contain a methodology (i.e. how are the samples to be taken?)
- there is no requirement to reinstate the area of disturbance;
• is there the ability to require an applicant to provide the results of a subsurface investigation to the Southland District Council if it is a permitted activity;
• there is no provision for cost recovery for auditing a site investigation report associated with the proposed development of contaminated/potentially contaminated land.

The terms which require definition are “disturbance”, “land-use change”, “development”, and “appropriately qualified and experienced practitioner”.

Southland District Council understands that Local Government New Zealand draft submission and the Auckland Regional Council have both discussed an alternative rule framework. Southland District Council is supportive of the alternative offered by Auckland Regional Council.

A Council needs to be able to manage the future use of the site in order to ensure it is appropriate based on the level of site contamination. Such mechanisms to manage the future use include covenants and consent notices.

j) Is the permitted activity - subsurface investigation requirement to provide a site investigation report appropriate?

In short the Southland District Council thinks not. There is no incentive or logic for someone to apply for land use consent (discretionary activity) to undertake an activity that they have already undertaken.

If a report is objectionable, the property owner is unlikely to want to apply for a discretionary consent. Furthermore, the requirement to provide a report on the findings could provide a disincentive for some landowners either to investigate land or to lodge a report with evidence of soil contamination with Council. Southland District Council agrees that the perceived adverse effects on land values are likely to be a significant deterrent.

The fundamental question in determining the appropriate rule framework is whether it is legally permissible to require investigation reports to be provided under a permitted activity rule and whether a permitted activity rule in an NES has any different status from that in the District Plan, or under the Act. Southland District Council considers that a definitive answer to this question is required before the regulation is drafted if this provision is to remain. The issues associated with this requirement, however, remain irrespective of the answer.

k) Have we adequately provided for activities that should not be caught by the requirements of this NES?

Southland District Council considers that the proposed NES has provided for the activities that should be caught by the requirements of the NES, but that it also needs to broaden its scope to provide for tank removal and a minimum volume of earthworks as a Permitted Activity. It is also noted as mentioned above noted by Council that the scope of the NES does not include petro – chemical land contamination.

l) Have we adequately defined the land that should be subject to a condition requiring site investigation?

MfE proposes a rule which will limit the type of land subject to site investigation to land on all or part of a site(s) that may be affected by contaminants due to its known historical use and the types of activities previously undertake on it. It includes land
with a known history of land uses and activities identified in HAIL;
that is indicated on the district or regional Council land-use information
registers as being potentially affected by contaminants in soil (or an
equivalent classification).

Southland District Council supports this approach in principle. The above categories
need to be linked by “and/or”. Clarification is needed regarding the definition of the
land that should be the subject of a condition requiring site investigation – specifically
what is “site” or “part of a site”? A Definition of “known history” also needs to be
included.

Southland District Council supports the view of Local Government New Zealand and
considers that the proposed rule should also capture (1) “fill that is of unverified
origin”; and (2) that the intended land use change, development, or subdivision is for
an activity that is the same as the existing lawfully established use. This will capture
a situation where remediation has been undertaken with no specific end use in mind.

m) How do you think the NES should ensure the adequacy of site investigation?

Southland District Council believes that site assessments and site investigations
must be undertaken properly as this is essential to achieve the objectives of the
proposed NES.

Ultimately, as discussed earlier an accreditation system or a list of the qualifications
considered to meet the “appropriately qualified and experienced practitioner” should
be part of the NES or at least be managed by MfE.

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

Southland District Council is strongly of the view that that where land is identified as
being contaminated or potentially contaminated, the use, development or subdivision
of that land should be provided for by way of a Controlled Activity, not a Permitted
Activity. Alternatively, the applicant could be required to apply for a Certificate of
Compliance. These options are described above as illustrated in the
Local Government New Zealand Draft Submission.

The proposed rule should cover circumstances where:

• subsurface investigations indicate that the land is potentially contaminated;
  and/or
• land is identified in HAIL; and/or
• land is indicated on a district or regional Council database as being
  contaminated or potential contaminated.

The proposed rule needs to capture that the risk to human health from soil
contamination and does not exceed the SGV for the intended land use change,
development or subdivision.

Under the rule as proposed, an applicant will be required to provide one or more site
investigation reports which confirm that there is no evidence of soil contamination or
that the proven levels of contamination are acceptable for the intended land use.
The TA will have the opportunity to assess the adequacy of the investigation and
whether the land meets the criteria.
The principal reason why Southland District Council considers that the activity status should be controlled, not permitted is because as a permitted activity there is no cost recovery available. Time/resources are likely to be spent on the following:

- liaising with the Regional Council over the site history (internal cost to TA and the regional Council);
- auditing the application (internal cost to TA; possibly to regional Council if consultation undertaken; possibly external review by consultant);
- having the application/technical assessment peer reviewed, sometimes by an external consultant. Southland District Council does not operate a full resource consent processing cost from applications rather there is a percentage of the total cost of a consent not recovered. The proposed NES is likely to impose additional costs on all ratepayers not developers or applicants.

**o) How should the NES address site-specific assessment for produce consumption?**

Southland District Council does not consider it appropriate to rely on SGVs which assume that inhabitants only consume 10% of their fruit and vegetables from their home gardens, especially in a rural based, primary production driven district.

**p) How should the NES address naturally occurring elements in soil?**

Southland District Council relies on the specific advice of Environment Southland (RC).

**Costs and Benefits**

**q) 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?**

Southland District Council (as is Local Government New Zealand), is concerned that the proposed rule structure will impose costs on Council as a territorial authority. Council will be responsible for auditing site investigations which are presented to the Council to determine (1) whether the investigation is adequate and (2) whether the levels are acceptable for the intended land use.

The costs which will be non-recoverable as a result of the proposed rule structure (Permitted Activity) are anticipated to be:

- Council internal staff time to undertake required assessment/audit
- External peer review commissioned by Council to provide advice
- Council consultation with Regional Councils - internal staff time for both Council and Regional Council staff members

**r) Are there any costs and benefits we have overlooked?**

Southland District Council does not agree that the costs have been accurately described or captured in discussion document. While we agree that where resource consent is required, costs will be passed onto an applicant, the discussion does not reflect the costs that are associated with the two proposed Permitted Activity rules – Rule 4.1.2 for subsurface investigations and Rule 4.1.3 for land use change etc of contaminated / potentially contaminated land.

This has been discussed fully above. The costs associated with administering these permitted activity rules cannot be passed directly onto an applicant. Southland District Council is concerned that as liability ultimately rests with the Councils; audits of the information lodged with the Council under permitted activities will be required.
Acceptance of this information will imply that it meets the permitted activity standards. In order to determine this it will need to be audited and liability would ultimately rest with the Council.

The “costs borne by Council” described in the discussion document are listed as administrative costs, specifically:

- linking information to property files
- carrying out data entry and copying information for Regional Councils

This cost is stated as being a relatively small, one-off cost for a number of Councils who do not currently address contaminated land issues and would be unlikely to without the NES. The cost is quantified as being less than $500,000 of internal staff time. How is this cost spread? Is it per annum? The basis for this figure is not stated.

The costs associated with the proposed Permitted Activities 4.1.2 and 4.1.3 will be ongoing and will be borne by both TAs and Regional Councils. The above discussion has not identified the costs of auditing/assessing the information lodged with Councils. The discussion document does not capture the TAs which are currently able to recover costs via a resource consent process, but will be unable to under the proposed rule structure which may be more permissive.

At the discussion under “Application Costs” the statement is made that “…These additional costs may be in the range of $5,000 to $20,000 per site (i.e. per application), depending on the nature and extent of contamination and the complexity of the site.” This discussion acknowledges there will be a cost to review assessments and that costs will inevitably result in higher consent fees (it is assumed).

Southland District Council is concerned in the context of other central government initiatives which may result in fees being raised such as the Discount Regulations. There is likely to be a negative response from ratepayers to the prospect of raising application fees across the board. The assumption underpinning this statement is that all applicants should share the cost of managing contaminated land. This would appear to be unjust.

Overall, Southland District Council is most concerned that the costs associated with the proposed NES for local government have been considerably underestimated and it appears the implications have not been well understood.

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?

The discussion above contains Southland District Council’s concerns.

Conclusion

In conclusion, Southland District Council considers that there is a significant gap between the proposed human health SGVs and environmental soil acceptance criteria. However, as a territorial authority responsible for public health, Council can see the merit in the approach taken in the proposed NES. As a smaller rural authority, Council sees considerable value in the guidance that the proposed NES could provide.
Southland District Council considers the further development of the NES needs to take into account the following:

- The legality of the proposed permitted activity requirement that site investigations must be provided to the relevant Territorial Authority (TA).

- In order to ensure the regulation is effective, either an accreditation system is required or there needs to be a register of qualified and registered practitioners. The NES needs to provide guidance on who (qualifications/experience) are suitable experts for conducting testing and verifying remediation. There also needs to be guidance on when it is appropriate for Council to undertake a peer review/technical review of the testing validation done by an applicant.

- Cost recovery is not provided for with the proposed rule structure which allows (as a Permitted Activity) development of land which is potentially contaminated. We consider that this would be better either as a Controlled Activity or should require an applicant to apply for a Certificate of Compliance. We support in principle the rule framework proposed by the Auckland Regional Council, and supported by Local Government New Zealand as an alternative to the framework proposed in the NES or an amended rule framework with a Certificate of Compliance instead of the Controlled Activity.

- MfE should work with Regional Councils to determine the adequacy of the existing registers of contaminated and potentially contaminated sites. Resources should be provided to Regional Councils, where required, to enable implementation of the NES.

- An assessment of HAIL should be undertaken prior to the implementation of the NES to determine its adequacy prior to the implementation of the NES.

- Further consultation with key stakeholders is required prior to drafting, in response to submissions received, in order to resolve technical issues raised. Following this, consultation at drafting stage is considered essential. Involvement of TAs who do not currently manage contaminated sites via their District Plan should be included in this stakeholders group.

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