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By email

Daniel Bryant  
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Dear Daniel

**ASSESSMENT OF EFFECTS ON HIGHLY PRODUCTIVE LAND UNDER SECTION 104 OF THE RESOURCE MANAGEMENT ACT 1991**

1. Agright will apply for resource consent for two new broiler farms at 780 and 874 Wani Road, Awaiti ("**Sites**") ("**Application**").
2. The Sites have been identified on the Landcare Research Land Use Capability ("**LUC**") maps as being predominantly LUC 3 soils, with a small portion having LUC 1 soils and are therefore Highly Productive Land ("**HPL**") under the National Policy Statement for HPL ("**NPS-HPL**").
3. You have been to a pre-application meeting with the Hauraki District Council in relation to the Application. We understand some concerns were raised around the HPL at the Sites, and the ability to grant resource consent under section 104 of the Resource Management Act 1991 ("**RMA**").
4. You have asked for our advice regarding the application of the NPS-HPL in the context of the application under section 104 of the RMA. In summary:
  - (a) the NPS-HPL is not required to be given effect to, rather it is to be had regard to, which is a lesser standard;
  - (b) the NPS-HPL is one consideration of many that a consent authority must have regard to in determining a resource consent application;<sup>1</sup> and
  - (c) the RMA is not a no-effects statute. Effects on HPL are expected to be less than minor. Even if there were significant effects on HPL, consent could still be granted under section 104.
5. We expand on these matters below.

<sup>1</sup> *Gray v Dunedin City Council* [2023] NZEnvC 75 at [202].

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### Section 104 of the RMA

6. In making an application for resource consent, a decision-maker must have regard to the matters under section 104 of the RMA in exercising its discretion to grant consent, and on what conditions. These matters include:<sup>2</sup>
  - (a) any effects on the environment (actual and potential effects, including positive effects);
  - (b) any relevant planning document; and
  - (c) any other matter considered relevant and reasonably necessary to determine the application.
7. It is well-established that the assessment of an application for consent under section 104 of the RMA requires the decision-maker to "have regard to" (rather than "give effect to") the relevant planning framework.<sup>3</sup> The NPS-HPL is one consideration of many.

### Overview of the NPS-HPL

8. The NPS-HPL seeks to protect HPL for use in land-based primary production, both now and for future generations. It includes a range of policies to achieve this, including protecting HPL from inappropriate use and development.
9. The NPS-HPL requires regional councils to map highly productive land in their region and incorporate relevant provisions in its respective regional policy statement.<sup>4</sup> In the meantime, the NPS-HPL applies and is relevant to the Application.
10. Clause 3.9 of the NPS-HPL requires councils to avoid the inappropriate use or development of highly productive land that is not land-based primary production. However, that is not absolute and there are a series of exceptions.<sup>5</sup> These include an activity that provides for supporting activities on the land<sup>6</sup> or a small-scale or temporary land-use activity that has no impact on the productive capacity of the land.<sup>7</sup>
11. In addition to this, the development must:<sup>8</sup>
  - (a) minimise or mitigate any actual or potential cumulative loss of productive land; and

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<sup>2</sup> Section 104(1).

<sup>3</sup> *RJ Davidson Family Trust v Marlborough District Council* [2022] NZCA 206 at [47], [73]–[75].

<sup>4</sup> NPS-HPL, cl 3.4(1). The Waikato Regional Council is yet to complete its mapping exercise.

<sup>5</sup> NPS-HPL, cls 3.9(1) and 3.9(2).

<sup>6</sup> NPS-HPL, cl 3.9(2)(a).

<sup>7</sup> NPS-HPL, cl 3.9(2)(b).

<sup>8</sup> NPS-HPL, cl 3.10.

- (b) avoid if possible, or otherwise mitigate, any actual or potential reverse sensitivity effects on land-based primary production activities.
12. As set out in the AEE for the Application, the broiler farms meets the two exemptions described in paragraph 10 and is taking various measures to minimise or mitigate any actual or potential cumulative loss of productive land. The broiler farms are not considered to have any reverse sensitivity effects on land-based primary production.

#### **Case law on the NPS-HPL**

13. Since the NPS-HPL has come into force, the Environment Court has considered its application in several contexts.
- (a) In *Gray v Dunedin City Council*, the Court reinforced the position that the provisions of the NPS-HPL "are among the wide range of identified matters that the consent authority must have regard to".<sup>9</sup> In this case, the Court granted consent for a dwelling on HPL in the Taieri Plains.
  - (b) In *Currie v Palmerston North City Council*, the Court granted consents to establish and operate a pet crematorium on rurally zoned land containing LUC 3 soils.<sup>10</sup> The effects of the proposed activity were found to be minor.
  - (c) In *Gibbston Vines Limited v Queenstown Lakes District Council*, the Court adopted a holistic approach to the application of the provisions of the NPS-HPL.<sup>11</sup> The Court granted consent for a subdivision and associated land development notwithstanding that it had minor adverse effects on the life supporting capacity of soils and was found to limit (but not "significantly impede") the capacity of local authorities to protect HPL.<sup>12</sup>
14. These recent cases reflect section 104 of the RMA, and the nature of the RMA as an effects-based statute: the NPS-HPL and effects on HPL are one consideration of many that goes into the overall assessment of an application. In each case, the relevant application was approved, despite not fitting strictly within the NPS-HPL provisions (as relevant). The Application can have adverse effects on HPL, but still be found to be appropriate.<sup>13</sup> The RMA is not a no-effects statute.
15. The Supreme Court (in relation to policy statements more generally and a project within the coastal environment) recently found that the wording of objectives and policies need to be carefully considered as a whole.<sup>14</sup> This reinforces the requirement to not consider the NPS-HPL in isolation. The Supreme Court also

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<sup>9</sup> *Gray v Dunedin City Council* [2023] NZEnvC 75 at [202].

<sup>10</sup> *Currie v Palmerston North City Council* [2023] NZEnvC 37.

<sup>11</sup> *Gibbston Vines Limited v Queenstown Lakes District Council* [2023] NZEnvC 265.

<sup>12</sup> At [81]–[88].

<sup>13</sup> See *Currie v Palmerston North City Council* [2023] NZEnvC 265.

<sup>14</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [79], [93].

reiterated the importance of "fact and context."<sup>15</sup> Provisions and other effects, including positive effects must be had regard to under section 104 when determining whether to grant consent for the Application.

### **Application of the NPS-HPL**

16. While the Application may lead to a loss of a small portion of HPL at the Sites, when considered in the context of the NPS-HPL in the round, the Application does not undermine the objectives and policies of the NPS-HPL.
- (a) The Application does not restrict the ability of the Council to implement the NPS-HPL. The Sites, only represent 0.01% of the Hauraki District's overall stock of HPL.
  - (b) The NPS-HPL does not afford absolute protection to HPL. Policy 8 for instance refers to protection from "inappropriate use or development". The Application meets two exceptions for being an appropriate activity on HPL as explained in paragraph 10 above. Specifically:
    - (i) Broiler farming can be a supporting activity which can be permitted under the NPS-HPL. Broiler farming produces chicken manure (that contains nutrients like nitrogen and phosphorous) which support dairy farming by improving soil quality.
    - (ii) Consents are being sought for 25 years. There is no guarantee of a consent being renewed. Many of the broiler farm structures sit on the land. If these consents are not renewed, these structures will be removed, meaning the land will still be available for land-based primary production in the future.
  - (c) The Farm Productivity Assessment that supports the Application outlines that the primary production from the chicken farms will be more than the dairy farm.
  - (d) The balance of the Sites will be retained and available for dairy farming (ie land based primary production). Grass grown on the remainder of the Sites will be fed to cows on the existing farms.

### **Next steps**

17. The fact the Site contains HPL is not a barrier to granting consent. The effects on HPL are one consideration of many that the decision-maker must consider, and the decision-maker must consider the NPS-HPL alongside the range of other considerations.

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<sup>15</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [80].

18. Please let us know if you have any questions.

Yours faithfully

**RUSSELL McVEAGH**



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