

NPS FOR HIGHLY PRODUCTIVE LAND

To: Ministry for the Environment

From: Resource Management Law Association of New Zealand Inc

Introduction

- 1 This Submission is made by the Resource Management Law Association of New Zealand Inc ("RMLA").
- 2 The RMLA is concerned to promote within New Zealand:
 - a An understanding of resource management law and its interpretation in a multi-disciplinary framework
 - b Excellence in resource management policy and practice
 - c Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes
- 3 The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others. Currently the RMLA has some 1,100 plus members. Within such an organisation there are inevitably a divergent range of interests in views of members.
- 4 While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the proposed NPS. It should also be noted that a number of members may be providing their own individual feedback and those may represent quite different approaches to the views expressed here.
- 5 For these reasons, this submission does not seek to advance any particular policy position in relation to the proposed NPS, but rather is kept at a reasonably high level and is made with a view to ensure that the proposed NPS:
 - a Is consistent with the general framework of existing laws and policies of relevance, and the Resource Management Act 1991 ("RMA");

- b Is practicable and workable; and
 - c Will assist in promoting best practice.
- 6 In relation to the RMLA's intention to assist in promoting consistency and efficacy of the proposed NPS-HPL, it is noted that the key intention of the introduction of an NPS-HPL is noted in section 3 of the consultation document to be:
- a To address a high level of variation in planning approaches to Highly Productive Land ("HPL");
 - b To provide clarity about the value of HPL; and
 - c To prevent further loss of HPL as a valuable resource for primary production.

Submissions

Section 3.1 Problem Statement

- *How are the values and wider benefits of highly productive land being considered in planning and consenting processes?*
- 7 The RMLA agrees that the value to be placed on HPL is a matter on which it would be helpful to have further national direction, and an NPS and/or interim NES is the optimal method for implementing any new policy promptly and effectively across the whole of NZ.
- 8 Clearer directions and support for Councils and landowners as to how HPL and high class soils are to be assessed, considered and regulated will ensure more robust and certain planning and decision making in respect of this resource.
- 9 The RMA includes a number of provisions that could potentially provide for consideration of the finite nature of HPL including s7(g) and s5(a) of the RMA, however these are not explicit, and as reflected in the consultation document they have been inconsistently considered and applied across NZ. Other policy directions relating to rural land, such as landscape classifications and policy appear to have been incorporated and applied more robustly in planning documents, potentially partly due to the clearer directions contained in s6(b).
- 10 Where provisions classifying soils and HPL have been included in planning documents, these do not appear to have resulted in consistent consideration or protection of HPL. To date any planning provisions addressing HPL appear to have been unsuccessful in 'outweighing' other policy directions, and the result has been that land uses that conflict with primary production activities have become established on large areas of HPL. The research shows any existing policy directions have rarely furthered the policy intention of the proposed NPS-HPL.

- 11 As identified in the consultation document, where new and conflicting land uses have been established in the past, this has led to further implications for HPL, including land fragmentation and reverse sensitivity issues.

Section 3.2 Urban expansion on to highly productive land

- *How is highly productive land currently considered when providing urban expansion? Can you provide examples.*
- 12 The case of *Gock v Auckland Council* [2019] NZHC 276 is a prime example of how effects on HPL have previously been assessed as a part of an overall policy evaluation, generally this issue has ultimately been out-weighted by other competing policy factors and evidence.
- 13 Even where plan provisions are relatively clearly stated, the weighing up of various competing policies, both in the private plan change and resource consent context, has rarely fallen in favour of protecting HPL from conflicting land uses. Commonly economic factors or pressures for residential land have prevailed as reasons to support granting consents to develop land with high class soils.
- 14 As a result, this NPS-HPL will need to be carefully constructed if it is to achieve the intention set out in section 3 of the consultation document.

Section 3.3 Fragmentation of highly productive land

- *How is highly productive land currently considered when providing for rural-lifestyle development? Can you provide examples?*
- 15 It is important to recognise that land use change away from a primary production activity (which is not ancillary to a primary land use activity), can introduce an environment which then increases the likelihood of future fragmentation of land. Because land use change introduces new effects, these can then become part of the baseline environment for future effects assessment, thereby creating development creep through incremental change. Land use change is the first step in that process.
- *How should highly productive land be considered when providing for rural-lifestyle development?*
- 16 The evidence referred to in the consultation document indicates that rural lifestyle development is a key contributor to the loss of productive land.

Section 3.4 Reverse sensitivity

- *How should the tensions between primary production activities and potentially incompatible activities best be managed?*
- *How can reverse sensitivity issues at the rural-urban interface best be managed?*

- 17 Where conflicting land uses are established on HPL and adjacent or close to primary production reverse sensitivity effects have been extremely difficult for local authorities to regulate without putting further considerable pressure on primary producers in terms of operational requirements and costs. Commonly the particular effects are not easy to manage or confine within property boundaries, particularly where they are dependant on weather conditions and other seasonal factors. Legal solutions such as covenants have their challenges, particularly around enforcement, and cannot be imposed by consent authorities without an applicant's agreement.
- 18 The assumption that effects of primary production should be internalised within the landholding being used for a primary production purpose is a difficult one. It effectively requires setbacks to restrict effects escape, and this further limits the ability to comprehensively and efficiently utilise a valuable HPL resource.
- 19 Where setbacks are required within the primary production unit then as a consequence all of the HPL within that setback would be significantly underutilised and/or become redundant land.
- 20 This is particularly aggravated in cases where a productive activity is on a smaller land parcels – which may commonly include properties efficiently utilising a high class soil resource for intensive small scale food production.
- 21 If the intent of this NPS-HPL is to be promoted, an alternative may be to set an expectation that any setbacks are to be absorbed within any adjoining residential or other land use development, i.e. the activity which conflicts with the preferred HPL land use, rather than within the property being used for a primary production purpose.
- 22 Clearly identified HPL resources, for example through zone maps or spatial planning, should assist in reducing potential land use conflicts by helping “head off” inappropriate land use change.

Section 4.5 Preferred option – a National Policy Statement

- *Which option do you think would be the most effective to address the problems identified in Chapter Three? Why?*
 - *Are there other pros and cons of a National Policy Statement that should be considered?*
 - *Are there other options not identified in this chapter that could be more effective?*
- 23 Generally speaking the NPS provides necessary and strong policy direction for managing HPL.
 - 24 The following comments concern the measure of immediate/interim protection that the NPS seeks to provide through proposed policies 6 & 7, which require consideration of HPL in the context of private plan changes and resource consent applications.

- 25 There is a possibility that this approach may not result in resource consent applicants proactively addressing the impact of their proposal on any HPL resource. It will heavily rely on council officers being highly aware of these policies and having ready access to maps showing the location of land classed as LUC 1-3. For some councils this may be a challenge, and as noted above the current assessment methods have not resulted in HPL policy out weighing other considerations.
- 26 Another option for managing resource consent processes that may be more effective could include issuing an NES with interim effect concurrently with the NPS-HPL, where the provisions of that NES could include rules requiring consideration of LUC 1-3 for any development proposal for the period of time it takes for specific regional planning provisions to be put in place.
- 27 Any interim NES rules might introduce stricter consent classifications for any land uses that are likely to cause the loss of HPL i.e. residential land use, where that activity is proposed to be located on an area mapped as LUC 1-3.
- 28 Any applicant would then be required to a) demonstrate that the application is/is not located on a high class soil resource; and b) detail how the proposal manages any effects on HPL.
- 29 An NES would be likely to ensure more certain and consistent consideration of the effects of activities on HPL than proposed policies 6 & 7 of the NPS-HPL. It could also address land uses that tend to be permitted in rural zones which also cause the loss of access to HPL.
- 30 Any such interim NES would only need to apply until such time as the regional and territorial authorities had had an opportunity to address the matters in proposed policies 1.1, 1.2, 2, 4 and 5. The required timeframes should be maintained to ensure that the interim NES is not in place for an undue period of time.
- 31 This alternative approach should be considered as it would be more likely to provide an effective interim measure to prevent further significant loss of HPL to conflicting land uses. If it is not followed it may be likely that another five years of development will proceed on HPL in a similar manner it has to date.
- 32 Mapping of HPL, through applying nationally consistent identification criteria, is likely to be required for any regulatory tool to be effective and reduce inefficiencies. To ensure consistency (while allowing for regional variation) the identification criteria should be directed via an NPS rather than an NES.

Section 5.2 Purpose of the Proposed National Policy Statement

- *Should the focus of the National Policy Statement be on versatile soils or highly productive land more broadly? Why/why not?*

- 33 The use of an HPL classification which responds to localised features and conditions is supported.
- 34 The use of the new 'HPL' classification should also better enable a transition to the new policy framework in some regions which have used other terminology to protect elite or high class soils. A new term could potentially prevent confusing double ups with existing classifications e.g. elite soils, high class soils, versatile soils.
- *Should the focus of the National Policy Statement be on a primary production generally or on certain types of food production activities? Why/why not?*
- 35 The distinction between the primary production activity of food growing and other primary production activities may need to be further detailed in the NPS order to best accommodate the intent of the NPS-HPL.
- 36 Some primary production activities such as food growing hubs provide more assured access to the HPL resource, while other primary production activities such as forestry may actually restrict access to an HPL resource for a long period of time.
- 37 Using forestry as an example, once a forestry activity is established this land use would be expected to continue for at least one rotation of 30+ years, and where a landowner opts into the ETS, then most likely that land will continue to be forested in perpetuity. As a result the forestry land use may not further the intent of this NPS for maintaining the availability of HPL for future generations.
- 38 Other commonly accepted rural activities may also need to be more closely considered in this regard, such as quarrying, mining etc. These rural land uses that would appear to conflict with the intent of the NPS-HPL do not appear to have been directly addressed in the NPS at present. It may be appropriate to direct local authorities to further consider this issue in their local context.

Section 5.3 The scope of the proposal

- *What matters, if any, should be added to or excluded from the scope of the National Policy Statement? Why/why not?*
- 39 As a general principle rural land which has already been zoned for a specific land use should be excluded from the NPS (examples might include land zoned specifically for tourism, mineral/gravel extraction, electricity generation). It would not be fair to retrospectively undermine a public RMA process.
- 40 One residential type of activity which is essential to ensuring the success of food production businesses is the ability to provide worker accommodation. Any policy direction needs to ensure that this ancillary activity is adequately provided for and/or new restrictions do not inadvertently create further complications.

- *Should future urban zones and future urban areas be excluded from the scope of the National Policy Statement? What are the potential benefits and costs?*
- 41 It is essential that the line between urban development and HPL is robust and clear in order to be effective.
- 42 If the intent of the NPS-HPL is to be maintained then future urban zones and areas should be bought within the scope of this NPS. If they are not, then this would seem to water down the policy somewhat and open the door for more 'out weighing' of the policies intended to protect HPL. However, for the same reason as above, if a piece of land has already been zoned via a public RMA plan development process, then the NPS risks undermining that RMA process (for example if it could be relitigated). It could therefore be appropriate to limit the extent of the NPS so that it ensures compatibility with the existing provisions of the future urban zone.
- *Should the National Policy Statement apply nationally or target areas where the pressures on highly productive land are greater?*
- 43 The NPS-HPL should be nationally applicable in order to be most effective.
- 44 It may be helpful for MfE to first direct support and resources to Councils where the pressures on highly productive land are greatest. This is even more so where those pressures coincide with high demand for residential land.
- 45 If all local authorities are supported to implement the NPS-HPL in the same way then this will strengthen the policy considerably.

Section 5.4 The proposed NPS

- *What would an ideal outcome be for management of highly productive land for current and future generations?*
- 46 A sensible and logical regime that is consistently implemented across all regions with due account for localised features and primary production activities.
- 47 A regime that results in spatial identification (mapping) of NZs HPL.

Policy 1: Identification of highly productive land

- *If highly productive land is to be identified, how should this be done and by whom?*
 - *Are the proposed criteria all relevant and important considerations for identifying highly productive land? Why/why not?*
- 48 The identification of HPL on a regional basis is supported and appropriate. By identifying HPL on a regional basis it will enable a broader use of resources and cohesiveness across the districts (through spatial planning and region wide policies/application of Policy 1 criteria) while still allowing for communities to protect their own unique features.

- 49 The NPS should contain criteria for local authorities to apply in the first instance. The absence of national criteria (direction) will result in inefficiencies and inconsistency across NZ.
- 50 The identification of HPL initially using LUC is supported, with a clear transition plan to prompt regional implementation. Flexibility should be maintained for assessments of HPL to be completed (by a suitably qualified person) down to an appropriate scale to enable clear assessments at a property level. Again, it may be helpful to maintain scope for landowners to further specify HPL conditions on their own land through a resource consent process.
- 51 It is important that regions identify what criteria are important to them for HPL. Water availability and quality should certainly be included as it is relevant.
- 52 Criteria should also allow for identification and application of primary production activities which may best utilise the HPL in each region, while still maintaining sufficient flexibility for new land uses to be accepted as appropriate in the future.

Alignment with the Urban Growth Agenda

- *Do you think there are potential areas of tension or confusion between this proposed National Policy Statement and other national direction (either proposed or existing)?*
 - *How can the proposed National Policy Statement for Highly Productive Land and the proposed National Policy Statement on Urban Development best work alongside each other to achieve housing objectives and better management of the highly productive land resource?*
- 53 While noting that the policy relationship between urban growth and protections for HPL is an inherently political one, the line drawn between the two issues will be a key matter to get right in order to ensure the efficacy of the NPS-HPL.
- 54 The relationship/interaction between urban development and HL should be clearly identified in both NPS-HPL and NPS-UD. If it is unclear then it will introduce further scope for argument and as made clear above, the importance of HPL has commonly been out weighed in an overall evaluation exercise.

Policy 4: Rural subdivision and fragmentation

- *How should the National Policy Statement direct the management of rural subdivision and fragmentation on highly productive land?*
- 55 It is noted that some food growing hubs can be located on quite small areas of HPL and/or on small landholdings.
- 56 The effects of subdivision of rural land to produce countryside living/lifestyle properties with consequent reduction of the land's productive capacity are identified and well

understood. Options are favoured which limit such subdivision and the amount of HPL land affected. These options include directing such subdivision away from the HPL resource to other locations, and allowing minimum lot sizes to be lower so that the total area affected is minimised or reduced.

- 57 It is noted that while the effects of rural subdivision and fragmentation on highly productive land are well understood, the same may not apply to other rural land uses (for example tourism, mineral extraction, electricity generation). Such other rural land uses may be compatible with the protection and use of HPL.

Policies 6 and 7: Consideration of private plan changes and resource consent applications on highly productive land

- *How should the National Policy Statement guide decision-making on private plan changes to rezone highly productive land for urban or rural lifestyle use?*
- *How should the National Policy Statement guide decision-making on resource consent applications for subdivision and urban expansion on highly productive land?*

- 58 Refer comments above regarding possible alternative interim measure.

Submissions on specific/technical questions

Section 5.3 The scope of the proposal

- *Should the National Policy Statement include policies that must be inserted into policy statements and plans without going through Schedule 1 process? What are the potential benefits and risks?*
- 59 If a Schedule 1 process must be followed this will mean that it could take at least 5 years before any policies protecting HPL are updated in regional and district plans. This will result in further losses of HPL which does not align with the intention of the NPS-HPL.
- 60 A middle ground may be found by inserting the more general policies 1-3 into policy statements and plans, with the more tailored solutions to follow with a localised focus.
- *What areas of land, if any, should be excluded from the scope of the proposed National Policy Statement? Why?*
- 61 As above, land already zoned for other rural activities could be excluded on the basis that it would be unfair and inefficient to allow previous RMA Plan Development processes to be unpicked and relitigated.
- 62 It would appear that resources should be directed to classifying HPL in rural areas under pressure before classifying other areas such as urban ones, and there may be a differing level of detail between different zones, however if the NPS-HPL wishes to provide for 'brownfields' type of re-development of HPL then all land should be bought within the scope of the NPS-HPL. This may also provide for unexpected future developments or an

earthquake or other event which results in significant land use changes in a short period of time.

- 63 Consideration should also be given to excluding Maori freehold and settlement land.

Specific questions – Policy 1

- *What are the pros and cons of requiring highly productive land to be spatially identified?*

- 64 Robust spatial information will best promote the intent of the NPS-HPL. However this comment is subject to the issues around reverse sensitivity and need for any boundaries between competing land use activities to incorporate some protections for the efficient use of all identified HPL.

- *Is the identification of highly productive land best done at the regional or district level? Why?*

- 65 There is an inherent tension because regional councils play a key role in managing HPL and also water, while district councils manage the types of activities which tend to most commonly cause loss of HPL, such as residential land use and lifestyle subdivisions.

- 66 The alignment between regional and district plans and consenting is therefore key to get right, and an important reason that this NPS-HPL should be nationally consistent and an interim NES would be more effective.

- *What guidance and technical assistance do you think will be beneficial to help councils identify highly productive land?*

- 67 Robust evidence of the location and type of HPL will be essential to underpin the mapping of HPL. Translation of that information into all councils' mapping software will again need to be robust in order to remove the risk of challenge and therefore delay to the implementation of the NPS-HPL.

Specific questions – Appendix A

- *Should there be a default definition of highly productive land based on the LUC until councils identify this? Why/why not?*

- 68 Yes. To provide certainty until such time as councils have had the opportunity to consider their local context through a Schedule 1 process.

Specific question – Policy 4

- *Should the National Policy Statement provide greater direction on how to manage subdivision on highly productive land (e.g. setting minimum lot size standards for subdivisions)? If so, how can this best be done?*

- 69 There are some key local factors that may mean that setting minimum lot sizes in this way would be inappropriate. For example land values and existing residential density may mean that a large lot size in Southland would be considered a lifestyle type property, while a 1 hectare lot in Queenstown or Auckland is more akin to a residential lifestyle property.
- 70 As a result the policy should be maintained in a manner that provides strong policy direction while providing for sufficient flexibility for any proposal to be assessed within its own local context.
- *Should the proposed National Policy Statement encourage incentives and mechanisms to increase the productive capacity of highly productive land (e.g. amalgamation of small titles)? Why/why not?*
- 71 These options would appear to be more appropriate to consider on a local scale, rather than incorporate in a national policy statement. Perhaps options for drafting appropriate policy and methods for incorporating in plans could be provided as part of the supports to be provided to local authorities.

Specific questions – Policy 6 and Policy 7

- *Should the policies extend beyond rural lifestyle subdivision and urban development to large scale rural industries operations on highly productive land? Why/why not?*
- 72 All activities that may mean a potential loss of access to HPL should be covered by these policies.
- 73 To best promote consistency and efficacy this should include quarrying and other rural activities such as large scale rural industries.

Specific questions – Interpretation

- *Should there be minimum threshold for highly productive land (i.e. as a percentage of site or minimum hectares)? Why/why not?*
- 74 This raises a key question about how small an area of HPL might be before it becomes unproductive. Again this may depend on the local context, including the local availability of elite soils and other relevant matters such as weather conditions and proximity to the market, but it also depends on future methods of food and other primary production which we cannot now predict.
- 75 In some areas of NZ quite small land holdings close to cities and towns can provide excellent opportunities for highly productive and valuable organic (or other 'value add') enterprises. Thus by removing some smaller sites from the compass of the NPS-HPL, this reduces the availability of these types of properties for small businesses operators who wish to be able to afford those types of property.

- 76 In areas where there is significant demand for land for land uses that conflict with primary production uses, any provision for a minimum threshold and/or size is liable to result in further losses of HPL including through development creep. These conflicting land uses also create new reverse sensitivity issues which further impact on the productive use of HPL resources, including through setbacks and introducing a need for new business practices to internalise standard effects of primary production.
- 77 A more certain method would be for the NPS to capture all properties with a quite small minimum threshold of HPL, and then provide for flexible decision making for each property in its local context.

Specific question – Implementation

- *Do you think a planning standard is needed to support the consistent implementation of some proposals in this document?*
- 78 A planning standard offers an alternative interim measure to the interim NES outlined above. However the issues that are potentially relevant to HPL (including specific regional HPL such as certain winegrowing areas) and conflicting land uses would likely mean that a planning standard approach would not be appropriate.
- 79 If there is any further opportunity to do so, the RMLA wishes to be heard in support of this submission.



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