

Government's Proposed National Environmental Standard will Restrict the Future Development of Contaminated Land

On 5 February 2010 the Government publically notified a proposed National Environmental Standard (NES) for assessing and managing contaminants in soil. The proposed standard can be obtained from the Ministry for the Environment website: www.mfe.govt.nz/publications/rma/proposed-nes-managing-contaminants-in-soil/

The NES is a regulation that will restrict the way contaminated land can be used and developed in the future. The NES will require resource consents for certain activities on land affected or potentially affected by soil contaminants. The submission period is now open and submissions must be received by the Ministry for the Environment by 19 April 2010. This article provides a brief summary of the key features of the NES and its implications.

Background

The overall amount of contaminated land in New Zealand is uncertain. The Ministry for the Environment estimates that councils have identified approximately 20,000 potentially affected sites. Of these, only a small proportion have been sufficiently investigated to determine whether the site has contaminants present.

Regional councils and territorial authorities are responsible for the day-to-day management of contaminated land and have specific functions under the Resource Management Act 1991 (RMA). Regional councils are currently required to identify and monitor contaminated land. As part of this duty, councils should compile a list of sites on which hazardous activities and industries known to have the potential to contaminate land have been carried out historically (HAIL sites). Territorial authorities have the responsibility of ensuring, when decisions are made concerning land-use changes or the subdivision or development of land, that the potential for health effects are evaluated. Territorial authorities are also required to include as part of their Land and Information Memoranda (LIM), information identifying the likely presence of hazardous contaminants.

A recent decision by the Ombudsmen found that councils who have information on hazardous sites or contaminated land regardless of whether it has been verified by comprehensive investigation, must release that information to the public unless there is a good reason for withholding it. Therefore, it is important councils ensure information held about contaminated land or unverified HAIL sites is as accurate as possible.

National Environmental Standards

National Environmental Standards are regulations issued under the Resource Management Act and apply nationally. This means that each regional and territorial authority must enforce the same standard. The NES prescribes technical standards, methods or other requirements for environmental matters. In practice, the NES is treated like a rule in a plan, and it will override an existing rule which is more lenient. In some circumstances, councils can impose a rule or consent that is more stringent than the NES but only if the standard expressly states this.

NES on Soil Contamination

The Proposed NES on Soil Contamination sets a new standard for determining that land is safe for human health. The purpose of the NES is to ensure that land directly 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. The Minister (Hon Nick Smith) says that many territorial authorities do not yet have adequate

controls that ensure this process is required at the critical stage, that is when land potentially affected by contaminants in soil is developed, subdivided or when its land use changes. The NES will affect the future consenting process for the development/change in use of contaminated land.

The proposed NES for assessing and managing soil contaminants includes:

- a. permitted activity status (i.e. no resource consent is required) for subsurface investigations of land to determine the presence, extent and nature of any contamination;
- b. soil guideline values (SGVs) that define the concentrations at which the risk to human health is considered acceptable for 12 priority contaminants;
- c. permitted activity status (i.e. no resource consent is required) for the use, development or subdivision of land where the risk to human health from soil contaminants is assessed as being acceptable for the intended land use;
- d. a restricted discretionary activity status (i.e. resource consent is required) for any use, development or subdivision of land where the risk to human health from soil contaminants is assessed as not being acceptable for the intended land use; and
- e. a restricted discretionary activity status (i.e. resource consent is required) for any use, development or subdivision of land where there is insufficient information to confirm whether the risk to human health from soil contaminants is acceptable or not, and the land in question has a known historical contaminated use. Historical use will be identified by the MFE's Hazardous Activities and Industries List, or as indicated on the district or regional council land-use information register.

Implications of NES

If the NES proceeds in its current form, future development or subdivision activities on contaminated land would require resource consent because the land has been found to be contaminated. Similarly where land is recorded as potentially contaminated, a preliminary site investigation should be carried out prior to a resource consent application and if the land is found to be contaminated a full investigation will need to be carried out. If the contaminants exceed the levels specified by the Soil Guideline Values, the future development of this land would become a restricted discretionary activity.

Consultation workshops on the proposed standard will be held around the country during March 2010.

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