Priority – High

Security Level – In Confidence

Ministry for the Environment
Manatū Mō Te Taiao

Ministry for Primary Industries
Manatū Ahu Matua

To: Hon Damien O'Connor, Minister of Agriculture
Hon David Parker, Minister for the Environment
From: Charlotte Denny, Director Natural Resources Policy (MPI)
Hayden Johnston, Director Land and Water Systems (MfE)

Proposed National Policy Statement for Highly Productive Land: Additional Recommendations to the December 2021 Briefing

Date	25 March 2022	**Reference**	MPI: B22-0116 MfE: BRF-1276

Decision required	**Date decision required by**
YES ☒ / NO ☐	29 March 2022

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Purpose

This briefing:

- seeks your agreement for officials to test the workability of three possible amendments to the National Policy Statement for Highly Productive Land (NPS-HPL) with councils, primary sector groups and tangata whenua. These amendments relate to the mapping process of highly productive land, the scope of activities that can be undertaken on specified Māori land, and the direction on tangata whenua involvement in giving effect to the NPS-HPL;
- provides an update on the officials' meeting with Pukekohe Vegetable Growers Association (PVGA) and Horticulture New Zealand (Hort NZ) on the NPS-HPL;
- provides an update on the recommended definition of specified Māori land; and
- informs you of the next steps to bring final advice to Cabinet in May.

The Minister for the Environment is invited to share this paper with Hon Kiritapu Allan, Associate Minster for the Environment for information.

Key messages

Officials met with you on 10 February. At the meeting, we informed you that we were continuing to develop additional recommendations on the final NPS-HPL.

Officials met with PVGA and Hort NZ representatives on 15 February to provide an update on the NPS-HPL. Some growers expressed concern with the potential for additional restrictions on the future use of their land, while others are overall supportive of the NPS-HPL.

Officials recommend testing the workability and necessity of three proposed amendments with a targeted group of stakeholders including with vegetable growers, Treaty partners, councils, and Manaaki Whenua Landcare Research. The testing relates to the mapping process, involvement of tangata whenua and the scope of activities that can be undertaken on specified Māori land. Officials propose for this engagement to occur online in early April. Results from this test will inform the final NPS-HPL.

Officials have amended the definition of "specified Māori lands" to align with latest Crown Law advice provided on the proposed National Policy Statement for Indigenous Biodiversity (NPS-IB).

Officials will provide a final draft NPS-HPL to you for approval at the Cabinet Legislation Committee in May 2022. Subject to Cabinet approval, the NPS-HPL will take effect in June.

Context

1. The Ministry for Primary Industries (MPI) and the Ministry for the Environment (MfE) officials held six exposure draft testing workshops between 26 October and 5 November 2021 with local government, non-government organisations (NGOs) and Treaty partners. The purpose was to test the workability of the draft NPS-HPL to ensure it achieves the policy intent.

2. Officials provided a briefing to you in mid-December 2021 (MPI B21-0710 / MfE BRF-1002 refers) to update you on exposure draft testing. You agreed to the recommended amendments to the exposure draft, directed officials to produce a final version of the NPS-HPL following further analysis on the involvement of tangata whenua and the definition of Māori land, and requested a meeting with officials.

3. At our last meeting, on 10 February we informed you that we were continuing to develop additional recommendations relating to the mapping process, involvement of tangata whenua and the scope of activities that can be undertaken on Māori land.

4. Officials met with Pukekohe Vegetable Growers Association (PVGA) and Hort NZ representatives on 15 February to provide an update on the NPS-HPL. Some growers expressed concern with the potential for additional restrictions on the future use of their land, while others were overall supportive of the NPS-HPL.

5. This briefing is seeking your agreement for officials to further test the workability and necessity of three possible amendments to the NPS-HPL that seek to:
   a) clarify how councils would reach decisions on which areas to exclude from being mapped as highly productive land;
   b) guide councils in relation to the involvement of tangata whenua in the implementation of the NPS-HPL; and
   c) expand the scope of activities that can occur on specified Māori land that is identified as highly productive land.

6. Officials consulted Te Puni Kōkiri and Te Arawhiti on 10 March on these possible amendments and recommendations.

Recommendation to test the workability of an amended clause directing councils on how decisions on which areas to exclude from being mapped as highly productive land shall be reached.

7. The intent of the NPS-HPL is to provide nationally consistent and clear direction to councils on what should be included in HPL maps[1]. As outlined in clause 3.2(1) of the NPS-HPL exposure draft, the mapping process is intended to be a straightforward exercise, that:
   a) is based on Land Use Capability (LUC) classes One, Two, and Three;
   b) zoned General Rural or Rural Production (or equivalent) and not the subject of a recent notified plan change;
   c) comprise large and geographically cohesive areas;
   d) excludes areas already identified for future urban development (as defined in the NPS-HPL); and
   e) includes areas that are not LUC One to Three, but which has the potential to be highly productive (based on current uses of similar land in the region), having regard to the soil type, physical characteristics, and climate of the area.[2]

8. At the exposure draft testing workshops, officials tested the workability of a clause that allowed councils to exclude land from HPL mapping if there were 'permanent water quality and quantity constraints'. These decisions needed to be informed and supported by the advice from 'a suitably qualified person'.

9. Workshop participants commented that the clause would be unworkable, open to interpretation and highly political, particularly in terms of water allocation and re-allocation.

10. Concerns were also raised that providing for land to be excluded based on water quality and quantity constrains may not align with the objective to protect our most productive land for future generations, given that these constraints are most likely to be temporary and not permanent.

11. There was consensus that most of the water quality and quantity constraints could be addressed through changes in the kind of land-based primary production, and management practices (supported through the Fit for a Better World land use grants and research grants). This view, however, was challenged by some vegetable growers at the meeting held on the 15 February.

12. Officials met with PVGA and Hort NZ representatives on 15 February to provide an update on the NPS-HPL. Some attendees at the meeting voiced their concerns with the proposed NPS-HPL, including:
   a) the definition of HPL, suggesting that criteria like labour access, water access[3] and other environmental and economic criteria should be taken into account; and
   b) concerns that the policy will reduce landowners' and farmers' opportunities to sell land that is mapped as HPL for subdivision and lifestyle block development, even when the land is not able to be viably used for vegetable production due to constraints imposed under the NPS-FM.

[1] HPL maps will constitute an 'overlay' which, defined in the National Planning Standards as "spatially identifies distinctive values, risks or other factors that require management".
[2] For example, non-LUC 1-3 land that is highly productive for growing stone fruit or for use in viticulture.

13. Officials recognise that the mapping of HPL should:
    a) avoid inappropriate development and a permanent loss of HPL that would be contrary to the objective of the NPS, but also; and
    b) avoid perverse outcomes that result in landholdings being unable to be sold and subdivided under the NPS-HPL, and unable to be used for vegetable production under the NPS- FM.

14. Officials have drafted possible amendments to clause 3.2 to address the concerns raised at exposure draft testing and we recommend these be tested with a targeted group. The amendments would:
    a) link the identification of permanent (water quality and quantity) constraints to the environmental outcomes that have been identified for a Freshwater Management Unit (FMU) or part of an FMU under the National Policy Statement for Freshwater Management 2020 (NPS-FM); and
    b) clarify the assessment process that regional councils would be required to undertake in order to reach decisions on whether that land is subject to 'permanent constraints'. This would be consistent with the 'qualifying matters' approach used in the NPS UD and would require councils to:
        i. identify the specific characteristics that makes the use of the land inappropriate for land based primary production;
        ii. demonstrate why the environmental outcomes sought for a FMU or part of a FMU presents a permanent restriction on that land being used for viable land based primary production and therefore incompatible with the objectives and policies of this National Policy Statement; and
        iii. evaluate an appropriate range of options to retain the productive value of the land, while managing the specific characteristics.

15. Officials will also test an alternative approach which is to define additional criteria to guide the interpretation of '*large and geographically cohesive area'.* This could provide councils with some flexibility to 'not map highly fragmented areas' that 'cannot be used productively'. The purpose will be to test criteria that could be used to determine 'highly fragmented areas' and 'cannot be used productively' to reduce litigation risk and achieve national consistency.

Recommendation to test the workability of clauses relating to Māori land and the involvement of tangata whenua in giving effect to this NPS.

16. As you agreed in the briefing in December 2021, officials have updated the definition of "Māori land" for the purposes of HPL to be consistent with the Crown Law Advice provided on the proposed National Policy Statement for Indigenous Biodiversity (NPS-IB).

17. The definition of Māori land is now referred to as "specified Māori land". It is expanded to include, "land held by or on behalf of an iwi or hapū if the land was transferred from the Crown, a Crown body, or a local authority with the intention of returning the land to the holders of the mana whenua over the land". The full definition is provided in Appendix One.

18. This revised definition captures the types of Māori land that should be subject to the more flexible subdivision, use and development settings in the NPS-HPL, whilst avoiding exempting land from national direction that has been purchased using settlement funds.

19. At the exposure draft testing workshop with Treaty partners, some requested that the scope of activities that can be carried out on Māori land should be expanded beyond papakāinga on the basis that the development of Māori land already faces existing and historic constraints and given that Māori land represents only a small amount of the total area of HPL in New Zealand.

20. Some attendees also requested that the NPS-HPL provide for the involvement of tangata whenua during the mapping process and preparation of District Plan provisions, to ensure the recognition of the importance of HPL to the health and wellbeing of mana whenua, and to address concerns with the lack of consistency in how tangata whenua are engaged with through Resource Management Act 1991 (RMA) and Local Government Act 2002 (LGA) processes.

Recommendation to test the workability and necessity of clauses to expand the scope of activities on Māori land.

21. The intent is for the policy to be permissive on the activities that can occur on specified Māori land that is identified as HPL, in recognition of the existing and historic restrictions (such as ownership structure and access to finance) which already limits the development of this land.

22. The exposure draft included greater flexibility for development to occur on Māori land compared with general land, by providing for 'papakāinga, marae and ancillary community facilities, dwellings, and associated infrastructure'. However, fuller recognition of Māori rangatiratanga over their lands would be to expand the types of activities that could occur on this land by using the National Planning Standards definition of 'Māori purpose zone'. This is supported by Te Puni Kōkiri and Te Arawhiti.

23. Officials recommend testing possible amendments to clause 3.7 which would make it consistent with the National Planning Standards definition by:

    a) clarifying that specified Māori lands that are mapped as HPL will be exempt from subdivision restrictions imposed by the NPS-HPL; and there will not be any restrictions on partitioning orders made under Te Ture Whenua Māori Act 1993; and

    b) expanding the use and development of HPL on any specified Māori land beyond "papakāinga, marae and ancillary community facilities, dwellings, and associated infrastructure" (as in the current exposure draft), *to encompass any use and development that "relates to a range of activities that specifically meet Māori cultural needs, including (but not limited to) residential and commercial activities"*.

Recommendation to test the workability of clauses relating to tangata whenua involvement.

24. Clause 3.2(4) of the NPS-HPL exposure draft directs councils on requirements for identifying and mapping HPL and was silent on the involvement of tangata whenua.

25. The RMA Schedule One process requires that local authorities consult with iwi authorities, and any customary marine title group, during the preparation of policy statements and plans. However, a common criticism[4] of the Schedule One process is that it does not provide for consultation with whānau, hapū, and iwi decision-making bodies beyond 'iwi authorities'.

26. Parts Two and Six of the LGA provide principles and requirements for local authorities that are intended to facilitate participation by Māori in decision-making processes when giving effect to policy statements or plans. However, there remains discretion as to how the LGA provisions are applied.

27. An analysis of the impact of the NPS-HPL on from a Te Tiriti perspective suggests that decisions on what land is mapped as HPL (included and excluded) will affect the different priorities of the different iwi/hapu/whanau - in terms of land being rezoned urban, land being protected for freshwater values, as well as opportunities for the development of Māori land.

28. Officials are seeking a better understanding of the costs and benefits of directing tangata whenua engagement within the NPS. The risk of including further direction to engage with tangata whenua in the NPS is that it could risk regional councils being unable to meet the timeframes for identifying HPL. However, it is also acknowledged that the mapping process could be delayed by legal challenges if councils do not meet the requirements for engaging/consulting under the RMA and LGA.

29. Officials recommend testing the following amendment, indicated with an underlined text, to clause 3.2(4): Regional councils must undertake the mapping:

    a) in collaboration with all relevant territorial authorities;
    b) at a level of detail that identifies individual parcels of land or, where appropriate for larger sites, parts of parcels of land; and
    c) in consultation with tangata whenua taking their views into account when reaching decisions on land to include and exclude in the mapping of highly productive land.

[4] A view reflected in paragraph 17, page 91 of the Randerson Review of the RMA System

30. Officials also recommend testing an additional draft clause to guide tangata whenua involvement in the implementation of the NPS-HPL. The proposed amendment is indicated with an underlined text below:
Tangata whenua involvement:

a) In giving effect to this National Policy Statement every territorial authority must actively involve tangata whenua to the extent they wish to be involved; and

b) the active involvement must involve consultation with tangata whenua that is:

i. early, meaningful and, as far as practicable, in accordance with tikanga Māori; and

ii. undertaken at the appropriate levels of hapū, and iwi decision-making structures, recognising that:

(i) some delegates will have to represent the interests and perspective of more than one group;

(ii) some committees are not always fully representative of every iwi and hapū in the region; and

(iii) each constituent group will continue to be entitled to make submissions on the notified plan and retain all other rights to be heard and have standing for appeals.

Recommendation on the format of further engagement for the purposes of testing these possible amendments.

31. Testing these amendments through a broad targeted consultation process (such as that used for the exposure draft) risks further delaying the gazettal of the NPS-HPL. Officials therefore recommend undertaking a smaller, targeted engagement to test the proposed amendments.

32. Officials recommend testing these possible amendments with the following organisations who were also involved in the exposure draft testing in late 2021:

a) five councils covering a range of growth pressures and types of primary production activities, including: Auckland Council, Waikato Regional Council, Horowhenua District Council, Otago Regional Council, Tasman District Council;

b) treaty partners including Waikato River Authority, Te Rūnanga o Ngāi Tahu, Muaūpoko Tribal Authority;

c) Manaaki Whenua Landcare Research; and

d) Hort NZ (plus three vegetable growers not at the exposure draft testing recommended by Hort NZ).

33. The upcoming engagement will be held online in early April.

Next steps

34. Subject to your approval of the following recommendations, we will test the workability of the three possible amendments to the NPS-HPL. Based on the test results, we will issue drafting instructions to have the NPS-HPL finalised.

35. Officials will circulate the draft advice package for agency consultation in mid-April 2022. This draft package will include the amended policy, draft Cabinet paper, Regulatory Impact Statement, RMA Section 32 cost-benefit report, RMA Section 42A Recommendation report.

36. We will provide the final advice package to you for approval at the Cabinet Legislation Committee in May. Subject to Cabinet approval, the NPS-HPL will be gazetted and take effect 28 days after gazettal.

Recommendations

37. It is recommended that you:

a) **Note** that exposure draft testing revealed strong consensus that the approach for excluding permanent constraints on primary production from water quality and quantity restrictions in the exposure draft was unworkable;

NOTED

b) **Note** that officials' meeting with Pukekohe Vegetable Growers Association on 15 February revealed concern from some growers that the NPS-HPL would not take into account the criteria such as labour access, water access and other environmental and economic criteria;

NOTED

c) **Note** that officials have continued to develop criteria that could be used to better direct how the councils may exclude land from being identified as highly productive land;

NOTED

d) **Note** that further direction to involve tangata whenua in giving effect to the NPS-HPL may be necessary;

NOTED

e) **Agree** that officials test the workability and necessity of three proposed amendments relating to the mapping process, involvement of tangata whenua and scope of activities that can be undertaken on specified Māori land;

YES / NO

f) **Agree** that the testing will be with a targeted group; including: Hort NZ, three vegetable growers who were not at exposure draft testing, Treaty partners, councils and Manaaki Whenua Landcare Research;

YES / NO

h) **Note** officials may also take this opportunity to test any further issues that arise through the drafting process;

NOTED

i) **Note** that officials will provide the final NPS-HPL advice package to you for approval at the Cabinet Legislation Committee in May 2022;

NOTED

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Hon Damien O'Connor
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/ / 2022

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Ministry for the Environment

Hon David Parker
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Minister's comments

Appendix One: Definition of specified Māori lands

Specified Māori land means land that is any of the following:

(a) Māori customary land and Māori freehold land (as defined in Te Ture Whenua Māori Act 1993):

(a) any Māori reservation established under Te Ture Whenua Māori Act 1993 or its predecessors:

(b) Treaty settlement land, being land held by a post-settlement governance entity (as defined in the Urban Development Act 2020) where the land was transferred or vested and held (including land held in the name of a person such as a tipuna of the claimant group, rather than the entity itself):

(i) as part of redress for the settlement of Treaty of Waitangi claims; or

(i) by the exercise of rights under a Treaty settlement Act or Treaty settlement deed:

(c) former Māori land or general land owned by Māori (as defined in Te Ture Whenua Māori Act 1993) that has at any time been acquired by the Crown or any local or public body for a public work or other public purpose, and has been subsequently returned to its former Māori owners or their successors and remains in their ownership:

(d) general land owned by Māori (as defined in Te Ture Whenua Māori Act 1993) that was previously Māori freehold land, has ceased to have that status under an order of the Māori Land Court made on or after 1 July 1993 or under Part 1 of the Māori Affairs Amendment Act 1967, but remains in the ownership of the same whanau or hapū:

(e) land held by or on behalf of an iwi or hapū if the land was transferred from the Crown, a Crown body, or a local authority with the intention of returning the land to the holders of the mana whenua over the land

An explanation of the different categories of land within this definition is provided below:

- Limb (a) is the definition of Māori land in the Te Ture Whenua Maori Act 1993
- Limb (b) is referred to as part of "protected land" under s 17 of the Urban Development Act 2020 and as part of "protected Māori land" in s 11 of the Infrastructure Funding and Financing Act 2020
- Limb (c) covers treaty settlement land. The wording is similar to the equivalent provision in the Urban Development Act and Infrastructure Funding and Financing Act. The intention is not to cover land purchased on the open market. The Departmental Report on the definition of "protected land" under the Urban Development Act stated that the provisions "*recognise that iwi and hapū have a special interest not just in Māori land that they own, but also in the land that they have received as redress or by the exercise of rights under Treaty settlements, or through transfer to them as mana whenua… They do not cover is land that has been acquired on the open market outside a settlement process. This land is the equivalent of land held by other private owners and as such is intended to be dealt with in the same manner as other privately-owned land under the Act*." Microsoft Word - UD Bill - Draft Departmental Report - Parts 1-3.docx (www.parliament.nz) see paragraphs 160-161.
- Limb (d) is not intended to capture *all* general land owned by Māori. It has been drafted in this way to be consistent with section 41 of the Public Works Act 1981 "disposal of former Māori land when no longer required". That section applies to Māori freehold land or General Land owned by Māori that was acquired under the PWA but was no longer required.

- Limb (e) captures two categories of former Māori freehold land. A similar provision is included in "protected land" under s 17 of the Urban Development Act and "protected Māori land" in s 11 of the Infrastructure Funding and Financing Act.
- Limb (f) is intended to capture land that has been returned not via a settlement process but for example, under the powers of the Waitangi Tribunal. A similar provision is also included as part of "protected land" under s 17 of the Urban Development Act and s 11 of the Infrastructure Funding and Financing Act.