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# Proposed changes to NES for Contaminated Sites

Local Government New Zealand's submission to the Ministry for the Environment

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## We are. LGNZ.

LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the national interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

This final submission was endorsed under delegated authority by Lawrence Yule, President, Local Government New Zealand.

## Introduction

Thank you for this opportunity to submit on the proposed changes to the National Environmental Standard for Contaminated Sites. This submission has been prepared on behalf of New Zealand's local authorities.

We support the overall direction of the changes to the National Environmental Standard.

As a general point, LGNZ wants to ensure that any amendments to the NES for Contaminated Soil firstly do not increase the liability for territorial authorities by shifting the responsibility from landowners/applicants to the consent authority and do not require additional work that is not cost-recoverable.

**Before any amendments are finalised, we recommend "road-testing" the regulations** with a number of applicants and local authorities to test their workability and identify any ambiguities in the drafting. We adopted this approach with the NES for Telecommunications Facilities and it has been a very valuable exercise.

**LGNZ requests the opportunity to review an exposure draft of the amended regulations so we can undertake a legal review ahead of them being finalised.**

MfE will need to check with consultants as to whether the certifying statement will invalidate their insurance. We understand this is likely to be an issue and therefore the assumptions underpinning the proposed changes to the NES will need to be reconsidered.

## Specific comments

### Hazardous Activities and Industries List (HAIL)

#### 3.1 Clarify the HAIL categories to increase consistency

LGNZ generally supports the changes proposed to improve the consistency in the interpretation of the HAIL. The HAIL list should be clear, concise and easy to interpret without ambiguity.

The existing HAIL list is open to interpretation for these reasons:

- Some of the sentence structure is poor, with some clumsy use of commas, 'and', 'or' and 'including'.
- Some of the categories are unclear and it is hard to determine what is intended or not intended to be captured.
- One of the biggest uncertainties is in terms of the scale an activity needs to be before it should be treated a HAIL site.

Accompanying guidance could include a list of examples for each category.

### 3.2 Remove express reference to 'sports turfs' in category A.10.

While there is agreement that non-intensively managed sports fields such as rugby and soccer grounds should not be included in the HAIL, those sports turfs that are intensively managed, such as bowling greens and golf greens should be retained. By way of example, testing of such sites in Tasman District and Nelson City has shown elevated presence of persistent pesticides. As these sites are the exception rather than the rule LGNZ recommends that the HAIL just specifies them by name and makes it clear that other types of sports turfs are not included.

Guidance on when to treat playing fields as intensively managed will be required, because these will still be treated as HAIL sites.

### 3.3 Remove express reference to 'environmental discharges' in category A.14 and 'risk' in categories H and I.

Minor releases of hazardous substances would be captured by the new Category I. Roading contractors periodically get calls to respond to small fuel spillages on road reserve, and these would now be treated as HAIL sites, even though the spillages are cleaned up and there is no ongoing risk to human health or the environment.

Some districts/cities have a number of HAIL E4 sites where temporary or historic concrete manufacture occurred. The human health risk is not clear from a site where a concrete batching plant was present for 6 months 40 years ago.

If Commercial Concrete Manufacture is to be retained as a HAIL activity it should be time bound, such as "and operated for at least 6 months over the last 2 years".

### 3.4 Guidance on the HAIL

Guidance on the size, scale and volumes for bulk storage and use of chemicals would be helpful for HAIL categories. This should be consistent with the threshold guidelines in the HSNO controls.

Territorial authorities report that uncertainty in the HAIL classifications has been one of the biggest difficulties in applying the NESCS. Therefore, any guidance that will help interpret the HAIL and apply it more consistently is supported.

Guidance is sought on the following:

- What constitutes 'bulk storage and use';
- What constitutes a 'scrap yard' or 'motor vehicle workshop'. In particular with reference to hobby or residential car repair, parts and vehicle storage, as opposed to commercial operators. Guidance on the anticipated size and scale of these activities intended to be captured would be beneficial;
- What volume of 'storage' triggers Category A.17. For storage tanks or drums for fuel, chemicals or liquid waste. Is there a difference between storage for domestic purposes versus commercial; and
- The characteristics of each activity and if any defining features can be identified. For example, an approximate date range for the historic use of particular chemicals associated with activities.
- The proposed guidance on types of hazardous substances for each HAIL is less likely to be of use, and more use to practitioners deciding what contaminants to test for. However, it may be of use to determine HAIL status if it was only during particular periods of time that a potentially contaminating activity occurred e.g. orchard activity in the 1960s vs orchard activity in 2016.

## Does the NESCS apply to my land?

### 4.1 Require a risk-based assessment when deciding whether the NESCS applies to a site.

The proposed changes require a risk-based assessment when deciding whether the NESCS applies to a site.

There is logic to the proposed approach, however any assessment logically should apply to the HAIL landuse together with the activity proposed.

The range of views from councils in response to this proposal indicates that further consideration is needed. Councils have raised concerns they will be exposed to additional liability as a result of decisions made under the NES because it relies on council staff being “upskilled” in order to adequately assess the risk associated with a proposal. If a council determines that a SQEP is necessary there will be issues around cost-recovery for the council if the activity is permitted.

With respect to terminology “more likely than not” better aligns with Crown Law Office advice regarding inclusion of HAIL classification on LIM statements where the balance of risk must be more than 50 per cent.

## NESCS activities and planning controls

### 5.1 No NESCS resource consent required for activities on sites found to have contamination below soil contaminant standards or Tier 1 soil acceptance criteria.

LGNZ generally supports this proposal and agrees that no consent should be required where a DSI shows the contamination standards for the relevant use are met. The proposal to have soil disposal as a separate category of consent is also supported.

An example cited is where a former potato farm was being subdivided and contamination was found. While the levels were found to be below human health limits, each new lot was then subject to the NESCS because soil disturbance above the permitted limits and a global resource consent was ultimately granted for the entire subdivision because there was no risk to human health.

However, it is noted that this amendment will need to be specific to the particular land use reported on in the DSI. If the land use changes to a more sensitive one, then the soil contamination may exceed the safe limits for that new use. Some guidance on determining when a land use has changed may be required, as it can be unclear.

Lastly, there is variability in the quality of PSIs and DSIs, despite the methodology and content being clearly specified. Consideration should be given to more guidance on improving this.

### 5.2 No NESCS resource consent required for soil disturbance by a network utility operator

LGNZ considers the general principle should be that exemptions should not be based on who the operator/applicant is.

It cannot be assumed that earthworks by network utility operators are actually low risk or that network utility operators and their contractors are appropriately managing risks.

The definition of ‘network utility operator’ in section 166 of the RMA is very broad, as is the list of network utility operators approved as a requiring authority. The range of sites affected is also very broad. It cannot be assumed that soil on these types of sites is usually under a sealed surface. Nor can it be assumed that network utility operators and their contractors are always aware of and are appropriately managing risks on their sites.

If this proposal proceeds, there is again the question of having to review a site management plan (SMP) as a permitted activity and the cost to the territorial authority in doing so. A SMP should be prepared by a suitably qualified and experienced practitioner and include a certifying statement. This should help to eliminate the production of poor quality SMPs and reduce costs to a territorial authority.

Clarification on this point would be beneficial and if a review is required guidance and training of territorial authorities on how to assess these reports.

### **5.3 No NESCS resource consent required for subdivisions that are purely ‘paper-based’ or do not facilitate a current or future change**

The proposal that the NESCS will only apply to subdivisions that increase the risk to health is supported. Paper based’ subdivisions should be assessed on their merits as potentially being exempt from the NESCS on an ‘Option 2’ basis (highly unlikely to increase risks to human health).

However, the wording could be amended to state that “the subdivision does not facilitate a change in use” to further clarify the ambit of the paper based subdivisions that this covers.

It may not always be necessary to have a PSI to make a permitted activity risk based assessment. There should be an option for the territorial authority to exercise discretion regarding whether a PSI is required, depending on the circumstances of the proposal. For example a farm may be subdivided to create residential lots but the original farm house and farm buildings including old dip areas are retained in one allotment. On this basis you do not need to have a PSI to be able to determine that the activity is highly unlikely to increase the risk to health.

### **5.4 Class soil disposal as a stand-alone controlled activity**

This proposal is supported in principle with the proviso that for any soil disposal (including permitted category) that either the soil needs to go to an authorised facility or it needs to be tested and meet clean fill criteria. The use of the word “OR” when describing the controls for soil disposal implies that if the volume of soil is less than 5m<sup>3</sup> per 500m<sup>2</sup> then this can be disposed of without testing.

We would also suggest that for the avoidance of doubt that it be noted that moving soil within the “piece of land” (such as placing in a bund) does not constitute “soil disposal” for the purpose of the NES.

To close the loop on the process and information recorded on a property file as part of the permitted activity, evidence should be required to be provided to a territorial authority to verify that the soil has in fact been disposed of at the authorised facility.

Regardless of the volume proposed to be disposed of, if disposal is to a facility authorised to receive soil of that kind (whether treated or not), this should be treated as a permitted activity.

### **5.6 Remove option of restricted discretionary and discretionary activity classes for soil sampling**

This is supported. Soil sampling is required as part of a DSI, therefore how can the consent authority have the report before the sampling can be undertaken?

### **5.9 “Piece of land”**

LGNZ agrees that “piece of land” needs to be better defined and agrees with the proposed amendment. However, there is confusion in the example given. Where a former orchard site is subdivided the newly created lot is probably all HAIL land therefore all of the new lot will be available as the starting point of the calculation. Where those new lots are approximately 2ha, the permitted earthworks volume is approx. 1000m<sup>3</sup>. If this is intended, it is not accurate to say this avoids the ability to undertake significant earthworks as permitted.

It is unclear whether the amendment proposed will address the problem with roads, for instance. Roads don’t have a property boundary.

**5.10 Require suitably qualified and experienced practitioners to use a standardised certifying statement in their report**

LGNZ agrees that this would be useful. Where PSIs and DSIs have been received where the consultants' wording has not exactly matched the wording in the NESCS, this has caused confusion as to whether the NESCS applies or what the activity status of a consent is.

Practitioners also do not always state their qualifications and experience in their reports, so this change will be useful.

MfE will need to check with consultants as to whether the certifying statement will invalidate their insurance. We understand this is likely to be an issue.

## Management of contaminated land

**6.1 Option of a template ongoing site management plan (with controls) for residential property owners**

The ongoing site management plan is already an option under the regulation 10(3)(c). We agree that there is a requirement for clear guidance for some residential landowners on how to manage their soil risks and prevent exposure to contaminants. However, a template may not provide the appropriate level of protection from soil contamination as it may not be tailored to manage the site specific risks.

**6.2 Non-regulatory guidance on options for managing contamination on residential properties**

There are many HAIL sites across New Zealand that have not been included on a register. Councils' records are not always sufficient to be able to actually identify these and as a result many will remain unidentified and hence will not be caught by the NES.

Non regulatory guidance therefore has an important part to play to minimise risk on residential sites where no HAIL or contamination information exists. For example, a pamphlet for land owners on growing vegetables safely would be beneficial, or how to minimise risk when carrying out earthworks.

The main risks with residential development are from the subdivision of rural land, and the change of use from commercial/industrial to residential purposes.