

**BEFORE THE HEARING COMMISSIONER APPOINTED BY THE BAY OF
PLENTY REGIONAL COUNCIL**

IN THE MATTER of the Resource Management Act 1991
(the Act)

AND

IN THE MATTER of hearing of submissions on Proposed
Change 6 to the Regional Policy
Statement

**INDUSTRY STATEMENT TO BE TABLED OF SARAH CAMERON FOR
HORTICULTURE NEW ZEALAND**

16 June 2023

PURPOSE AND SCOPE OF EVIDENCE

1. This statement responds to the Section 42A report recommendations in regard to Horticulture NZ submission and further submissions on Change 6, specifically on the National Policy Statement for Highly Productive Land (NPSHPL).

INTRODUCTION

1. HortNZ is the industry body for the horticulture sector, representing growers who pay levies on fruit and vegetables sold either directly or through a post-harvest operator, as set out in the Commodity Levies (Vegetables and Fruit) Order 2013.
2. On behalf of growers, HortNZ takes a detailed involvement in resource management planning processes as part of its national and regional environmental policy response.
3. HortNZ is affiliated with two key product groups representing growers within the Bay of Plenty region: New Zealand Kiwifruit Growers Incorporated and Avocados New Zealand. These product groups have their own commodity levies.

RESPONSE TO SECTION 42A REPORT

4. **Appendix 1** includes a summary table setting out HortNZ's submissions, the recommendations of the S42A report on these submissions and HortNZ response.
5. The specific topic of NPSHPL, where further explanation is required, is addressed below.

National Policy Statement for Highly Productive Land

6. HortNZ submission sought to include relevant provisions from the NPSHPL including a definition of highly productive land (HPL).
7. The S42A author recommends that the submissions be rejected on the basis that "Proposed Change 6 was notified prior to the NPS-HPL's gazettal on 17 October 2022. Proposed Change 6 was not developed with the intention of giving effect to the NPS-HPL and submissions on it are considered out of scope".
8. The approach of defining HPL (and then providing for the NPSHPL through the Regional Policy Statement) has been adopted by other regions- specifically Waikato Regional Council.

9. Waikato Regional Council notified Change 1 - National Policy Statement on Urban Development 2020 and Future Proof Strategy in October 2022 (prior to the gazettal of the NPSHP)
10. HortNZ submissions sought similar provisions to Change 6 including a definition of HPL which was accepted by the S42A author
11. The S42A¹ author noted "I see the NPS-HPL as a relevant consideration in WRPS Change 1 and do not consider it out of scope insofar as it relates to provisions which also address urban growth and the NPS-UD. Given the NPS-HPL will still apply in relation to urban development on highly productive land, the provisions of WRPS Change 1 would be immediately out of date without amendment to recognise and remove inconsistencies with the NPS-HPL. This would not assist WRC and territorial authorities in the region to achieve their functions".
12. "Some submitters suggested such amendments would go beyond the scope of WRPS Change 1 in regard to giving effect to the NPS-HPL. As I have explained above, the amendments I recommend to WRPS Change 1 do not bypass the Schedule 1 process required by regional councils to give effect to or implement the NPS-HPL, this will occur through a separate process, Proposed Change 5. Rather, I recommend amendments to recognise the NPS-HPL which are within scope".
13. Following the release of the S42A report, the Hearing Commissioners set out the panel's approach to submissions in relation to NPSHPL. The panel stated "The Panel must comply with the statutory requirements contained in section 61 of the RMA, in particular s61(1)(da), which requires that WRPS Change 1 must be "in accordance" with the NPSHPL".
14. Under s41C(2) of the RMA, the Panel requested all submitters (including further submitters) that have lodged submissions in respect of the NPS HPL to provide further information:
 - How does the submission/opposition of submission fall within the current Schedule 1 process for the WRPS Change 1 rather than sit within the proposed Schedule 1 process for WRPS Change 2
 - How does the submission/opposition of submission enable the proposed WRPS Change 1 to be in "accordance with" the NPS HPL as required by s61(1)(da) of the RMA? Minute 2 is attached as **Appendix 2**.

¹ <https://atlas.boprc.govt.nz/api/v1/edms/document/A4391615/content>

15. HortNZ sought a legal opinion on these questions which is attached as **Appendix 3**
16. The legal advice agreed with the approach taken by council and supported the view that inclusion of the NPSHPL was appropriate.

Conclusion

17. The S42A author for Change 6 has recommended the NPSHPL is out of scope. HortNZ rejects this approach based on the approach taken by Waikato Regional Council and HortNZ legal advice.
18. A key constraint to horticultural operations is access to land. This is due to a number of factors, one being competition for HPL for housing, an aspect which has been heavily influenced by policy
19. Not all land is suitable for food production; this makes the productive use of HPL important. Urban development and productive land need to be considered together to provide an integrated, planned approach that facilitates urban growth in a manner which maintains the overall productive capacity of highly productive land.
20. HortNZ supports an approach to include amendments to Change 6 that recognises the NPSHPL.

Sarah Cameron

16 June 2023

Appendix 1

Provision	Support/oppose	Reason	Decision sought	S42A Response	HortNZ response
Definitions					
New – highly productive land	New	To align with National Policy Statement Highly Productive Land	Include definition of highly productive land from the National Policy Statement Highly Productive Land	Reject	HortNZ continue to accept a definition of HPL
Part two: Resource management issues, objectives and summary of policies and methods to achieve the objectives of the Regional Policy Statement					
2.8.1 Regionally significant urban and rural growth management issues	Support in part	Recognise domestic food supply and lower emissions food production	Amend 2.8.1 (2) to include: An imbalance of land supply, demand and uptake can have adverse economic and social effects, yet it is very difficult to plan and predict. Inefficient patterns of land use and ad hoc development are difficult and costly to service and maintain. Unplanned growth and inefficient land use also have the potential to adversely affect rural production activities and to reduce the ability of versatile land to be used for a range of productive purposes <u>including food supply for New Zealand</u>	Reject	HortNZ accepts the recommendation in the S42A report

			<u>and transition to lower emissions food production</u>		
Policy UB 14B	Support in part	HortNZ consider it important that urban development and productive land are considered together to provide a planned approach so new urban areas are designed in a manner that maintains the overall productive capacity of highly productive land.	Amend Restricting urban activities outside urban environments <u>and avoiding urban development on highly productive land</u>	Reject	HortNZ continues to seek alignment with the NPSHPL
Part three: Policies and methods					
Policy UG 7A	Support in part	HortNZ consider it important that urban development and productive land are considered together to provide a planned approach so new urban areas are designed in a manner that maintains the overall productive capacity of highly productive land and	Amend to include <u>g. Reverse sensitivity effects from development are managed so as not to constrain land-based primary production activities on highly productive land</u> <u>h. Restricting urban and lifestyle activities outside urban environments</u>	Reject	HortNZ continues to seek alignment with the NPSHPL and reverse sensitivity protections

		avoids reverse sensitivity effects			
Policy 18B Managing rural development and protecting versatile land	Support		Retain but give effect to amendments to in UG 7A	Accept	HortNZ accepts the recommendation in the S42A report
Policy UG 19B Providing for rural lifestyle activities	Support in part		<p><u>Amend to include Territorial authorities must avoid zoning highly productive land as rural lifestyle, except where:</u></p> <p>a. <u>the overall productive capacity of the highly productive land will be enhanced, when considered on a district-wide basis; and</u></p> <p>b. <u>there are no other options available within the district to provide for a</u></p>	Reject	HortNZ continues to seek alignment with the NPSHPL

			<p>c. <u>rural lifestyle zone on land that is not highly productive land; and additional land is required for rural lifestyle purposes to provide a recipient zone for lots under transferable development rules.</u></p>		
Policy UG 20B Managing reverse sensitivity effects on rural product activities and infrastructure in rural areas	Support	Support minor amendments but retention of policy	Retain	Accept	HortNZ accepts the recommendation in the S42A report
Policy UG 24B Managing reverse sensitivity effects on existing rural	Support	Support minor amendment but retention of policy.	Retain	Accept	HortNZ accepts the recommendation in the S42A report

production activities in urban areas					
Method 18: Structure plans for land use changes	Support in part		Amend to include <u>x. Show how reverse sensitivity next to rural productive land will be managed so as not to constrain land-based primary production</u>	Reject	HortNZ continues to seek reverse sensitivity protections

Appendix 2

**HEARING OF WAIKATO REGIONAL POLICY STATEMENT – PROPOSED CHANGE 1
BY THE WAIKATO REGIONAL COUNCIL
HEARING PANEL MINUTE #2**

1. The purpose of Minute #2 is to set out the Panel's approach to submissions in respect of the National Policy Statement for Highly Productive Land (**NPS HPL**) lodged in respect of Proposed Change 1 hearing (**WRPS Change 1**).

2. The Panel is cognizant of the following:
 - (a) Section 55 of the Resource Management Act 1991 (RMA) sets out the ways in which a Regional Council may incorporate an NPS into its operative Regional Policy Statement.
 - (b) The NPS HPL directs a Regional Council to prepare maps of the highly productive land within its region and thereafter incorporate these within its operative Regional Policy Statement by way of the Schedule 1 process (clause 3.5 NPS HPL). A Regional Council has 3 years following commencement date of the NPS HPL to do so.
 - (c) The NPS HPL is silent as to the incorporation of the balance of the NPS HPL into Regional Policy Statements and therefore the Schedule 1 process must be followed.
 - (d) The Waikato Regional Council intends via proposed WRPS Change 2 to incorporate the NPS HPL into the operative Regional Policy Statement (**WRPS Change 2**).
 - (e) WRPS Change 1 is proceeding through the Schedule 1 process to incorporate the National Policy Statement for Urban Development and the present Future Proof Strategy into the operative Regional Policy Statement.
 - (f) The Panel must comply with the statutory requirements contained in section 61 of the RMA, in particular s61(1)(da), which requires that WRPS Change 1 must be "in accordance" with the NPS HPL.

3. Accordingly, by way of its powers under s41C(2) of the RMA, the Panel requests all submitters (including further submitters) that have lodged submissions in respect of the NPS HPL, provide the further information referred to in paragraph 4 below (**further information**). The further information must be lodged with Council by **4.00pm, 4 May 2023**. The further information may be incorporated within the legal submissions lodged by the submitter prior to hearing, provided it is identified by way of heading "Further

Information: Response to Minute 2" or provided by way of separate document titled "Further Information: Response to Minute 2")

4. The further information requested is:

- (a) How does the submission / opposition of submission fall within the current Schedule 1 process for the WRPS Change 1 rather than sit within the proposed Schedule 1 process for WRPS Change 2? and
- (b) How does the submission / opposition of submission enable the proposed WRPS Change 1 to be in "accordance with" the NPS HPL as required by s61(1)(da) of the RMA?



Barbara Mead (Chairperson)
WRPS Change 1 Hearing Panel
12 April 2023

Appendix 3

**BEFORE THE COMMISSIONERS
AT WAIKATO**

IN THE MATTER of the Resource Management Act 1991
(**the Act**)

AND

IN THE MATTER of Proposed Waikato Regional Policy
Statement Plan Change 1

LEGAL SUBMISSIONS FOR HORTICULTURE NEW ZEALAND

4 MAY 2023



ATKINS | HOLM | MAJUREY

Helen Atkins/Louise Ford
PO Box 1585
Shortland Street
AUCKLAND 1140

Solicitor on the record
Contact solicitor

Helen Atkins
Louise Ford

Helen.Atkins@ahmlaw.nz
Louise.Ford@ahmlaw.nz

[09] 304 0421
[09] 304 0429

INTRODUCTION

1. These legal submissions are on behalf of Horticulture New Zealand (**HortNZ**) in relation to the proposed Waikato Regional Policy Statement Change 1 (**Change 1**), and in response to the further information requested by the hearing panel in Minute 2, dated 12 April (**Minute**).
2. HortNZ made a submission on Change 1 and considered the Waikato Regional Council's (**Council**) section 42A report sufficiently addressed HortNZ's concerns. HortNZ therefore, did not lodge evidence on Change 1. However, following the Minute, HortNZ considers these legal submissions are necessary to clearly set out its position.

Background to Change 1

3. Change 1 was notified in October 2022 for the purpose of incorporating the requirements of the National Policy Statement on Urban Development 2020 (**NPSUD**) into the Waikato Regional Policy Statement (**WRPS**) and to reflect the updated Future Proof Strategy.
4. Upon notification, Change 1 did not make any reference or meaningful attempt to incorporate the National Policy Statement for Highly Productive Land (**NPSHPL**), which came into force in October 2022. The Section 42A Report on Change 1 stated:¹

The National Policy Statement for Highly Productive Land (NPS-HPL) came into force on 17 October 2022. As such, it was not considered in the development of WRPS Change 1 (which was publicly notified on 18 October 2022). WRC has up to 3 years (from 17 October 2022) to publicly notify changes to the WRPS to give effect to the NPS-HPL, including mapping highly productive land in the region. This will be done separately from the WRPS Change 1 process. However, as I address below, there are some inconsistencies between WRPS Change 1 and the NPS-HPL and I recommend amendments in line with the WRC staff submission to resolve this.

5. HortNZ supports the Council's recommendations to amend Change 1 to remove inconsistencies between Change 1 and the NPSHPL.

¹ Change 1 Section 42A Report, paragraph 37.

6. WRC has indicated, as noted in the Minute, that the NPSHPL will be incorporated into the WRPS through Waikato Regional Policy Statement Change 2 (**Change 2**). Change 2 is yet to be consulted on or notified. As such, there is no information from WRC on the way the NPSHPL would be incorporated into the WRPS.
7. The Independent Hearings Panel (**Panel**) released the Minute directing that Counsel for submitters make submissions on the following questions:
 - (a) How does the submission/opposition of submission fall within the current Schedule 1 process for the WRPS Change 1 rather than sit within the proposed Schedule 1 process for WRPS Change 2? (**Question 1**); and
 - (b) How does the submission/ opposition of submission enable the proposed WRPS Change 1 to be "in accordance with" the NPSHPL as required by S61(1)(da) of the Resource Management Act 1991? (**Question 2**).

HortNZ's Overall Position

8. Many of HortNZ's concerns were addressed in WRC's Section 42A report (**Report**). The Report recommended a number of changes to Change 1 to make it more consistent with and recognise the NPSHPL, such as the inclusion of the definition of highly productive land from the NPSHPL. As noted above, HortNZ is generally accepting of the recommendations in the Report, which is why it decided not to submit evidence in this process.
9. These legal submissions respond to the Minute and set out HortNZ's position that recognition of the NPSHPL should not be left to Change 2. This is due to the lack of certainty around what Change 2 will look like or when it may be implemented. Until such a time as Change 2 is notified it is unclear whether the NPSHPL will adequately be given effect to. Furthermore, in the time intervening Change 1 and the notification of Change 2 there is potential for a "trickle down" of negative planning results from Change 1's failure to adequately implement the NPSHPL.

10. HortNZ submits that the Panel have the scope and obligation to consider and address, as far as practicable, the NPSHPL through this Change 1 process.
11. We make these submissions noting that Change 2 will still be necessary to give full effect to the NPSHPL given the timing of Change 1 and the timing of the gazetting of the NPSHPL.

RESPONSE TO QUESTION 1

12. HortNZ submits that the consideration and implementation of the NPSHPL can fall within the current Schedule 1 process for Change 1, and is more appropriate to start now, rather than waiting until the Schedule 1 process for Change 2.
13. In relation to local authority consideration of national policy statements, section 55(2D) of the RMA requires the following:

"In all cases, the local authority must make the amendments—

 - (a) as soon as practicable; or*
 - (b) within the time specified in the national policy statement (if any); or*
 - (c) before the occurrence of an event specified in the national policy statement (if any)."*
14. The ultimate effect of these provisions is that the Council has a statutory obligation to give effect to the provisions of the NPSHPL in the WRPS as soon as practicable.
15. In *Horticulture New Zealand v Manawatu-Wanganui Regional Council*² the High Court found that the Council (and later the Environment Court) was not obliged to consider implementing the National Policy Statement for Freshwater Management (**NPSFM**) at that stage in the proceedings due to the fact that implementation must be undertaken through a Schedule 1 process, of which notification and consultation are vital aspects, and to implement the NPSFM at that late stage in proceedings would undermine the Schedule 1 process.³
16. This case can be distinguished from the current Change 1 process as the NPSHPL took effect in October 2022. Change 1

² *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.

³ *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, at [101].

was open for submissions and consultation after the NPSHPL was gazetted and in effect. Therefore, while Change 1 (as notified) did not consider the NPSHPL, the Council has recommended amendments which remove many inconsistencies between Change 1 and the NPSHPL.

17. HortNZ supports the recommendations in the section 42A Report and submits that Change 1 enables the Council to implement the NPSHPL, as soon as practicable, and to the extent possible based on the scope provided by submissions on Change 1.
18. In contrast, Change 2 has yet to be notified, or consulted on. While consideration and implementation of the NPSHPL through Change 2 is required, leaving it to the Change 2 Schedule 1 process will not meet the Council's obligation to "make amendments as soon as practicable".

RESPONSE TO QUESTION 2

19. HortNZ submits that its submission provides the scope for the Panel's consideration of the NPSHPL to occur under this Schedule 1 process for WRPS Change 1. HortNZ submits that the Panel has the scope to make changes to Change 1 for it to be "in accordance with" the NPSHPL, as required by s61(1)(da) of the RMA.
20. Section 61(1)(da) of the RMA requires that regional councils must prepare and change their regional policy statements in accordance with national policy statements, it is therefore a legal requirement that the WRPS be changed in accordance with the NPSHPL. HortNZ's submission on Change 1 gives the Panel scope to consider, and make determinations, in accordance with the NPSHPL.
21. When considering whether an amendment to a proposed plan or policy statement is fairly and reasonably within the submissions filed, the relevant test is whether an interested person would have reasonably anticipated that an amendment to a proposed plan (or policy statement) could have resulted from a decision sought by the submitter as summarised by the local authority.⁴

⁴ *Christchurch International Airport Ltd v Christchurch City Council*, ENC C77/99, 12 May 1999, at [15].

22. The present case falls squarely within this test. HortNZ made multiple references to the implementation of the NPSHPL in its submission on Change 1. Thus, bringing the consideration of the NPSHPL within the ambit of consideration during Change 1's Schedule 1 process, and for this consideration to be "in accordance with" the NPSHPL, as required by s61(da) of the RMA.
23. Many of the recommendations sought in HortNZ's initial submissions, along with those recommended in the Report align closely and could reasonably have been anticipated by anyone who had read HortNZ's initial submissions. There is a clear link between HortNZ's submissions, and the recommendations made in the Report.

CONCLUSION

24. In conclusion, HortNZ submits that there is a requirement for the Council to implement the NPSHPL as soon as practicable. HortNZ's submission on Change 1, and the Council's recommendations in its Report, give the Panel the necessary scope to consider the NPSHPL, and to make a determination which would be in accordance with the NPSHPL.
25. HortNZ considers the Report sufficiently addresses its concerns in relation the implementation of the NPSHPL, and sufficiently protects highly productive land, until a specific Schedule 1 process is undertaken for the indicated Change 2.

DATE: 4 May 2023



Louise Ford / Tait Hoby
Counsel for Horticulture New Zealand