

Submission on possible National Policy Statement- highly productive land

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NPS-HPL Submission
Land and Water Policy Team
Ministry for Primary Industries
PO Box 2526
Wellington 6140



RE: Submission on the proposed National Policy Statement for Highly Productive Land

This submission is by Hill Young Cooper, a strategic resource management and environmental policy and planning consultancy with offices in Auckland and Wellington.

Contact: d.mead@hyc.co.nz. Phone 021 440 961.

Thank you for the opportunity to comment on the proposed National Policy Statement on Highly Productive Land (NPS-HPL). We wish to make the following comments:

1. What is the Resource Management issue being addressed?
2. Options to address the issue
3. Objectives
4. Policies – plan changes and resource consents.

Problem Statement

The discussion documents statement of the problem is that the lack of clarity under the RMA on how highly productive land should be managed means the value of highly productive land for primary production is given inadequate consideration, with more weight generally given to other matters and priorities.

The fact that highly productive land is not given particular consideration in the RMA is deliberate. As the M.E. cost benefit analysis notes, comparison of land use outcomes in financial terms at a single parcel level is heavily weighted toward favouring change away from productive farming. This is because the financial returns from residential and business uses are in almost all instances greater than those from productive farm activity using highly productive land, while the value of land for countryside living is usually several times that of land used for productive farming activity. That means there is considerable incentive for current (farming) landowners to sell land, because the value of the soil resource to the individual landowner is usually far less than the potential price to be gained by selling for countryside living or urban purposes.

The RMA was designed to enable such market-based transactions to occur without interference from public agencies, as there are perceived to be no adverse effects on the environment to be managed from such transactions. The NPS seeks to address a resource *allocation* issue, rather than a resource management issue. Where the RMA does stray into allocation, it is for a public resource

like air or water; or a resource (like the coastline) which has a strong element of public amenity to it. Productive land is not a public resource, nor is one that has other public values attached to it.

The lack of recognition in the RMA is not the underlying problem. The issue is whether market-based processes for the allocation of highly productive land amongst competing land uses correctly reflect the costs and benefits involved. Specific factors that may lead to a misallocation of highly productive land appear to be:

- Cumulative loss – the tyranny of small decisions can see incremental loss that only becomes significant over time
- Time inconsistent preferences – short versus long term, for example the needs of future generations
- Externalities – activities like rural-residential development generate a reverse externality in that they expect nearby productive activities to curtail their activities
- Incorrect pricing – for example incorrect pricing of transport infrastructure can generate excessive urban expansion
- Poor policy – for example constraints on urban intensification which then lead to urban expansion
- Future use value – future generations should have an option to use the resource at some point in the future, whether that use is known or unknown.

Public policy theory would suggest that these issues should be tackled one-by-one. If incorrect pricing of transport systems is the issue, then the remedy is amending transport costs (road pricing). Reverse sensitivity could be addressed by some form of no complaints covenants on new rural-residential lots. There may well be substantial benefits from tackling the loss of productive land from urban growth through measures that support and enable intensification, rather than trying to stop urban expansion. Future use value could be secured through some form of public covenant over productive land (whereby the public purchase the future use value).

Whether the RMA should be used to address an allocation issue is not straight forward. Nevertheless, the RMA may be a tool to address the above issues; but to do so, there needs to be a clear rationale as to why the RMA should be used.

Even so, the approach of the NPS-HPL tends towards amending matters to be taken into account when deciding whether highly productive land should be used for non-primary production activities. That is, trade-offs and choices are still to be made on a case-by-case basis, but within an amended framework. That amended framework may tip the balance away from some conversion of productive land to urban uses, for example, but will not stop it. It may just slow it down.

Our experience is that the wide range of issues involved in urban expansion, including infrastructure costs, transport costs, and a host of environmental and community factors mean that productive land values quickly get 'lost' in any cost/benefit or multi-criteria analysis. Typically, if highly productive land is located on the edge of an urban area, then to avoid this, new greenfields development has to be located away from the existing urban area, imposing high transport and infrastructure costs. These costs can quickly overwhelm productive soil benefits. Flat land is always easier to develop for housing and business than hilly land.

Sitting behind the NPS appears to be a more fundamental concern that because of the finite nature of the productive land resource, and the uncertainty over future national and global conditions,

there needs to be some 'bottom lines' drawn so as to maintain options for the future. While current generations may value housing over vegetables, for example, in the future circumstances may change and vegetables will be more valuable than houses. But if this is the case there is no way to convert houses to vegetable growing land. The inability to reverse changes in land use is different to many other land use decisions where there is a degree of substitution possible, as well as 'reversibility'.

This is the concept of 'future use value', i.e. the value in retaining the option to use an environmental resource and its services in the future. This value can also be called a 'bequest value'. Future use value is related to potential, but uncertain, future resource uses. The value is likely to be small in the presence of close substitutes (for example, vegetables could be imported from somewhere else). However if there are no substitutes, then future use value may be high.

To retain options for future generations is a reasonable and justifiable value-driven decision to make, but if so, it should be explicit. This is important as a value-driven decision to 'protect' a specific resource needs to sit clearly within the 'effects management' approach of the RMA.

It is therefore important that the problem statement better define the issues and concerns, as this will lead to better policy. In particular it may be that within the overall context of managing highly productive land, that there is a graduation of policy responses. For example:

LUC 1 and 2: Protection in all circumstances (bottom line)

LUC 3: Case by case, but within a more expanded policy framework (better trade off).

Furthermore, a better 'trade off' type approach may require some structural amendments to the RMA (i.e. a different class of activity and an alternative to section 104).

Objectives of the NPS.

There are three objectives of the proposed NPS:

- Objective 1: Recognising the benefits of highly productive land;
- Objective 2: Maintaining the availability of highly productive land; and
- Objective 3: Protection from inappropriate subdivision, use and development.

The objectives should be re-cast as outcome statements, rather than be a statement as to an action. For example Objective 1 reads:

Objective 1: Recognising the benefits of highly productive land.

To recognise and provide for the value and long-term benefits of using highly productive land for primary production.

The objective reads more like a purpose statement. This objective could be re ordered so it says:

The value and long term benefits of using highly productive land for primary production are recognised and provided for.

However, there is still ambiguity in the objective. The word 'value' is not defined, neither is 'long term'. Is value an economic value, an ecological value or a societal value? Highly productive land has ecological value – such land grows good trees as much as it grows nice veges, for example. Long term could be taken to be 30 years, if reference is made to the notion of long term under the NPS-

UDC. It may be that reference should be to future generations to accord with the principle under Section 5 of the RMA (foreseeable needs of future generations, which the Court has stated should be at least two generations).

The RMA does refer to intrinsic values – the underlying or inherent value of the resource.

One option may be:

The intrinsic values of highly productive land are recognised and provided for when achieving the purpose of the Act.

Intrinsic value of highly productive land could then be defined to mean the actual and potential value of the land to support a wide range of intensive agricultural, food production and ecosystem services, now and into the future.

Not all highly productive land will be used for primary production, now or in the future. I should imagine that one approach to the Policy Statement will be to say that only x percentage of highly productive land will ever actually be used for primary production, and therefore there is a surplus that should be used for urban development, rather than sit idle.

Objective 2 tries to tackle this issue, with its reference to ‘availability’:

Objective 2: To maintain the availability of highly productive land for primary production for future generations.

Perhaps more pointedly, the focus should be on the finite nature of the resource. This would better match the schema of the RMA, for example Section 7’s reference to any finite characteristics of natural and physical resources. For example:

The finite stock of land of high productive value is maintained for future generations.

Objective 3 will be the objective most tested through RMA processes. Objective 3 reads in full as:

Objective 3: Protecting from inappropriate subdivision, use and development

To protect highly productive land from inappropriate subdivision, use and development, including by:

- *avoiding subdivision and land fragmentation that compromises the use of highly productive land for primary production;*
- *avoiding uncoordinated urban expansion on highly productive land that has not been subject to a strategic planning process; and*
- *avoiding and mitigating reverse sensitivity effects from sensitive and incompatible activities within and adjacent to highly productive land.*

The discussion document states that Objective 3 provides direction to all decision makers to ensure highly productive soils are protected from “inappropriate” subdivision, use and development through avoiding certain types of development and adverse effects. This will help to maintain the availability of highly productive land for primary production (Objective 2).

The draft wording for Objective 3 is aimed at providing an indication of what is “inappropriate” subdivision, use and development (e.g. fragmentation, uncoordinated urban development) while

leaving some flexibility for councils to determine this on a case-by-case basis. Case law has confirmed that reference to “inappropriate” within a provision means there may be appropriate development in particular circumstances.

The question of what is ‘inappropriate’ could be better described through a series of policies, rather than be determined through an objective. There are some difficulties in drafting the objective to cover off all the circumstances as to what is inappropriate. For example:

- The second leg (uncoordinated urban expansion that has not been subject to a strategic planning process) is somewhat hard to interpret. What is uncoordinated development? Most urban development of any scale is coordinated by somebody.
- Is coordinated urban development that has not been subject to a strategic planning process ok? Unplanned may be better than uncoordinated.
- The third leg’s reference to mitigation opens the door to a range of scenarios, including small scale or token mitigation.

If the intention is to better spell out what to achieve, rather than the broad term “incompatible subdivision use and development”, then the objective could be more pointed, for example:

Objective 3: Protecting from inappropriate subdivision, use and development

Land of high productive value is protected from unplanned urban encroachment and intrinsic values are not diminished by land fragmentation and/or reserve sensitively effects from incompatible activities.

This type of objective better accords with the idea of a bottom line and the ‘protective’ language of Section 6 of the RMA. But it is necessarily more directed at the specific allocation of a resource. It compares with Town and Country Planning Act:

(d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

Options

Three options to better recognise and protect highly productive land are identified:

- A National Policy Statement for Highly Productive Land;
- National Environmental Standards for Highly Productive Land; and
- Amendments to the National Policy Statement on Urban Development Capacity 2016.

Whether the RMA is the appropriate tool to efficiently and effectively allocate resources between competing resources rather than manage resources is not questioned.

The discussion document notes that “another option considered was amending section 6 of the RMA to include the protection of highly productive land as a matter of national importance, similar to the Town and Country Planning Act 1977”.

The benefits of this approach are not discussed. Section 6 provides a ready framework for ‘matters of national importance’ to be addressed when plans are prepared and consents assessed. If a

'bottom line' type approach is to be taken, then amending section 6 of the RMA is the appropriate route. The discussion document says that amendments to Part 2 of the RMA "would need to be considered over a longer timeframe as part of the wider review of the resource management system and would take many years to achieve the desired outcomes through RMA plan provisions and resource consent decisions. As such, this option was not identified as a key option at this stage but may be considered as part of future resource management reform".

The more likely reason that Section 6 is not intended to be amended is that the NPS is not seeking to impose a bottom-line, rather it is intending to provide an enhanced framework for considering trade-offs.

But stepping away from the Section 6 option introduces a range of complexities as to how plans are formulated and administered. The proliferation of national policy statements creates further confusion as to what weight they should be accorded to a specific NPS and how they sit with regard to Part 2 and the statutory requirements when preparing plans and assessing resource consents.

Weight to given to National Policy Statements when preparing plans.

In theory, the requirement for plans to "give effect to" national policy statements means that national policy statements should be more than a "list of potentially relevant considerations, which will have varying weight in different fact situations".

National policy statements translate the general principles in Part 2 into more specific objectives and policies, and should not require weighing up of their provisions against other matters covered by the RMA. NPS should introduce clear and explicit directions. But if policies in national policy statements use varying language, with some policies being more prescriptive than others, then inevitably questions of weight come into play.

For example, proposed Policy 3 (new urban development and growth on highly productive land) states that "Urban expansion must not be located on highly productive land unless":

- a. there is a shortage of development capacity to meet demand (in accordance with the NPS-UDC methodologies and definitions); and*
- b. it is demonstrated that this is the most appropriate option based on a consideration of:*
 - *a cost-benefit analysis that explicitly considers the long-term costs associated with the irreversible loss of highly productive land for primary production;*
 - *whether the benefits (environmental, economic, social and cultural) from allowing urban expansion on highly productive land outweigh the benefits of the continued use of that land for primary production; and*
 - *the feasibility of alternative locations and options to provide for the required demand, including intensification of existing urban areas.*

The matters set out leave open a wide range of possible outcomes, with protection of the land likely to be low on the list:

- Urban expansion pressures occur because there is demand. The way that the NPS-UDC is crafted, there is always insufficient 'feasible' capacity, especially capacity related to intensification.
- Cost benefit analysis struggles to address long term costs and benefits, let alone future use values. Discounting see future costs and benefits given lower values. There is no methodology to weigh the irreversible lost value of highly productive land for primary production.
- Benefits to households from proximity to workplaces and services will almost always outweigh returns to primary activities from using productive land.

At the very least, the use of term 'cost benefit analysis' should be qualified. Multi-criteria analysis may be more appropriate to the wide range of issues involved and the focus on value judgements.

More importantly, the policy introduces additional transaction costs for councils, developers, landowners and communities, but provides very little additional direction. The requirement in Section 74 of the RMA for plans to give effect to National Policy Statements sits alongside the requirements that the plan must be in accordance with Part 2 of the Act. Unless the NPS provides a clear expression of how Part 2 is to be implemented, then there will be a great deal of confusion as to which takes precedence.

Proposed Policy 6 - consideration of requests for plan changes – adds a further matter to the above list. It refers to the alignment of the private plan change request with relevant local authority statutory and non-statutory plans and policies relating to urban growth and highly productive land.

What weight is to be given to non-RMA plans? RMA processes typically given little or no weight to plans that have not been tested via the RMA process. The criteria of whether the private plan change request aligns with relevant local authority plans and policies relating to urban growth, such as a structure plan for a particular area or a future development strategy to give effect to the NPS-UDC is supposed to provide a reason to decline the plan change. But a veto cannot be based on a document that sits outside the RMA and which may have not passed through an appropriate consultation process and/or been subject to significant scrutiny.

Weight to be given to NPS in Resource Consents

The policy for assessment of resource consents is equally problematical to administer, given the overall emphasis of the RMA and section 104 on the management of adverse environmental effects when assessing resource consents.

Section 104 states that when considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to National Policy Statements. They (NPS) do not have to be given effect to at the consent stage.

The proposed policy provides no support for refusing consent to non-complying activities. In fact the policy would appear to rule out any form of 'first principles' decision that the application will generate effects that are more than 'minor'. Unless the loss of productive land can be identified as an effect that is more than minor, there will be little control over consents.

The policy further entrenches a case-by-case trade-offs type assessment, but without giving a high weight to the protection of highly productive soils.

Policy 7 refers to:

When considering an application for subdivision or urban expansion on highly productive land, consent authorities must have regard to:

- a. The alignment of the application with relevant local authority statutory and non-statutory plans and policies relating to urban growth and highly productive land;*
- b. The extent to which the subdivision or development will impact on the existing and future use of the land for primary production;*
- c. The practical and functional need for the subdivision or urban expansion to occur at that location;*
- d. The potential for reverse sensitivity effects and proposed methods to avoid or mitigate potential adverse effects on, and conflicts with, lawfully established activities; and*
- e. The benefits (environmental, economic, social and cultural) from the proposed activity compared to the long-term benefits that would occur from the continued or potential use of the land for primary production.*

The discussion document suggests that the intent of these policies is to ensure a simple economic argument that highly productive land is worth more as urban development does not outweigh the benefits of the continued use of the land for primary production before any private plan changes request or resource consent application is approved.

What is being sought by the policy is a completely different assessment to that which is normally applied to resource consents. It is an overall broad judgement type assessment of all the costs and benefits, not whether adverse effects are adequately avoided, remedied or mitigated. This type of 'trade off' type assessment is a major step away from current practice and will introduce a range of legal and methodological issues, none of which will be easy to resolve.

It may be more effective if the NPS (or an NES) introduced a separate set of 'tests' and 'processes' to assess the merits of proposed non-primary use of highly productive land, rather than seek to graft onto Section 104 a range of matters that do not relate to managing adverse effects.

This could be similar to section 106, for example. Section 106 sets out specific tests for subdivisions and natural hazards, The NPS could introduce a separate section into the RMA setting out a presumption against urban encroachment or rural-residential development of highly productive land unless certain conditions apply, for example it is demonstrated that there are no other reasonably practical options to accommodate the proposed urban or rural-residential development.