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# The Contaminants NES – are the legal risks greater than the health risks?

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# What is the (legal) problem?

*Since the early 1990s councils have identified approximately 20,000 sites that are affected or potentially affected by contaminants from industrial, domestic or agricultural activities. Many of the more seriously impacted sites have largely been identified and managed. However, many other sites are yet to be properly assessed and many additional sites are expected to be identified over the coming years.*

*There is another aspect to the problem that relates to the role of local authorities in managing property information. At the time of purchase, the liability for land is normally transferred to the new owner; hence it is paramount that property information is accurately categorised and publicly available to interested parties. It follows that the land tenure system depends on the public having confidence that land information is properly administered, and that potential risks are identified if known.*

(Discussion Paper by the Office of the Minister for the Environment explaining the proposed NES to the Cabinet Economic Growth and Infrastructure Committee – “What is the problem?”)

# Key points

- Significant administrative and legal burden for territorial authorities, lack of certainty and clarity, and increasing trend of claims against councils
- There is no risk-free approach, and information management role is critical in reducing potential liability for councils
- Reducing legal risks requires good systems, co-operation between local authorities and industry organisations, and improved guidance/direction from central government

# Purpose of NES

- Impacts on local authorities both as landowner and as regulator
- Directly affects functions of territorial authorities but does not directly affect regional councils
- Protection of *human health* (not other receptors)
- Policy objective: *To ensure contaminated land is appropriately identified and assessed when soil disturbance and/or land development activities take place and, if necessary, remediated, or the contaminants contained, to make the land safe for human use*

# Scope of NES and relevance to local authorities ...

- Nationwide planning controls for certain activities on “at risk land” – some of the triggers are potentially very broad
- External documents incorporated – MfE guidance documents
- Land is considered to be contaminated or potentially contaminated (or “at risk”), if an activity or industry on the HAIL, has been, is, or is more likely than not to have been, undertaken on that land

# How is the NES triggered?

Is it HAIL land?



Determined by information held by council *or* a preliminary site investigation (SQEP)



Relevant use of land?



NES applies, consents required

# Methods for identifying whether NES applies to land

- A nationwide approach to site investigations and reporting
- Two methods used to establish whether the land has had hazardous activities or industries conducted on it:
  - by reviewing the most up-to-date information about the land that is held and is accessible by the relevant territorial or unitary authority
  - by conducting a preliminary site investigation (PSI), certified by a suitably qualified and experienced practitioner (SQEP)

# Possible basis for Council liability

- Mandatory and discretionary requirements, resulting in possible civil liability, judicial review
- Accurate and comprehensive collection and provision of information
- Volunteering advice
- Exclusion of contaminated land from HAIL database
- Reliance on PSI and certification by SQEP
- Processing of resource consents
- LIMS and PIMS



# Collection of information

- Cross referencing and updating databases
- Cooperation with regional councils – information that a territorial authority “has available to it” about a piece of land
- “Most up to date” information vs. historic land uses
- Level of proof

# Providing information

- Provide access to information vs. undertaking the assessment
- Should a council undertake assessment to protect itself?
- Consequences of incomplete information
- Comparison with LIMs
- *Marlborough District Council v Altmarloch*

# SQEP issues

- Second method under Regulation 6 – who is a “suitable qualified and experienced practitioner”?
- Term not defined, but guidance in MfE Users’ Guide
- Reasonable to rely on qualifications/experience in User’s Guide, but also will vary depending on complexities
- Undertaking PSI to determine if HAIL activity has occurred vs. assessing the site’s risk to human health
- Number of experts involved in PSI
- Possible SQEP initiatives – accreditation?

# Relationship with plans

## Relationship between NES and District Plans and resource consents

- Regulatory “bite”: NES automatically overrides district plan provisions (unlike NPS)
- Conflicting rules
- Uncertainty with rules concerned with different effects – eg not for the protection of human health
- Policies and objectives - consenting where national standards exceeded

# Consenting

- NES does not (on its face at least) apply retrospectively
- Recognises existing use rights
- EUR prevail over the NES requirements:
  - Activities lawfully established, by way of consent or otherwise, prior to 13 Oct 2011 and effects the same or similar in character, intensity and scale
  - Decision about whether or not to notify a consent application made before 13 October 2011
- *Hastings DC* case has provided some clarification

# Tips for reducing liability risks

- Full and accurate recording keeping
- Create protocols as to what council staff can comment on (especially non-specialist staff)
- Liaison protocols with the regional council to ensure regular exchange of information and cooperation in obtaining new or improved information
- Proper process/regular audits

# User's Guide advice

- Compliance with checklists
- Delegations to match appropriate skills and experience
- Enlisting of specialist expertise
- Legal advice prior to critical actions/decisions
- Provide any information requested in written form

# Looking ahead

- Lessons learnt
- In practice – variable quality information, variable resources, interpretation of grey areas, national consistency with nationally inconsistent information?
- Centralisation of environmental regulation: future national guidance in the planning horizon?
- Simple solution is to amend NES to give councils greater powers to require additional information/investigation
- Accreditation of SQEPs, codes of practice also useful