

14 October 2019

Ministry for Primary Industries
Wellington

By email: soils@mpi.govt.nz

Re: Valuing highly productive land – discussion document on proposed National Policy Statement on Highly Productive Land

1. Introduction

- 1.1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the discussion document *Valuing highly productive land – proposed National Policy Statement on Highly Productive Land* (discussion document).
- 1.2. This submission focuses on potential issues with the practical application of the provisions of the draft National Policy Statement on Highly Productive Land (draft NPS-HPL), which is Option 1 (the preferred option) in the discussion document. The Law Society makes some general points, before commenting on specific objectives and policies in the draft NPS-HPL.

2. Options for addressing future management of highly productive land

- 2.1. The Ministry for the Environment and Ministry for Primary Industries (the Ministries) have jointly prepared the draft NPS-HPL and are now consulting on that draft via the discussion document, alongside two other options for providing national direction on the management of highly productive land:
 - 2.1.1. Option One – the draft NPS-HPL;
 - 2.1.2. Option Two – a National Environmental Standard (NES); or
 - 2.1.3. Option Three – amendments to the existing NPS on Urban Development Capacity 2016, to explicitly require highly productive land to be considered when identifying new urban areas to meet the requirements of that NPS.

Need for integration and prioritisation between various NPSs

- 2.2. The Law Society has a general concern about the integration and prioritisation between various National Policy Statements (NPSs), which is highlighted by the options that have been put forward in this discussion document. There has already been the need for judicial consideration of the preambles of various NPSs, to assist in determining how those should be applied in the event of potential conflict.
- 2.3. Clearly, there will be significant interface between the draft NPS-HPL and other NPSs (both existing and proposed), notably those regarding Urban Development and Freshwater Management. The Law Society considers that the draft NPS-HPL should set out how potential conflicts between the various policy objectives are to be reconciled and direct when certain issues (such as the need for urban development) must take priority over others (such as the need to protect highly productive land). That is the type of guidance that should be provided

by central government and which must be included in higher order planning documents (including NPSs) for them to be of value.

- 2.4. For this reason, the Law Society **recommends** that consideration is given to the potential benefits of pursuing Option Three, which is to address the management of highly productive land by way of amendments to the existing NPS on Urban Development Capacity 2016. In the Law Society's view, this could be the most effective and efficient way of providing the required level of national direction.
- 2.5. Similarly, there is a need for national direction on what priority should be given to the allocation of water for primary production purposes. As presently proposed, the draft NPS-HPL is relatively neutral on both water availability and quality, even though these issues are central to primary production. This issue could appropriately be addressed in the proposed NPS on Freshwater Management, which is currently being consulted on.
- 2.6. The Law Society also **recommends** that Option 2 (proceeding by way of an NES) should be given more detailed consideration. From a review of the discussion document, it appears that this option has been dismissed on the basis that there would be challenges in developing an NES that was suitable for all regions/areas of New Zealand. It is unclear why this was seen as an issue for the NES that would not equally apply to the NPS. In any event, it may be possible for such issues to be overcome, for example by using the proposed default definition of highly productive land, as well as allowing for the NES to be overridden to take account of local circumstances (as provided for in section 43B of the Resource Management Act 1991).

3. Resourcing to implement the draft NPS

- 3.1. The second general point is the increasing workload being placed on local authorities, in part as a result of the range of reform proposals that are currently being progressed. The Law Society notes that the provision for default definitions and exemption from using the Schedule 1 process to implement the requirements of the draft NPS will assist in this regard, provided there has been appropriate consideration of the impacts that approach may have. However, workload pressures on local authorities will need to be kept in mind as the draft NPS is progressed.

4. Proposed Objectives 1 and 2

- 4.1. Objective 1 is proposed to read as follows:

“To recognise and provide for the value and long-term benefits of use of highly productive land for primary production.”
- 4.2. This objective is not an outcome. Nor does it provide any practical guidance for local authorities, as is required for national direction to be of value. The discussion document states (at page 36) that the policy intent is to ensure that these matters are *“are better recognised in RMA planning and decision-making”*. This simply begs the questions – how much better, and when will we know that this objective has been achieved? Proposed Objective 1 gives no indication.
- 4.3. The Law Society **recommends** that:
 - 4.3.1. The focus of the objectives of the draft NPS should be on retaining the value and long-term benefits of using highly productive land for primary production; and

- 4.3.2. If they are to be retained, proposed Objectives 1 and 2 (recognising the benefits and maintaining the availability of highly productive land) could be merged into one objective, which should be redrafted in the form of an outcome.

5. Proposed Objective 3

- 5.1. Proposed Objective 3 commences as follows:

“To protect highly productive land from inappropriate subdivision, use and development including by ...”

- 5.2. The discussion document refers (at page 37) to the direction from the Supreme Court in *King Salmon*¹ as to how “inappropriateness” should be judged (that is, subdivision, use and development will not be considered inappropriate on highly productive land in all circumstances). It then provides the helpful example of nationally significant infrastructure potentially being appropriate on such land, where it can largely co-exist with primary production use.
- 5.3. However, post the *King Salmon* decision, the phrase “inappropriate subdivision, use and development” creates significant scope for debate and, by implication, the potential for litigation. National direction should be designed to reduce such potential, not increase it.
- 5.4. The discussion document also makes clear (at page 37) that what is “appropriate” development is largely being left for local authorities to determine on a case-by-case basis. Again, national guidance is of most value when it prescribes the circumstances in which development on highly productive land *must* be considered appropriate or inappropriate (for example), while still providing flexibility for local circumstances to be accommodated, rather than simply “directing” local authorities to determine this.
- 5.5. Further, the current wording of proposed Objective 3 is not consistent with the evident policy intent (as outlined for example on page 33 of the discussion document) that the use of highly productive land might have to give way to urban expansion, where there are no practicable alternatives.
- 5.6. In this regard, the Law Society **recommends** that proposed Objective 3 be amended by the addition of “*while accepting that urban expansion may need to proceed on highly productive land where there are no practical alternative locations and options*”, to the first sentence.

6. Proposed Policy 1

- 6.1. Proposed Policy 1, related to identification of highly productive land, cross-references the draft criteria in Appendix A of the discussion document. The criteria are related to the potential primary productive capacity of the land.
- 6.2. However, Appendix A contains a series of factors that local authorities may also consider “*when identifying areas of highly productive land*”. Most of those factors are matters that might mean that potential is not realised in practice. In other words, they are not actually factors in the identification process, but rather reasons why, notwithstanding the fact that land might meet the specified criteria, it should nevertheless not be “*identified*” as such.
- 6.3. The Law Society **recommends** that the criteria in Appendix A be amended by adding an additional criterion (d) along the lines of the following:

¹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

“Whether, notwithstanding criteria (a)-(c) above, there is good reason not to identify areas of highly productive land, including ... [insert the existing factors (a) to (f)].”

7. Proposed Policy 2(b)

7.1. Proposed Policy 2(b) currently reads as follows:

“Local authorities must maintain the availability and productive capacity of highly productive land for primary production by making changes to their Regional Policy Statements and District Plans to: ...

...

b. Consider giving greater protection to areas of highly productive land that make a greater contribution to the economy and the community.”

7.2. The Law Society notes that, as matter of general practice, local authorities already consider such matters. There is therefore little value in providing national “direction” that they do so.

7.3. In that regard, the Law Society **recommends** that:

7.3.1. Either proposed Policies 2(a) and (b) be amalgamated, so the extent of any prioritisation under (a) reflects, among other things, the extent of contribution to the economy and the community by areas of highly productive land; or

7.3.2. Proposed Policy 2(b) be amended so that it begins with *“Give greater protection to ...”*.

8. Proposed Policy 3

8.1. Proposed Policy 3 provides guidance on when new urban development and growth on highly productive land might be acceptable. If proposed Objective 3 is not amended as suggested above, or to like effect, the Law Society notes that this proposed policy will not achieve that proposed objective.

9. Proposed Policies 6(a) and 7(a)

9.1. Proposed Policy 6(a) directs that when considering a private plan change request for urban or rural lifestyle development on highly productive land, a local authority must have regard to *“relevant local authority ... non-statutory plans and policies relating to urban growth and highly productive land”*. Proposed Policy 7(a) contains a similar requirement with respect to resource consent applications for subdivision or urban expansion on highly productive land.

9.2. Non-statutory plans are, by definition, not prepared within a statutory framework. On that basis, the Law Society **recommends** that:

9.2.1. Non-statutory plans therefore ought not to be given the same weight as relevant local authority statutory plans; and

9.2.2. If such plans are to be given any weight, the draft NPS should better define what plans and policies might fall within this category. For example, is this restricted to plans that have been prepared using a consultative process in accordance with the Local Government Act 2002? And/or plans that have been prepared and adopted on a joint basis for regions (such as the Future Urban Land Supply Strategy for

Auckland, Smartgrowth for the Bay of Plenty and the Heretaunga Plains Urban Development Strategy for Hawke's Bay)?

10. Proposed Policy 6(c)

- 10.1. Proposed Policy 6(c) directs that when considering a private plan change request for urban or rural lifestyle development on highly productive land, a local authority must have regard to whether "*there are alternative options for the proposed use on land that has less value for primary production*".
- 10.2. Applicants for private plan changes usually seek to rezone land that they own or control. Land that they do not own or control will therefore be outside the scope of their request and as such, not a practicable alternative option for the applicant.
- 10.3. Accordingly, the Law Society **recommends** that Policy 6(c) be deleted, unless this is introduced in combination with a mechanism that enables the kind of alternatives analysis that would occur in the context of a council-initiated plan review to be undertaken in the context of a private plan change request.

This submission has been prepared by the Law Society's Environmental Law Committee. If further discussion would assist, please do not hesitate to contact the committee convenor, Bronwyn Carruthers, via the Law Society's Law Reform Adviser Emily Sutton (emily.sutton@lawsociety.org.nz)

Yours faithfully



Herman Visagie
Vice President