



## Details on s46A process to amend the National Policy Statement for Highly Productive Land (NPS-HPL)

Date Submitted:	10 March 2023	MfE tracking: BRF-2841 MPI tracking: B23-0143
Security Level	Policy and Privacy Classification	MfE Priority: Urgent

	Action sought:	Response by:
Hon David PARKER, Minister for the Environment  Hon Damien O'CONNOR, Minister of Agriculture	Agree to scope of s 46A process including proposals to consult on.	13 March 2023
FW: Minister Woods	For information.	
Actions for Minister's Office Staff	<b>Forward</b> this report to: Hon Megan WOODS, Minister of Energy and Resources <b>Return</b> the signed report to MfE and MPI.	
Number of appendices and attachments: 4	Appendix 1: Proposed Amendment (Option 1) to NPS-HPL. Appendix 2: Comparison of approach in other National Direction Appendix 3: NPS-HPL item provided in weekly report for the week ending 17 February Appendix 4: Legal advice obtained by Hort NZ	

### Key contacts

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# Details on s 46A process to amend the NPS-HPL

## Key Messages

1. You have both agreed to amend the National Policy Statement for Highly Productive Land (NPS-HPL) to clarify how “new” specified infrastructure is provided for on HPL (highly productive land) via a section 46(A) process under the Resource Management Act 1991 (RMA) (BRF-2654 refers). You both also noted that officials will provide advice about addressing the concerns of Horticulture New Zealand — Ahumāra Kai Aotearoa (Hort NZ) as part of a section 46(A) process<sup>1</sup> which includes reference to Resource Management Reform (RM Reform) timeframes.
2. This current briefing sets out:
  - A. an amendment process that meets the requirements of s46(A)(3)(b), and seeks the Minister for the Environment’s agreement to follow that process; and provides you both with:
  - B. options for amending the NPS-HPL in relation to specified infrastructure
  - C. options for amending the NPS-HPL in relation to intensive indoor primary production
  - D. implications of these proposed amendments for RM Reform
  - E. pros and cons of these proposed amendments to the NPS-HPL
3. Amending the NPS-HPL to provide a pathway for “new” specified infrastructure is considered by officials to be a more straightforward amendment as this was always the intent of the policy<sup>2</sup>.
4. Amending the NPS-HPL to provide for intensive indoor primary production may be challenging to align with the policy intent to protect the soil resource and will warrant a more comprehensive amendment process<sup>3</sup>.

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<sup>1</sup> The option agreed upon (BRF-2654 refers) included the possibility of including other amendments. Minister O’Connor, you have signalled that the concerns of Hort NZ should be included in this amendment, the current briefing provides details on this matter.

<sup>2</sup> Provided for in Exposure Draft version of the NPS-HPL and the recs report provided to Cabinet

<sup>3</sup> Such as a longer consultation period and the possibility Cabinet does not delegate decision making to Ministers (more details in section C).



## Recommendations

We recommend that:

- a. **Minister for the Environment agrees** to establish and follow the process outlined in Table 1 (that meets the requirements of s 46A(3) of the RMA) to amend the NPS-HPL,  
Yes/No ~~Yes/No~~
- b. **Note** that providing for “new” specified infrastructure on HPL aligns with the policy intent, and either or both of the following options can be consulted on,  
Noted
- c. **Agree** to consult on **Proposed Amendment 1:** include ‘construction’ of specified infrastructure in clauses 3.9(2)(j)(i) and (ii),  
Yes/No ~~Yes/No~~
- d. **Agree** to consult on **Proposed Amendment 2:** bespoke pathway for renewable energy and electricity transmission,  
Yes/No ~~Yes/No~~
- e. **Note** that Hort NZ has provided recommendations for clarifying how agricultural ‘supporting activities’ are provided for in the NPS-HPL and these will be incorporated into the implementation guide to be published next month,  
Noted
- f. **Note** that including intensive indoor primary production in the scope of the amendments will require a more comprehensive amendment process e.g. longer consultation time and the possibility that Cabinet does not delegate decision making to Ministers,  
Noted
- g. **Agree** to consult on **Proposed Amendment 3:** bespoke pathway for intensive indoor primary production as part of the same s 46A process as specified infrastructure,  
Yes/No ~~Yes/No~~ Yes.
- h. **Note** that we will prepare a consultation document and Cabinet package based on your decisions in this paper, which you will receive at the end of March 2023 for consideration by Cabinet,  
Noted
- i. **Agree** to forward a copy of this briefing to Hon Megan Woods, Minister of Energy and Resources,  
Yes/No ~~Yes/No~~

## Signature

Hayden Johnston Director – Water and Land Use Policy	
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<p>Charlotte Denny Director – Natural Resources Policy</p>	
<p>Hon David PARKER, Minister for the Environment</p> <p>Hon Damien O'CONNOR, Minister of Agriculture</p>	
<p>[Date field]</p>	<p>16/3/23</p>

## Purpose

5. The purpose of this briefing is to obtain a decision from both the Minister for the Environment and the Minister of Agriculture on the scope of proposed amendments to the NPS-HPL. The briefing also seeks the Minister for the Environment's decision on a proposed process for amending the NPS-HPL that will meet the requirements of s46A(3)(b) of the RMA.

## Background

6. As raised in previous briefings<sup>4</sup>, Ministry for Primary Industries (MPI) and Ministry for the Environment (MfE) policy officials are confident that the intent when developing the NPS-HPL was to expressly provide for the development of new specified infrastructure on HPL. However, this intention is not reflected in the *Gazetted* version of the national policy statement (BRF-2654 refers).
7. This matter is particularly relevant for renewable electricity generation (solar farms in particular) and we understand that there are a number of applications currently being (or soon to be) considered by decision-makers.
8. Addressing this ambiguity requires a change to the NPS-HPL using one of the processes referred to in s 46A(1) of the RMA, which you have agreed to. The process and timeframes involved in a s46A amendment is the focus of this briefing.
9. As previously raised, officials have been working with Hort NZ to address their concerns that:
  - the pathway for supporting activities in the NPS-HPL requires further clarification in relation to packhouses and Recognised Seasonal Employer (RSE) accommodation
  - that the NPS-HPL does not appropriately provide a pathway for intensive indoor primary production activities (that don't rely on the soil).
10. If Ministers wish to pursue an amendment to accommodate Hort NZ's concerns, we recommend this is focussed on providing for types of intensive indoor farming or hydroponic glasshouses as appropriate on HPL (more detail provided in section C of this briefing).

## Analysis and Advice

### A. *Proposed s46A process that meets the requirements of s46(A)(3)(b),*

11. There is some flexibility for how amendments to national policy statements (NPSs) are undertaken. The RMA requires that the Minister for the Environment must either elect to

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<sup>4</sup> BRF-2654; BRF-2607



follow a process involving a Board of Inquiry or establish and follow an alternative process that meets the requirements of s46(3)(b) (that includes the steps described in s46A(4)).

12. Given the limited scope of the proposed amendment we recommend that an alternative process is selected. The recommended steps are detailed in Table 1 below.

**Table 1: Recommended s 46A process.**

Steps in s46A(4)	Proposed steps in detail
(a) the public and iwi authorities must be given notice of— (i) the proposed national direction; and (ii) why the Minister considers that the proposed national direction is consistent with the purpose of the Act; and	A discussion document will be prepared and published on MfE and MPI websites and notice given to the public and iwi authorities about this proposed amendment to the NPS-HPL.  Early communications will be provided to those Treaty Partners and key stakeholders who made a submission on the Discussion Document notifying them that they can expect a Discussion Document and invitation to attend online hui about an amendment in the coming months.
(b) those notified must be given adequate time and opportunity to make a submission on the subject matter of the proposed national direction; and	Targeted engagement will be carried out providing an opportunity for Treaty Partners and key stakeholders to provide verbal and written feedback on the proposed amendment.  Further consideration and supporting analysis is required to confirm timeframes for public consultation depending on the scope of the proposed amendment. A 6 week consultation process may be required given that the amendment has been determined not to be technical or minor.
(c) a report and recommendations must be made to the Minister on the submissions and the subject matter of the national direction;	Officials will provide a report and recommendations on the submissions received from this engagement.
(d) the matters listed in section 51(1) must be considered as if the references in that provision to a board of inquiry were references to the person who prepares the report and recommendations	These matters (including the purpose of the RMA, any submissions or evidence received, and other relevant matters) will be considered in the report.

## ***B. Options for amending the NPS-HPL in relation to specified infrastructure***

13. How “new” specified infrastructure is provided for on HPL, should be considered alongside how specified infrastructure is provided for in other national direction including the National Policy Statement on Indigenous Biodiversity NPSIB (in draft), the National Policy Statement on Freshwater Management (NPSFM), the National Policy Statement on Renewable Electricity Generation (NPSREG) and the National Policy Statement on

Electricity Transmission (NPSET). A comparison and analysis of the different approaches is provided in Appendix 2.

14. Officials consider that adding the word 'construction' to clause 3.9(2)(j)(i) (see Appendix 1) will provide an appropriate pathway for "new" specified infrastructure. The construction of specified infrastructure will be specifically included in the list of activities that are 'not inappropriate' on HPL, alongside maintenance, operation, upgrade and expansion of specified infrastructure.
15. This pathway will still require applicants to demonstrate that the construction of specified infrastructure:
- (a) meets the definition of specified infrastructure; and
  - (b) meets the tests for functional and operational need to locate on HPL; and
  - (c) minimises or mitigates any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
  - (d) avoids if possible, or otherwise mitigates any actual or potential reverse sensitivity effects on land-based primary production.
16. Officials consider these tests provide a sufficient level of stringency in relation to the construction of specified infrastructure (including solar farms on HPL).
17. Due to the finite nature of HPL as a resource, offsetting is not an option for mitigating or remedying the loss of HPL and therefore applying the effects management hierarchy is not a practical management tool for HPL.
18. The proposed amendment to the NPS-HPL in relation to "new" specified infrastructure is not considered to have implications for how the approaches to "new" specified infrastructure in the NPSFM, proposed NPSIB and NPSREG are interpreted or applied.
19. The recommended proposed amendments to the NPS-HPL to consult on to clarify how "new" specified infrastructure should be provided for on highly productive land are:

**Proposed Amendment 1:** Amend clause 3.9(2)(j)(i) to include the word 'construction' of specified infrastructure. For consistency subclause (ii) would also be amended, although the effect is less material as defence facilities are specifically enabled under s4 of the RMA.

**And/or**

**Proposed Amendment 2:** Provide a bespoke pathway for solar farms/renewable electricity generation on HPL similar to clause 3.6 (urban rezoning) with tests requiring assessment of costs and benefits and alternatives.

### *C. Options for amending the NPS-HPL in relation to intensive indoor primary production*

20. In relation to recommendation (e) of previous briefing on the NPS-HPL (BRF-2654)<sup>5</sup>, ongoing discussions between officials and Hort NZ have indicated a strong desire from the sector to amend the NPS-HPL to be more permissive of different horticultural activities and supporting facilities (BRF-2654 refers). Amendments to the implementation guide have gone some way to alleviating their concerns<sup>6</sup>.
21. Hort NZ has raised concerns regarding the NPS-HPL and have provided detailed comments on the draft implementation guide (refer to legal advice they obtained provided in Appendix 4). Some of the concerns raised are that the NPS-HPL should be more enabling of supporting activities such as RSE accommodation and packhouses; and that a specific pathway should be provided for intensive indoor primary production.
22. Officials consider that concerns regarding supporting activities can be addressed through the implementation guide. However, intensive indoor primary production and hydroponic glass houses currently restricted on HPL would require an amendment to the NPS-HPL (analysis is provided in table 2 below). Under the gazetted NPS-HPL these activities can only establish on HPL if they support a wider farming system.
23. Should Ministers wish to include proposed amendments to address Hort NZ concerns as part of this s46A process, this will extend the timeframes of this s46A process (refer to indicative timelines in Table 3 below). This amendment may be challenging to align with the policy intent Cabinet has agreed to and, therefore, would require longer consultation, with the possibility that Cabinet may not delegate decision making to you both.
24. The proposed amendment to the NPS-HPL to address Hort NZ's concerns is:

Proposed Amendment 3:	Provide a bespoke pathway for intensive indoor primary production in clause 3.9 and lengthen the <u>s 46A process for specified infrastructure</u> .
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### *D. RM Reform implications*

25. The pros and cons of how these proposed amendments are undertaken relate to how existing national direction and amendments are transitioned into the new RM system.

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<sup>5</sup> Rec (e) of BRF2654: '**Note if Option 2** (s46A process) is selected then officials will provide advice on whether to incorporate changes to address concerns about establishing indoor farms, worker accommodation and post-harvest facilities on highly productive land'

<sup>6</sup> As provided in weekly updates (included in Appendix 3)



26. In relation to specified infrastructure RM Reform officials have confirmed that a pathway for new specified infrastructure on HPL will be provided in the first iteration of the National Planning Framework (NPF) (BRF-2654 due 31st of March will refer) irrespective of whether this amendment to the NPS-HPL is completed prior to notification of the first NPF.
27. In relation to intensive indoor primary production, RM Reform officials have confirmed there will not be time for inclusion of these changes in the first notified NPF. If changes to the NPS-HPL are progressed under the RMA in the timeframes below, submitters may be commenting on the amended NPS-HPL provisions during the public NPF board of inquiry process, and the board will consider these submissions.
28. Any amendments to the NPS-HPL will continue to apply to RMA plans under transitional provisions which could extend beyond 10 years. This creates an imperative that these amendments are made to the NPS-HPL irrespective of their incorporation in the NPF. It is likely that the amended NPS-HPL will be incorporated into the second iteration of the NPF in time for the preparation of NBA plans.

*E. Pros and cons of proposed amendments the NPS-HPL*

**Table 2: Evaluation of Proposed Amendments**

Specified Infrastructure		Intensive Indoor Primary Production	
	Proposed Amendment 1	Proposed Amendment 2	Proposed Amendment 3
Pros	<p>Proposed Amendment 1 meets the objective of confirming that the construction of “new” specified infrastructure was intended to be provided for on HPL subject to specific tests ie:</p> <ul style="list-style-type: none"> <li>a. Meets definition of specified infrastructure</li> <li>b. Meets functional and operation need to locate on highly productive land</li> <li>c. Minimises or mitigates cumulative loss of HPL in the district and reverse sensitivity</li> <li>d. Avoids if possible, or otherwise mitigates any actual or potential reverse sensitivity effects on land-based primary production.</li> </ul>	<p>Proposed Amendment 2 meets the objective of seeking feedback on how “new” specified infrastructure could be provided for on HPL - specifically in relation to solar farms.</p>	<p>Will address concerns from Hort NZ, Pork NZ and Inghams that the NPS-HPL is too restrictive on new indoor primary production activities that do not rely on the soil.</p> <p>May better acknowledge the importance of the horticulture sector to food supply in NZ, and the use of hydroponic glasshouses to help meet freshwater bottom lines in some catchments.</p> <p>Amendment will create certainty for the intensive indoor primary production sector.</p>

	Potentially feasible to complete within a 2-3 month period provided it is kept separate from Proposed Amendment 3 and Ministers receive delegated powers to decide on final amendment and there is no increase in scope.		
Cons	Does not elaborate on how the specific tests for specified infrastructure should be applied in relation to solar farms on HPL.	Could require a more comprehensive engagement and policy analysis that will take longer than 2-3 months.	<p>Would require a more comprehensive engagement and policy analysis than the proposed amendment for specified infrastructure and will take longer than 2-3 months to complete. This will then extend timeframes for consulting on specified infrastructure.</p> <p>May undermine the policy intent of the NPS-HPL to protect the soil resource for land-based primary production.</p> <p>Cabinet may be less willing to delegate final decisions to Ministers.</p> <p>The risk of amending the NPS-HPL so early after gazettal is that it may generate a perception that the NPS-HPL process was not robust.</p>

## Next steps

29. Indicative timelines for progressing the amendment of the NPS-HPL via the recommended s 46A process (described in Table 1 above) is set out below in Table 4.
30. Two indicative timeframes have been outlined depending on whether the amendments for intensive indoor primary production are combined with the s 46A process for specified infrastructure or the amendment is limited to specified infrastructure only.
31. Appropriation for the Ministry for the Environment has a minimum 6 week public consultation period for all work streams. The indicative timeframes outlined below do not meet this minimum requirement and further consideration and supporting analysis is required. A 6 week consultation process may be required given that the amendment has been determined not to be technical or minor. The indicative timelines provided below may need to be extended in order to meet this standard.

**Table 4: Indicative timelines for s46A processes to undertake the Proposed Amendments**

Key Stages/Steps	Proposed Amendment 1 Specified infrastructure only	Combined s46A process specified infrastructure and intensive indoor primary production ie Either all proposed amendments or just 1 and 3
Agreement on s 46A process	13 March	13 March
Draft Cabinet paper (amend RIS, S32, CBA, Recs report)	27 March (2 weeks)	24 April (6 weeks)
Agency and Ministerial consultation on draft package	10 April (2 weeks)	8 May (2 weeks)
Lodge Cabinet papers	26 or 27 April	17 May
Cabinet committee decision ENV/DEV/LEG	3 or 4 May	31 May
Full Cabinet	8 May	6 June
Public consultation/ targeted engagement period	8-22 May (2 weeks)	6 June - 18 July (6 weeks)
Summary of Submissions Report completed	29 May (1 week)	1 August (2 weeks)
Minister Briefing: recommended amendment	29 May	8 August
Delegated decision and Drafting instructions	31 May (1 day)	22 August (2 weeks)
Ministers' final approval of amended NPS-HPL	1 June	25 August
Executive Council Approval	6 June	28 August
Tabling in the House of Representatives and Gazette	Tbc	tbc
Commencement date (28 days after gazettal)	Tbc	tbc

## Appendix 1: Recommended Amendment to NPS-HPL (1)

Change indicated by underlined and yellow highlighted.

### ***3.9 Protecting highly productive land from inappropriate use and development***

- (1) Territorial authorities must avoid the inappropriate use or development of highly productive land that is not land-based primary production.
- (2) A use or development of highly productive land is inappropriate except where at least one of the following applies to the use or development, and the measures in subclause (3) are applied:
  - (a) it provides for supporting activities on the land:
  - (b) it addresses a high risk to public health and safety:
  - (c) it is, or is for a purpose associated with, a matter of national importance under section 6 of the Act:
  - (d) it is on specified Māori land:
  - (e) it is for the purpose of protecting, maintaining, restoring, or enhancing indigenous biodiversity:
  - (f) it provides for the retirement of land from land-based primary production for the purpose of improving water quality:
  - (g) it is a small-scale or temporary land-use activity that has no impact on the productive capacity of the land:
  - (h) it is for an activity by a requiring authority in relation to a designation or notice of requirement under the Act:
  - (i) it provides for public access:
  - (j) it is associated with one of the following, and there is a functional or operational need for the use or development to be on the highly productive land:
    - (i) the construction<sup>7</sup>, maintenance, operation, upgrade, or expansion of specified infrastructure:
    - (ii) the construction, maintenance, operation, upgrade, or expansion of defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990:
    - (iii) mineral extraction that provides significant national public benefit that could not otherwise be achieved using resources within New Zealand:
    - (iv) aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand.

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<sup>7</sup> Alternative wording as per the recommendations report is 'development' using the term 'construction' avoids duplicating the word 'development' used in the header line of this subclause.

- (3) Territorial authorities must take measures to ensure that any use or development on highly productive land:
  - (a) minimises or mitigates any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
  - (b) avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on land-based primary production activities from the use or development.
- (4) Territorial authorities must include objectives, policies, and rules in their district plans to give effect to this clause



## Appendix 2– Comparison of approach in other National Direction

### Approach in NPS-HPL

1. The tests for specified infrastructure in the NPS-HPL require applicants to demonstrate that they:
  - meet the definition of specified infrastructure; and
  - meets the tests for functional and operational need; and
  - minimise or mitigate any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
  - avoids if possible, or otherwise mitigates any actual or potential reverse sensitivity effects on land-based primary production
2. The NPS-HPL Implementation Guide directs decision makers to the definition of functional and operational need in the National Planning Standard which are defined as:
 

**Functional need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.

**Operational need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.
3. Officials confirm that the tests for “new” and expansion of specified infrastructure on HPL were intended to be the same as for maintenance, operation and upgrade. In practice these tests would be more difficult to meet when considering “new” specified infrastructure. Sound justification for the proposal would be required to avoid the unnecessary loss of a finite resource. The NPS-HPL objective of maintaining the availability of highly productive land for use in land-based primary production will likely have significant weight when considering functional and operational need for new specified infrastructure to locate on HPL and an assessment would likely require a consideration of alternatives.
4. Officials currently have no concern about whether these tests provide a sufficient level of the stringency in relation to solar farms.

### Approach in NPSIB

5. A separate briefing has been provided to Minister Parker on the pathway for REG in the NPSIB (refer to amended BRF-2724). The NPSIB proposes different pathways for specified infrastructure depending on whether it is “existing” or “new”.
6. Under clause 3.15 of the proposed NPSIB, local authorities must include objectives, policies, and methods in their policy statements and plans to enable the continuation of existing ‘specified established activities’ or ‘specified types of established activities’, as ‘permitted’ without additional tests where the effects are not intensified.
7. Whilst the NPS-HPL does include tests for maintenance, operation and upgrade of existing specified infrastructure in practice these will be relatively simple to achieve – ie functional and operational need to maintain, operate and upgrade is pretty obvious.

8. In the NPSIB, new and major upgrades to specified infrastructure in or affecting Significant Natural Areas (SNAs) are provided for with a consent pathway using the Effects Management Hierarchy<sup>8</sup>.
9. The Effects Management Hierarchy is a key tool used in the NPSIB and NPSFM to ensure that a methodical and thorough consideration of the adverse effects on indigenous biodiversity is undertaken and ensure that options for avoiding, minimising and remedying adverse effects are considered before offsetting.
10. Given the finite characteristics of HPL there is limited ability to offset or compensate the loss of HPL<sup>9</sup>. There is also no hard 'avoid' because HPL is not a matter of national importance, hence the preferred approach to amend the NPS-HPL is to leave it to decision makers to weigh up the relative merits of an application for "new" specified infrastructure on HPL, subject to the specific tests (which don't include referring to an Effects Management Hierarchy or offsetting).

### *Interactions with NPSREG and NPSET*

11. There is currently no policy analysis on the interactions between the NPS-REG / NPSET and NPS-HPL in the draft discussion document for NPS-REG / NPSET as there is for:
  - NZCPS (the preservation of the natural character of the coastal environment (including the coastal marine area) (section 6(a)),
  - NPSFM (protection of outstanding natural landscapes and features (section 6(b)), and
  - NPSIB protection of areas of significant indigenous fauna and significant habitat of indigenous fauna (section 6(c)).
12. Whilst highly productive land is not a section 6 matter of national importance under the RMA, like renewable energy it is a s7 matter and is a key environmental outcome in the NBE Bill.
13. The NPS-REG currently refers to two approaches for providing clear, nationally consistent 'consenting pathways' for REG projects.

Proposed Amendment 1 – Introduce consenting pathways for REG projects that are nationally consistent and consistent with infrastructure provisions in other national directions

Proposed Amendment 2 – Provide a more enabling consenting pathway for renewable electricity generation projects through applying a specific effects management hierarchy for those projects

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<sup>8</sup> effects management hierarchy means an approach to managing the adverse effects of an activity on indigenous biodiversity (see full definition in the NPSIB)

<sup>9</sup> transferable development rights have proven to be very difficult and the results questionable.

14. Whilst MBIE have indicated that the pathways for REG via the specified infrastructure pathway in the NPS-HPL are acceptable they have raised concern that it does not expressly provide for the construction of “new” specified infrastructure.
15. The pathway for REG in the NPSFM, NPSIB and NZCPS have been carefully developed to work within a particular framework. For the reasons outlined above, Officials do not recommend further policy analysis to develop a consistent pathway that satisfies the intent of all of these instruments at this stage (or particularly as part of this proposed amendment of the NPS-HPL).
16. Officials also note that there is scope for existing national direction to continue via transitional provisions until the work is completed to fully integrate them into the NPF.

### **Appendix 3: NPS-HPL item provided in weekly report for the week ending 17 February**

Horticulture NZ's concerns of the NPS-HPL being a barrier for horticulture activities

Officials met with Hort NZ on 18 January and 14 February to discuss concerns about the potential impact of the NPS-HPL on the development of new hydroponic glasshouses, large-scaled post-harvest facilities, and seasonal worker accommodation that supports multiple businesses. The draft guidance encourages councils to provide for these activities on land that is not HPL as they do not rely on the soil's physical properties. We are not aware of any current applications where the NPS-HPL is preventing these types of developments.

We will continue to work with Hort NZ to ensure the NPS-HPL guidance is as enabling of these activities as possible, without opening the gate for any type of development to occur on HPL where an applicant can demonstrate that it is related to primary production.

## APPENDIX 4: LEGAL ADVICE OBTAINED BY HORT NZ

**TO:** Michelle Sands, Horticulture New Zealand

**FROM:** Helen Atkins & Amelia Scharling

**DATE:** 6 March 2023

**SUBJECT:** **DEFINITION OF "LAND" IN THE NPS-HPL**

### INTRODUCTION

1. The National Policy Statement for Highly Productive Land (**NPS-HPL**) regulates the use and development of land which is deemed highly productive for use in primary production. This policy statement looks to protect current land-based primary production, to better provide long term security to land users reliant on highly productive land (**HPL**). To achieve this, the NPS-HPL prescribes certain kinds of use and development which are enabled for HPL, and restricts uses and activities which would degrade the productive nature of the land, and thereby risk future production capabilities.
2. Horticulture New Zealand (**HortNZ**) generally supports this policy statement, given its interest in protecting growers and their land use rights, including from encroachment of urban development.
3. However, there are two areas where the NPS-HPL has created difficulties. The first is in relation to supporting activities, and the second is in relation to activities that are currently located on class 1, 2, and 3 soils but which do not rely on the productive capacity of those soils. HortNZ's position is that those activities should be provided a pathway to either continue to remain (for existing) or to locate (for new) on HPL, given the practical requirements of location.
4. This memorandum is concerned with the supporting activities pathway.

### ISSUE

5. Clause 3.9(2) states that use or development of HPL is inappropriate except for the circumstances set out in the clause. The relevant circumstances are in (a) – supporting activities on the land, and (g) – small-scale or temporary land-use activities that have no impact on the productive capacity of the land.
6. You have asked whether it would be possible for the guidance on the NPS-HPL to clarify that the word "land" means HPL.
7. Supporting activities are defined in the NPS-HPL as follows:



"**supporting activities**, in relation to highly productive land, means those activities reasonably necessary to support land-based primary production on **that** land (such as on-site processing and packing, equipment storage, and animal housing)" (emphasis added)

8. This definition is unclear as to whether the supporting activity is supporting the land-based primary production activity on the parcel, the landholding, or on HPL more broadly.
9. As a result of this, HortNZ and others raised an issue with the Ministry for the Environment (**MfE**) and the Ministry of Primary Industries (**MPI**), seeking clarity that supporting activities did not need to be on the same parcel of land, or within the same landholding, as the supported primary production activity. This is important because many supporting activities (including those listed in the definition), and others like seasonal accommodation are, more often than not, not on the same parcel or landholding, and are more often than not on HPL.

#### NPS-HPL GUIDANCE

10. As a consequence of raising this issue, the National Policy Statement for Highly Productive Land: Guide to Implementation (**Guidance**) includes at Table 2 details of activities which might be appropriate on HPL under Clause 3.9(2). This clarifies that the intention of the clause is that:

"activities that support land-based primary production on **surrounding HPL or as part of a land-holding where the production is occurring**, have a pathway to occur on HPL." (emphasis added)

11. While this Guidance goes some way to assisting in the clarity that HortNZ is seeking, it is guidance, and as such has no binding authority on those seeking to regulate activities under the NPS-HPL.
12. Of particular note is that if the intention was that supporting activities could occur on only the parcel of land or landholding upon which the supported primary production activity sits, then this wording should have been used in the definition within the NPS-HPL itself.

#### ANALYSIS

13. We discuss the following:
  - the meaning of land in the NPS-HPL;
  - the role of guidance; and
  - the meaning of "reasonably necessary".

### What does “land” mean?

14. Currently the NPS-HPL does not provide a definition for “land”, and hence its use throughout other definitions and clauses is somewhat ambiguous.
15. At first blush it can be argued that “land” in certain contexts refers solely to HPL, given the focus of the entire policy statement, however this remains open to interpretation.
16. This is further complicated by the Guidance, which refers to land as including landholdings, and uses the definition of landholding from the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**). The relevant paragraph from the Guidance is reproduced as follows:

The intention of this clause is that activities that support land-based primary production on surrounding HPL or as part of a landholding where the production is occurring, have a pathway to occur on HPL... Note 'landholding' in this context is intended to have the same meaning as the definition of 'landholding' in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 which is defined as "means one or more parcels of land (whether or not they are contiguous) that are managed as a single operation".

17. While the clarification in the Guidance is useful, it remains a point of concern due to its non-binding nature – where disputes arise over the application of clause 3.9(2), it will be possible for parties to argue different interpretations of the clause, and any guidance notes will not hold legal weight in resolving conflicts in the definitions.
18. Dependent on context, “land” might also be interpreted to mean “site”, which creates a stricter interpretation of this exemption. This would not allow for supporting activities within a given area, that are reasonably necessary to allow land-based primary production to occur on landholdings or surrounding HPL.
19. The issue with either of these approaches is the uncertainty. If MfE had intended to mean either landholding or site in these contexts, then greater clarity would be achieved by using either of these terms expressly in the NPS itself. Choosing to instead use “land” leaves the interpretation open.

### What is the role of guidance?

20. Guidance notes are provided as accompanying documents to assist decision makers and local authorities in applying and enforcing national policies and standards. These are often helpful in unpicking any complexities or understanding ambiguities which may exist within the relevant source document.

21. While guidance notes are useful for those who implement policy statements in the first instance, they are non-binding, and hence are unable to provide absolute legal certainty particularly in instances where decisions may be appealed to a judicial body.
22. In this instance, the Guidance provides mixed degrees of help on the issue. On the one hand, the Guidance helps HortNZ's position regarding supporting activities, and that they are not necessarily required to be on same land as the primary production activity which is being supported. However, on the other hand, the Guidance confuses the issue through the examples which are provided.
23. While we consider the best outcome is for the wording in the NPS-HPL to be amended, in the short term we recommend focusing on amendments to the Guidance to better achieve HortNZ's interests. This could be done in particular by focusing on the use and meaning of "reasonably necessary", to better focus which supporting activities will be considered appropriate under the clause.

#### **What does "reasonably necessary" mean?**

24. The meaning of "reasonably necessary", in respect to the definition of supporting activities, requires unpacking. Intended to be an objective standard, the threshold of reasonably necessary is still open to interpretation, and may be a gateway for activities to occur on HPL that are outside the intended exemptions. This may include such activities as transport depots, which could feasibly be defined as supporting primary production, but are only obliquely necessary within the HPL proper.
25. Case law assists in providing a better understanding of how the courts will view what is "reasonably necessary" in a given situation. In interpreting sections of the Resource Management Act 1991 (**RMA**), the use of "reasonably necessary" has been taken to mean:

"necessary, which falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance."<sup>10</sup>

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<sup>10</sup> *Bungalo Holdings Ltd v North Shore City Council* ENC Auckland A052/01, 7 June 2001. Note this case was distinguished by *Wymondley Against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162, however only on the point that it should be the designation which was reasonably necessary, and not the works themselves. The description of reasonably necessary as a standard has been cited by other recent cases including *Re Queenstown Airport Corp Limited* [2012] NZEnvC 206 at [51], *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [94], and *Chen v New Zealand Transport Agency - Waka Kotahi* [2022] NZEnvC 220 at [31].

26. The understanding of "necessary" can further be interpreted as something required in both a physical sense, and from a timescale perspective.<sup>11</sup> Without both senses of necessity, proposed works or activity might not qualify as reasonably necessary.

#### PROPOSED NEW WORDING FOR GUIDANCE

27. Taking the above into account, we propose the following amendment to the Guidance, which is intended to clarify the meaning of reasonably necessary, and hence remove any ambiguity which might result in adverse practical implications. We have deleted the section shown because:
- (a) First, we say the test is reasonably necessary and ancillary rather than linked to scale. Therefore, the link to scale in this part of the Guidance is confusing because many facilities in the horticulture sector are physically large and it is important to provide a pathway for them;
  - (b) Secondly, we have covered off the reference to dairy factories in the earlier changes to the Guidance; and
  - (c) Finally, we have already discussed transport depots and say they are not ancillary.

The proposed changes to the Guidance are:

*The intention of this clause is that activities that support land-based primary production on surrounding HPL, or as part of a landholding where the production is occurring, have a pathway to occur on HPL. Activities such as residential accommodation for the landowner and/or farm staff, seasonal worker accommodation, sheds for farm machinery, workshops for repairing and maintaining equipment and roadside sales of goods produced on site would all be anticipated under this clause where these support land-based primary production. This clause could also cover on-site processing and manufacturing of goods that were produced on HPL, packing produce, or installing a water reservoir to support the land-based primary production activity. However, the purpose of these activities must be to directly support land-based primary production. The support provided by these activities must be reasonably necessary in order to be considered appropriate under this clause.*

Supporting activities are considered reasonably necessary where the activity meets the definition of primary production in the National Planning Standards<sup>12</sup>, and relates to land-based primary production, i.e.

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<sup>11</sup> *Fugle v Cowie* [1997] NZRMA 395 at p401.

<sup>12</sup> Recommend this definition is included as a footnote in the Guidance



- a) Includes initial processing, as an ancillary activity, of commodities that result from the listed activities in a);
- b) Includes any land and buildings used for the production of the commodities from a), and used for the initial processing of the commodities in b); but
- c) Excludes further processing of those commodities into a different product.

For example, this would include minimal processing activities as defined by the Food Act, but would not include a dairy factory.

Supporting activities are also considered reasonably necessary to land-based primary production when they are ancillary to that production activity, but not when they are independent rural industries.

For example, supporting activities would include seasonal workers accommodation delivered as part of land-based primary production activity, including accommodation serving multiple sites and landholdings. Supporting activities would not include accommodation serving a labour supply company, which is a rural industry, or a transport depot serving a transport company which is a rural industry.

~~Clause 3.9(2)(a) is not intended to cover larger-scale activities that might support land-based primary production indirectly but have no direct or exclusive link to the HPL where the production is taking place. This includes, for example, rural industries like large-scale dairy factories, large-scale processing facilities that process goods from multiple operations, and transport depots. These larger-scale rural industries are considered to be inappropriate on HPL and are more appropriately located in industrial zones or other parts of the rural environment that are not HPL.~~

## CONCLUDING COMMENTS

28. These changes assist in the clarity in relation to supporting activities but do not address other issue of concern to HortNZ relating to activities that are currently located on class 1, 2, and 3 soils but which do not rely on the productive capacity of those soils. HortNZ's position is that those activities should be provided a pathway to either continue to remain (for existing) or to locate (for new) on HPL, given the practical requirements of location. This issue is likely to require an amendment to the NPS-HPL in order for a secure pathway to be achieved.

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