Martin J.E. Williams
BARRISTER

20 November 2023

Mr Raoul Oosterkamp
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By email: Raoul.Oosterkamp@mitchelldaysh.co.nz

Dear Raoul

**BLUE SKY MEATS – WOODLANDS MORTON MAINS ROAD ABATTOIR EXPANSION – NATIONAL POLICY STATEMENT – HIGHLY PRODUCTIVE LAND REZONING**

You have requested my opinion as to whether a private plan change to provide for the proposed expansion of the Blue Sky Meats Morton Mains Road Abattoir could be secured within the constraints of the National Policy Statement – Highly Productive Land 2022 (**NPS-HPL**).

Specifically, I understand that Blue Sky Meats (**BSM**) is proposing to prepare and lodge a private plan change request seeking to rezone the BSM site at Morton Mains Road to Industrial, with the new zoning to be applied to all land within the "cadastral boundary" of the abattoir.[1]

In considering this issue and preparing this opinion I have:

- Reviewed the information provided to me as to the nature, extent and parameters of the proposed expansion of the abattoir.
- Reviewed all Environment Court decisions released interpreting the provisions of the NPS-HPL since it came into force in October 2022, along with the *National Policy Statement for Highly Productive Land : Guide to Implementation* (March 2023).
- Reviewed relevant case law under the RMA (and more generally) as to the definition of the term "upgrade" as employed under clause 3.11 of the NPS-HPL (and other existing national direction).

**Summary of opinion**

The NPS-HPL contains strongly directive (stringent) provisions (objective and policies) to protect Highly Productive Land (**HPL**) for use in land-based primary production (agriculture, pastoral and horticultural use along with forestry).

Rezoning and development for other including industrial purposes is generally to be 'avoided' (meaning prevented from happening[2]), i.e., except as provided for under the NPS.

[1] But excluding associated land used for wastewater and biosolids disposal.
[2] *Environmental Defence Society v King Salmon* (2014) ELRNZ 442, at [96].

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At its core, the NPS-HPL sets a platform of national direction, requiring local authorities to amend their planning instruments to both protect HPL and support land-based primary production on HPL, in the various ways expressed across the overall policy and implementation clause framework.

By contrast, the NPS-HPL does not (in and of itself) create direct obligations with immediate effect on local authorities,[3] and nor (in my opinion) does it amount to some form of "injunction" against any further development of HPL. It would only be on future implementation of the NPS-HPL by local authorities, that the instrument takes full effect.

Furthermore, local authorities should approach implementation of the NPS-HPL in a coherent and holistic way; that is to advance options for future planning in relation to HPL that "give effect to"[4] the NPS-HPL, taken in the round.

As the Supreme Court found in *Port Otago Limited v Otago Regional Council,*[5] conflict between potentially competing provisions of a National Policy Statement (as in that case, within the New Zealand Coastal Policy Statement 2010) should be dealt with at the plan level, rather than being left to the consent stage of the overall RMA process.

On the face of the instrument, there is potential for a degree of conflict between the NPS-HPL provisions. The provisions do not solely seek to restrict new urban zonings and inappropriate use and development on HPL. They also aim to provide for sufficient development capacity to meet demand for business (<u>including industrial</u>) land, and (in doing so) achieve integration and alignment with national direction under the National Policy Statement on Urban Development 2020 (**NPS-UD**).

In my opinion, this degree of tension and the need to implement both the NPS-HPL and NPS-UD as it relates to the BSM site and abattoir, can be resolved through the proposed private plan change, in the circumstances of this case.

Specifically, having regard to the case law that has considered and applied the NPS-HPL to date,[6] the proposed private plan change would be consistent with and supported by the following provisions of the NPS-HPL:

- **Policies 2 and 5**, along with implementation **clause 3.6(4),** whereby the proposed rezoning (to enable the expansion) is required to provide sufficient development capacity to meet demand for industrial land within the district; there being no other reasonably practicable or feasible options for wet industry in the locality and District, in order to service land- based primary production (i.e. agriculture);

- **Policies 4 and 8**, along with implementation **clause 3.9**, whereby the rezoning would provide for a "supporting activity" to land-based primary production, as an essential adjunct to agricultural activities which are directly reliant on the soils resource; and

- **Clause 3.11**, whereby the expansion can be said to comprise an "upgrade" of the existing abattoir, which the Council is required to provide for under its district plan.

[3] *Gray v Dunedin City Council* [2023] NZEnvC 45, at [197].
[4] Section 75(3) of the RMA.
[5] [2023] NZSC 112, at [72]-[73].
[6] Along with the Ministry for the Environment Guide to Implementation for the NPS-HPL as also covered below in this opinion, and case law addressing the term "upgrade" as employed under clause 3.11.

Overall, the plan change would better enable the Southland District Council to fulfil its statutory functions including under s 31 of the RMA, to promote the purpose of the RMA in relation to HPL, in the manner directed by the NPS.

I now address the basis of my opinion in more detail having regard to the information and case law reviewed, as summarised above.

**Case Law Interpreting and Applying the NPS-HPL**

There has been a small flurry of Environment Court case law generated as a result of the near immediate commencement of the NPS (as at 17 October 2022), i.e. without a transitional period for existing plan change and consenting processes.

That said, an overriding theme through the cases I have reviewed is that the NPS-HPL is more a framework for future resource management of HPL by local authorities, than an instrument intended to stop existing or prospective processes in their tracks.

As the Environment Court found in *Gray v Dunedin City Council,* the transitional provisions of the NPS (including as deem LUC 1-3 land to be HPL with immediate effect[7]) do not create any obligations on territorial authorities, either as planning authorities or as consent authorities.[8]

In line with High Court authority generated in response to the introduction of the National Policy Statement – Freshwater Management (2011),[9] the NPS-HPL has its own code for implementation. The Courts have generally cautioned that the statutory process needing to be followed under this form of national direction should not be "short circuited through a hurried implementation exercise".[10]

Notable within the implementation requirements of the NPS are that:

(a) The principal obligation is on Regional Councils to map HPL and introduce that mapping through the Schedule 1 process, by way of amendment to their regional policy statements;[11] and

(b) The national direction set through what are arguably the most stringent provisions (against urban zoning, subdivision or inappropriate use of HPL) is that territorial authorities include objectives, policies and rules in the district plan to give effect to them,[12] no later than two years after the commencement date.

Of specific relevance to this opinion, in *Balmoral v Dunedin City Council*, the Court set out an overview of the overall policy framework serving the objective of the NPS-HPL,[13] stating as follows:[14]

> Nine policies give effect to this objective. These policies acknowledge that the identification and management of HPL will require consideration of the interaction between managing HPL with freshwater and the need to use some land for urban

[7] Clause 3.5(7), as addressed below.
[8] Paragraph [197] of the decision.
[9] *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.
[10] Refer *Balmoral Developments Limited v Dunedin City Council* [2023] NZEnvC 59, at [81] to [87].
[11] Clauses 3.4 and 3.5.
[12] See for example clauses 3.8(4), and 3.9(4), along with Clauses 4.1 and 4.2.
[13] Objective 1, being to protect HPL for use in land-based primary production.
[14] *Balmoral* at [30] to [49], extract cited being at paragraph [33].

development in giving effect to the National Policy Statement on Urban Development 2020 (**NPS-UD**).

Reflecting that overview assessment by the Court, in my opinion, local authorities should approach implementation of the NPS-HPL in a coherent and holistic way; that is to advance options for future planning in relation to HPL that "give effect to"[15] the NPS-HPL, taken in the round. Further, and as discussed in the summary of the opinion set out above, they should do so in a manner that resolves any conflict or tension between the NPS provisions as far as possible, and to ensure alignment with the NPS-UD.

Consistent with that approach, the Environment Court in *Drinnan v Selwyn District Council*[16] applied the wording of clause 3.6 (1)[17] to the evidence in that case, as to whether the rezoning of certain land for residential development would be necessary to provide sufficient development capacity for housing in the district. In doing so, the Court drew directly on the related provisions of the NPS-UD.[18]

Beyond that, the principal issues addressed in the case law regarding the NPS-HPL to date have been centred on the transitional definition of HPL under clause 3.5(7).[19] The Environment Court decisions have not yet drilled down into the specific wording of the NPS-HPL to any greater extent than this, reflective of the emergent state of the instrument, notwithstanding its immediate (albeit transitional impact), as referred to above.

Specifically, there is no Environment Court guidance on the specific clauses of the NPS-HPL of most relevance to the proposed BSM rezoning of its abattoir site, and in particular:

- Clause 3.6(4),
- Clause 3.9,
- Clause 3.11,

as also referred to above.

As a further general point, the Environment Court has somewhat distanced itself from the Ministry for the Environment guidance information, including the *National Policy Statement for Highly Productive Land: Guide to Implementation* (March 2023) (**Ministry Guidance Document**).

For example, in *Gray v Dunedin City Council,* the Environment Court declined to give any weight to the Ministry Guidance Document, on the basis that the interpretation of statutory provisions (including planning instruments) is the domain of the Courts, not the Government Executive.[20]

[15] Section 75(3) of the RMA.
[16] [2023] NZEnvC 180.
[17] As applicable to Tier 1 and 2 territorial authorities, noting that Southland District Council is a Tier 3 authority under the NPS-UD.
[18] Paragraphs [21] to [25].
[19] For example as in *Gray v Dunedin City Council, Balmoral v Dunedin City Council* and *Wakatipu Equities Limited v Queenstown Lakes District Council* [2023] NZEnvC 188.
[20] Gray at [205] to [ 207], see also *Wakatipu Equities* at [8] to [9].

On the other hand, in *Drinnan v Selwyn District Council*, the Environment Court did have regard to the Ministry Guidance Document, adopting a "purposive" approach to the interpretation of transitional clause 3.5(7) of the NPS.[21]

In my view, reference to the Ministry Guidance Document remains appropriate as to the manner of that implementation by local authorities. Caution must however be applied in terms of the interpretation of specific words and phrases used in the NPS, which is ultimately the preserve of the Courts.

I return to aspects of the Ministry Guidance Document with these observations in mind further below.

**Clause 3.6 – Restrictions on Urban Zoning of HPL**

Taken together, Policy 5 and clause 3.6 of the NPS-HPL restrict any urban zoning of HPL to situations where that zoning is needed to provide sufficient development capacity to meet demand for housing or business land, and there are no other reasonably practicable options.

Specifically, for a Tier 3 territorial authority (such as Southland District Council), an urban rezoning can only proceed under Clause 3.6(4), i.e. if:

> (a) The urban zoning is required to provide **sufficient development capacity** to meet expected demand for housing or **business land** in the district; and
>
> (b) There are **no other reasonably practicable and feasible options** for providing the required development capacity; and
>
> (c) The environmental, social, cultural and economic **benefits of rezoning outweigh the** environmental, social, cultural and economic **costs** associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.

In addition, under clause 3.6(5), territorial authorities must take measures to ensure that the *spatial extent* of any urban zoning of HPL is the minimum necessary to provide the required development capacity.

Rezoning the BSM site Industrial would comprise an "urban zoning" for the purpose of clause 3.6 of the NPS-HPL, with "urban zoning" defined to include any zoning for industrial, heavy industrial or general industrial activities.[22] Similarly, under the NPS-UD, "business land" is defined to include "any industrial zone".

As the Ministry Guidance Document explains, the requirements of clause 3.6(4) applying to Tier 3 territorial authorities (as set out above) are not as extensive as those applying to Tier 1 and 2 authorities under clause 3.6(1).[23]

For example, there is no specific reference to the NPS-UD,[24] even though this applies to Tier 3 authorities. Nor is there any reference to the "same locality and market" under the "other reasonably practicable options" clause. I return to that point below.

These differences aside, this clause does underscore the need, in supporting the proposed private plan change, for BSM to demonstrate that there is a lack of suitably zoned land *in the*

[21] Paragraphs [82]-[87] of *Drinnan*.
[22] Clause 1.3 of the NPS-HPL.
[23] Pages 50 to 51.
[24] Unlike Clause 3.6(1)(a).

*Southland District* to meet the needs of this type of wet industry. In that regard, the availability of such land within the adjacent Invercargill District is not relevant under the clause 3.6(4) tests, which are territorial authority specific.

With Southland District Council being a Tier 3 local authority, no Future Development Strategy[25] is required to determine how and where sufficient development capacity to meet demand for housing and business land will be provided. I nevertheless understand that the nearest industrial zoned sites to the abattoir that (potentially) have capacity for new industrial activity generally, are between 20-50 kms away from the site. Furthermore, there would be significant "Three Waters" constraints facing the establishment of any equivalent facility within any more urban based industrially zoned site within the District, whereas the BSM site itself is essentially self-contained as to water supply and wastewater treatment infrastructure specifically.

In that regard, the Ministry Guidance Document references the definition of "sufficient development capacity" in the NPS-UD in addressing clause 3.6 of the NPS-HPL,[26] whereby to be "sufficient", the development capacity must be both plan enabled and infrastructure ready.[27]

As noted in *Balmoral v Dunedin City Council* (as set out above), implementation of the NPS-HPL should be done in a manner that aligns and integrates with the NPS-UD, having regard to the requirements of Policy 2 of the NPS-HPL. The Court in *Drinnan v Selwyn District* applied a similar approach on assessing the issue of development capacity and demand, albeit under Clause 3.6(1).[28]

While not expressly containing a "same locality and market" requirement (as noted above),[29] the Ministry Guidance Document supports an interpretation of clause 3.6(4)(b) which ensures focus on options that are located *as close possible* to where the industrial land (or business land more generally) is needed, in order to meet the identified demand.[30] Options beyond that are not "reasonable practicable".[31]

As well as being within the Southland District therefore, other industrially zoned sites cannot be too distant from the market served by the abattoir in order to qualify as reasonable alternatives. I return to the point noted above about the nearest alternative industrially zoned sites being 20 to 50km away in that respect.

While I understand the abattoir currently serves a broad market throughout much of the District, the issue of location and distance (between on farm meat production sites and the abattoir, or any alternative industrially zoned site) is certainly at least relevant under Clause 3.6(4), including to the assessment of social and economic costs and benefits, as would cover relative transportation and freight costs.

More important to the analysis under this clause would likely be the question of infrastructure to accommodate water take and wastewater discharge requirements, as referred to above.

In this respect, the Document notes the alignment of the words "reasonably practicable options" with the test in s 32(1)(b)(i) of the RMA being intended to ensure a *pragmatic*

[25] Refer clause 3.12 of the NPS-UD.
[26] Refer page 44, albeit in the context of clause 3.6(1), but with the same wording applied in clause 3.6(4).
[27] Page 44.
[28] Refer also Ministry Guidance Document at pages 42-43.
[29] As to the assessment of reasonable practicable and feasible options.
[30] Page 49 of the Ministry Guidance Document.
[31] Page 46 of the Ministry Guidance Document.

*assessment of realistic and achievable options* to provide the required development capacity is completed.[32] The same point is made as to the assessment of costs and benefits under Clause 3.6(4)(c), closely reflecting the language of section 32 (2) of the RMA.[33]

The Ministry Guidance Document also notes that in the case of private plan changes, there can be more limitations on the reasonably practicable options that can be assessed.[34]

With these aspects of the Ministry Guidance being more strictly directed to future implementation, I consider they can be given considerable weight.

The short point being that while a robust need and options (as well as costs and benefits) assessment would be required under clause 3.6 for the private plan change to proceed, that analysis could proceed in tandem with the s 32 evaluation inherent to preparation of such a plan change in any event.

Overall, in my opinion, subject to these factors being established through the evaluation, and as to the need to provide for the expansion to meet demand for abattoir facilities and services within both the locality and District more broadly in particular, rezoning the site industrial would be consistent with Policy 5 and clause 3.6 of the NPS-HPL, and better ensure alignment between the NPS-HPL and the NPS-UD in the manner directed by Policy 2.

Bearing in mind the requirement in clause 3.6(5), the question of spatial extent actually needed to provide for the proposed expansion would no doubt be tested through the plan change process. Consideration might be given to just rezoning an area of land more closely reflecting the additional areas of building footprint and hardstand proposed under the planned abattoir extension.

However, the wastewater treatment facilities[35] serving the existing plant occupy virtually the entire cadastral boundary, and indeed extend considerably beyond the site on to adjacent land. These facilities are defined as an industrial activity under the District Plan, and rezoning the site to recognise and reflect that existing use would be appropriate,[36] as well as minimise the area being rezoned (i.e., to not include the extensive area of adjacent land, also being used for wastewater treatment and disposal).

**Clause 3.9 – Supporting Industry**

In order to implement Policy 8, Clause 3.9 of the NPS-HPL requires that territorial authorities avoid the inappropriate use or development of HPL that is not land based primary production, and include objectives, policies and rules in their District Plan to give effect to this clause.

Clause 3.9(2) sets out a range of uses by way of "exceptions"; the presumption appearing to be that unless an activity is included within that list of exceptions, it is effectively deemed to be "inappropriate" for the purpose of clause 3.9 and Policy 8 of the NPS-HPL.

The first exception relates to any use of HPL that:

> Provides for **supporting activities** on the land.

[32] Page 46 of the Ministry Guidance Document.
[33] See page 45 of the Ministry Guidance Document.
[34] Page 46 of the Ministry Guidance Document
[35] Treatment ponds and irrigation areas.
[36] It would also be consistent with Clause 3.11 in this regard, as addressed below.

The Ministry Guidance Document explains that the specifically listed activities "may be appropriate" on HPL, not that they necessarily are.[37] Questions of scale and activity status arise, having regard to Policy 4 (being to support and prioritise land based production activities), and associated clause 3.12.

In my opinion, the existing (and proposed expanded) abattoir on the BSM site would qualify as a "supporting activity" to HPL.

That is, a meat works or abattoir is a necessary adjunct to agricultural use, as clearly and squarely falls within the definition of land-based primary production;[38] with this use of HPL therefore needing to be prioritised and supported under Policy 4.

The term "supporting activities" is defined in the NPS-HPL to mean:

> In relation to highly productive land, means those activities **reasonably necessary** to support land-based primary production on that land (such as **on-site processing and packing**, equipment storage, and animal housing).

While the definition refers to "on site" processing (by way of example), the Ministry Guidance Document explains that the intention of the clause is that activities which support land-based primary production *on surrounding HPL* (or as part of a land holding where production is occurring), have a pathway to occur on HPL.[39]

The Guidance Document further notes that supporting activities could include initial processing and any land and buildings used for initial processing of commodities that result from primary production activities, directly.[40]

The Guidance Document suggests that this would include "minimal processing" activities but would not include a dairy factory.[41]

As noted earlier, case law confirms that the Guidance Document is not determinative on questions of specific interpretation.

In my opinion however, i.e. regardless of this guidance from the Ministry, the abattoir is an essential adjunct to land-based primary production proper, which is closely connected in the overall food processing chain to direct on farm meat production itself. The case can sensibly be made that the proposed expansion is not an inappropriate use which must be avoided under the NPS-HPL.

It is instead a supporting activity which may be provided for under clause 3.9, and indeed should be provided for by the Council, having regard to Policy 4.

**Clause 3.11 – Continuation of Existing Activities**

Building on this analysis of the NPS-HPL as a whole, Clause 3.11 directs that territorial authorities include objectives, policies and rules in their District Plans to:

> Enable the maintenance, operation, or **upgrade** of any existing activities on highly productive land.

[37] Pages 70-71 of the guidance document.
[38] Clause 1.3 of the NPS-HPL.
[39] Page 28 of the Guidance Document.
[40] Guidance Document at 29.
[41] Ibid.

My understanding from the information provided is that the proposed expansion of the abattoir would result in an approximate 25% increase in plant capacity (at least initially), and a 30% increase in the area of HPL on the site covered by buildings associated with the expanded facility (including carpark areas).[42]

This raises the question of whether, in giving effect to clause 3.11, an industrial rezoning could also be said to provide for an "upgrade" of the existing activity on the site.

After a reasonably extensive search, there appears to be little if any direct guidance under relevant case law to confirm whether the extent and nature of the proposed expansion would comprise an "upgrade" for the purpose of clause 3.11.

The term "upgrade" has been considered and applied most commonly in the context of electricity transmission and distribution infrastructure; but not as it appears in equivalent "pathway" provisions of other national instruments under the RMA, for example in relation to "specified infrastructure" in the National Policy Statement – Freshwater Management 2020 (**NPS-FM**) and the National Policy Statement for Indigenous Biodiversity (**NPSIB**), nor as applied under certain Policies of the National Policy Statement on Electricity Transmission (2008) (**NPS-ET**).

Notably, none of these national instruments include a definition of the term "upgrade" and nor (as just noted) is there any case law specifically interpreting the term "upgrade" as applied under this set of national direction.

The National Environmental Standard – Electricity Transmission (**NES-ET**) does include a definition of "upgrade", but again in an electricity transmission (rather than general industrial activity) context.

I **append** to this opinion a schedule setting out a range of sources of definitions for the term upgrade (including under the NES-ET), along with an overview of such guidance from the Courts as I can divine on the likely meaning of the term "upgrade" in an RMA context, albeit with this case law being more directly applicable to the electricity transmission context than the use and protection of HPL.

In my opinion, and given this lack of direct guidance in either case law or other national direction", the Courts interpreting the term "upgrade" as applied under the NPS-HPL would (as a starting point) fall back to the plain and ordinary meaning of the word, namely being to:

"*improve or update*"

"*raise in standard, value or importance*"

Beyond that, a well established principle of statutory interpretation is that the meaning of words is to be taken from their immediate context ('*noscitur a sociis'*, whereby words derive colour from those which surround them).

As evident from the Appendix, the term "upgrade" appears alongside "construction" in the NPSFM and NPSIB and within the definition of "maintenance" (alongside "replacement") under the Electricity Act 1992.

Similarly, under the NPS-HPL, the term "upgrade" is applied alongside "maintenance" and "operation" and in relation to *existing activities*.

[42] Increasing the areas of LUC land covered by 2.2 hectares, from an existing coverage of 7.3 hectares.

That context clearly places an inherent limitation on the extent of improvement to an existing asset which can sensibly be said to fall within the meaning of the term upgrade itself.

Simply put, the word “upgrade” in its context under the NPS-HPL would not allow for unlimited improvements or activity expansion, particularly noting that the term is applied within a clause dealing with the *continuation of existing activities*.

Beyond that, under the RMA, there is a long line of case law whereby regard should be had to the broader context of plan provisions, particularly where any ambiguity or uncertainty arises (*Powell v Dunedin City Council* (2003) 11 ELRNZ 144, at [35]).

The context of clause 3.11 to the NPS-HPL is of course that provided by the overriding objective and supporting policies, as aim to protect HPL for use in land-based primary production and protect HPL from inappropriate use and development, but also to support land based primary production and enable supporting activities.

Taking the meaning of the term “upgrade” too far would again run contrary to this broader context.

By analogy with the case law referred to in the Appendix, limitations of effect (the dominant concern under the RMA as a whole) also sensibly constrain how far the meaning of that term can be extended, at the broader level of principle.

Under that approach to the interpretation exercise however, the question is not so much one of scale (of the activity relative to its original format) *per se*, but incremental changes in *character and intensity of effect*. Similarly, the increase in volume and rate of meat processing enabled through the expansion is not the controlling factor.

Specifically, the principal consideration in this context (for the abattoir, under the NPS-HPL) would be how much additional impact there is on the LUC 2 land, in relative terms. While considerable in terms of the proposed increased footprint, that is not the case in percentage terms over the site as a whole.

Highly significant also in my opinion is the point noted earlier, whereby the additional land being rezoned falls within a site which is currently used for an existing industrial activity (providing wastewater treatment disposal for the abattoir itself). As part and parcel of that existing use, on this analysis, the rezoning does no more than reflect and provide for continuation of the existing activity, taken as a whole.

Overall, in my opinion, the proposed expansion of the abattoir within the parameters proposed, could sensibly be said to fall within the plain and ordinary meaning of the term ‘upgrade’, having regard to the broader context of the NPS-HPL (objective and supporting policies), and such guidance as is available from the Courts in the RMA electricity transmission infrastructure context.

This is particularly so taking into account that an industrial rezoning of the site would reflect and provide for the existing wastewater treatment facilities, which are an integral part of the activity as it stands.

In essence, I consider that clause 3.11 can be applied in support of the plan change, alongside clauses 3.6 and 3.9 and the policies they address.

**Part 2**

For completeness, I note that to the extent the abattoir expansion is considered (including by the District Council) to fall outside the intended scope of (in particular) clauses 3.9 and 3.11 of the NPS-HPL, the resulting situation could be said to amount to a "gap" in the coverage in the instrument in terms of the lack of enabling provision for a necessary adjunct to land-based primary production activities (agriculture, directly).

In line with the Supreme Court's decision in *Environmental Defence Society v King Salmon*, recourse could therefore be had to Part 2 of the RMA on the grounds of "incomplete coverage" (or uncertainty of meaning).[43]

That is, the argument could legitimately be made in response that, in addition to being in line with the instrument as addressed in this opinion (including under clause 3.6), the private plan change to rezone the abattoir site industrial would promote the broader sustainable management purpose of the RMA, in providing for social and economic wellbeing, and the efficient use of land and physical resources in the district.

**Conclusion**

For all of these reasons, in my opinion, the proposed private plan change to provide for the abattoir expansion is not only available under the NPS-HPL, but would (taken as a whole) serve to implement the objective and policy framework of this national direction and in turn enable the District Council to fulfil its functions to promote the purpose of the RMA in relation to HPL, in the manner directed by the NPS.

Yours sincerely

**Martin Williams**

[43] *Environmental Defence Society v King Salmon* at [90].

Martin J.E. Williams
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26 August 2024

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Dear Sarah

**BLUE SKY MEATS (NZ) LIMITED– WOODLANDS MORTON MAINS ROAD – HIGHLY PRODUCTIVE LAND REZONING – FURTHER OPINION**

The purpose of this letter is to record my opinion and assessment regarding the proposed rezoning of part of the Blue Sky Meats (**BSM**) site at 729 Woodlands Morton Mains Road (Southland), with reference to the requirements of the National Policy Statement – Highly Productive Land 2022 (**NPS-HPL**), in particular.

In an earlier opinion (dated 20 November 2023 (**Original Opinion**)), I explained that:

> The NPS-HPL contains strongly directive (stringent) provisions (objective and policies) to protect Highly Productive Land (**HPL**) for use in land-based primary production (agriculture, pastoral and horticultural use along with forestry).
>
> Rezoning and development for other including industrial purposes is generally to be 'avoided' (meaning prevented from happening[1]), i.e., except as provided for under the NPS.
>
> At its core, the NPS-HPL sets a platform of national direction, requiring local authorities to amend their planning instruments to both protect HPL and support land-based primary production on HPL, in the various ways expressed across the overall policy and implementation clause framework.
>
> By contrast, the NPS-HPL does not (in and of itself) create direct obligations with immediate effect on local authorities,[2] and nor (in my opinion) does it amount to some form of "injunction" against any further development of HPL. It would only be on future implementation of the NPS-HPL by local authorities, that the instrument takes full effect.

In that context, and based on the information available to me the time, I concluded that the intended private Plan Change would be consistent with and supported by the following provisions of the NPS-HPL:

- **Policies 2 and 5**, along with implementation **clause 3.6(4),** whereby the proposed rezoning (to enable the expansion) is required to provide sufficient development capacity to meet demand for industrial land within the district; there being no other reasonably practicable or feasible options for wet industry in the locality and District, in order to service land- based primary production (i.e. agriculture);

[1] *Environmental Defence Society v King Salmon* (2014) ELRNZ 442, at [96].
[2] *Gray v Dunedin City Council* [2023] NZEnvC 45, at [197].

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- **Policies 4 and 8**, along with implementation **clause 3.9**, whereby the rezoning would provide for a "supporting activity" to land-based primary production, as an essential adjunct to agricultural activities which are directly reliant on the soils resource; and

- **Clause 3.11**, whereby the expansion can be said to comprise an "upgrade" of the existing abattoir, which the Council is required to provide for under its district plan.

Dealing with clause 3.6 of the NPS-HPL in particular, I observed that:

> … while a robust need and options (as well as costs and benefits) assessment would be required under clause 3.6 for the private Plan Change to proceed, that analysis could proceed in tandem with the s 32 evaluation inherent to preparation of such a Plan Change in any event.
>
> Overall, in my opinion, subject to these factors being established through the evaluation, and as to the need to provide for the expansion to meet demand for abattoir facilities and services within both the locality and District more broadly in particular, rezoning the site industrial would be consistent with Policy 5 and clause 3.6 of the NPS-HPL, and better ensure alignment between the NPS-HPL and the NPS-UD in the manner directed by Policy 2.

Since preparing that earlier opinion I have now had the opportunity to:

(a) Review the Plan Change application, draft s 32 evaluation and other supporting technical reports (including landscape, economics, transportation), and the proposed changes to the Southland District Plan;

(b) Review further decisions of the Environment Court regarding relevant provisions of the NPS-HPL which have been released since I drafted the Original Opinion; and

(c) Consider feedback received regarding the Original Opinion.

Having regard to that further review and my consideration and assessment of the information set out above, I now conclude as follows.

**Plan Change Gives Effect to the NPS-HPL**

I essentially remain of the opinion recorded in the Original Opinion, i.e. that the proposed private Plan Change would be consistent with and supported by the various provisions of the NPS-HPL set out above.

However, with the benefit of the additional information since reviewed, I can now go further, and conclude that the proposed private Plan Change would *give effect to* the NPS-HPL.

My reasons for that conclusion are now explained.

First and foremost, the Plan Change application explains its essential purpose as follows :

> The Plan Change has been prepared and advanced to recognise the long-standing industrial land use present at the site for meat processing and associated waste water treatment and disposal activities, and to ensure that there is sufficient industrial land supply available to the Southland District that can cater for this type of 'wet' industry i.e. industries that generate manufacturing or processing wastewater.
>
> The Plan Change will enable the expansion of existing BSM facilities to increase the meat processing capabilities at the site, which will in turn provide for economic growth within the Southland District and wider Southland Region. The PPC represents a logical addition to industrial land supply in the Southland District that cannot practicably be duplicated elsewhere.

Fundamentally, the Plan Change would better align the Southland District Plan with the realities of a long established existing industrial activity which (including the associated wastewater treatment and disposal facilities) extends over the entire site being rezoned. Taking a "real word" approach to the existing environment,[3] the site is already industrial in character and effects, including on the soils resource in question.

Rezoning the proposed 46ha area of this site would therefore not only serve to fulfil the Council's functions (and responsibilities) under s 31(1)(aa) of the RMA, but indisputably give effect to implementation **clause 3.11** of the NPS-HPL.

These requirements of the RMA and NPS-HPL (respectively) require that the Council include objectives, policies, rules and methods (i.e. including zones) in its District Plan to:

(a) Ensure that there is sufficient development capacity in respect of housing and business (including industrial) land to meet the expected demands of the district; and

(b) Enable the maintenance, operation, or upgrade of any existing activities on highly productive land (while minimising the area being rezoned for this purpose) .

All other factors aside (including the proposed expansion of the BSM plant), the Plan Change is needed to give effect to clause 3.11 of the NPS-HPL, and discharge the Council's functions under s 31 of the RMA in relation to the supply of industrial land in its District.

Indeed, the proposed industrial re-zoning can be said to give effect to the NPS-HPL on that substantive basis alone i.e. without recourse to (or calling on) the other NPS provisions addressed in the Original Opinion, as set out above.

I nevertheless am (and remain) satisfied that:

(a) As to **clause 3.6 (4)** of the NPS-HPL, the Plan Change (including supporting economic assessment and s 32 evaluation) confirm:

  (i) The industrial zoning is needed to provide sufficient development capacity (*plan enabled and infrastructure ready*) to meet the expected demand for wet industry land, as evidenced by BSM's proposed upgrading of activities at the site;[4]

  (ii) There are no other reasonably practicable options (including alternative industrial rezoned land within Southland district), or other planning methods (including a resource consent pathway), to provide the required development capacity for this type of wet industry in the District, and even if there were an alternative suitably zoned site, it would be a completely inefficient use of capital to attempt to recreate the existing facilities elsewhere, at a cost of tens of millions of dollars.[5]

  (iii) The economic, social and environmental benefits of proceeding with the rezoning (including the additional GDP and employment contribution to the District enabled by the Plan Change), very significantly outweigh the costs, including any opportunity cost of not returning the site to full land-based primary

[3] *Queenstown Central Limited v Queenstown Lakes District Council* (2013) 17 ELRNZ 585 at [85].
[4] With the proposed upgrading being as summarised (for example) in sections 3.1 and 3.3 of the economic assessment – Appendix C to the Plan Change application.
[5] Section 4.2 of the economic assessment, noting the $15 million recently invested by BSM in additional wastewater treatment and disposal infrastructure.

production, and with all relevant effects (landscape, transportation, freshwater or biodiversity, as managed through the Blue Sky Precinct Plan) being negligible or minor at worst.

For completeness, I also remain of the opinion that the rezoning better provides for a supporting activity to the use of highly productive land for land-based primary production in the District generally, for the purpose of implementation of clause **3.9(2)(a)** of the NPS-HPL.[6]

In summary, the information and assessment in the Plan Change application (and supporting appendices) confirms my Original Opinion, now also being that the Plan Change would give effect to the NPS-HPL taken in the round, i.e. having regard to the implementation clauses set out above, and the NPS policies (and objective) which they serve to achieve.

**Recent Case Law**

Since the Original Opinion was prepared, a number of further decisions of the Environment Court have been released addressing the NPS-HPL.

Of most relevance to this situation are the following two decisions of the Environment Court:

(a) *Gibbston Vines Limited v Queenstown Lakes District Council.*[7] This decision confirms the point made in the Original Opinion that the NPS-HPL does not represent an "injunction" against subdivision or use of highly productive land, for activities other than land-based primary production.[8] In this case the Environment Court approved a two lot subdivision despite finding an (albeit minor) impact on the life supporting capacity of soils, and future Council ability to implement or give effect to the NPS.[9]

Beyond this however, a key finding of the Court is that it is *local authorities* (including the Southland District Council in this case) which need to apply the implementation clauses of the NPS-HPL, rather than the Environment Court.[10] As set out above, the Plan Change directly enables the Council to meet these obligations under the NPS, as they relate to the BSM site.

(b) *Save the Maitai Incorporated v Nelson City Council.*[11] In this decision, the Environment Court confirmed that the assessment required under clause 3.6 involves the assessment of strategic matters on a district wide basis as part of a Schedule 1 process, with these provisions setting a "very high bar" to meet the statutory obligation for a District Plan to *give effect to* the NPS-HPL.[12]

Again, for the reasons addressed in both my Original Opinion and as set out above in this letter, I am of the view that the very high bar is met in the unique circumstances of this case, and indeed demonstrably so. The Plan Change can and should progress through the Schedule 1 process accordingly, in preference to a resource consent pathway as would 'side step' the rigour of the schedule 1 and clause 3.6 evaluation.[13]

[6] Noting page 65 of the Plan Change application in that regard.
[7] [2023] NZEnvC 265.
[8] Refer paragraph [47].
[9] Refer paragraphs [78] to [86] of the decision .
[10] Refer paragraphs [39] to [42] of the decision.
[11] [2024] NZEnvC 155.
[12] Paragraphs [99] to [103] of Appendix 1 to the decision.
[13] As also noted in the s 32 evaluation .

**Feedback on Original Opinion**

I understand that my Original Opinion was discussed with the client and I have received feedback from your firm regarding the content. Responding to that feedback on the two issues raised, I note as follows.

Implementation Guide

Firstly, I acknowledge that the Original Opinion does draw on the Ministry for the Environment Guide to Implementation (March 2023) in reaching the conclusions stated.

That said, my reasoning principally relied on the wording of the NPS-HPL itself (as set out expressly in the body of that opinion), with the Ministry Guidance Document referenced as a secondary resource.

As I noted in the Original Opinion, there is a somewhat divergent approach in the Environment Court decisions as to the degree of reliance on (or reference to) the Guidance Document in interpreting the NPS-HPL.

I am firmly of the view that when it comes to *implementation* of the NPS at territorial authority level, it is entirely appropriate to refer to the Guidance Document, this being the essential purpose of that document, after all.

By contrast, it is the role of the Environment Court (rather than the executive, or Ministry for Environment) to interpret RMA legislation, and the Court is careful to protect its role in that respect.

That concern simply does not arise for the Council when it comes to implementation of the NPS-HPL in the manner directed by (inter alia) clauses 3.6, 3.9 and 3.11 of the NPS-HPL as addressed in my Original Opinion.

Definition of 'business land'

Another issue raised was based on the definition of "business land" in the NPS-UD, as applied under the NPS-HPL under clause 3.6(4).

As I explained in the Original Opinion, the Environment Court has found that the NPS-HPL should be applied in a coherent and holistic way, including so as to ensure alignment with the NPS-UD. In this respect, I note that in *Save the Maitai*, the Environment Court preferred an approach to interpretation of clause 3.6 of the NPS-HPL, which it found resolved any conflict with NPS-UD implementation.[14]

Consistent with that general approach, Clause 3.6(4)(a) of the NPS-HPL, uses the term "business land" (alongside housing) in referring to whether an "urban zoning" is required to provide sufficient development capacity for such land.

The term "business land" is not defined in the NPS-HPL, but is defined in the NPS-UD as including industrial zoned land. The NPS-HPL expressly records that terms *defined* in the NPS-UD and *used* in the NPS-HPL, have the meaning stated in the NPS-UD, *unless otherwise*

[14] Refer paragraph [17] of the Court's' decision, along with Appendix 1 paragraphs [76]-[104].

*specified* .[15] Application of the NPS-UD definition of 'business land' is clearly intended in this context, but with the NPS-HPL definitions prevailing in the event that any conflict arises through such application (i.e. the "*unless otherwise specified* "reference in clause 1.3(3)). I return to that specific drafting point below.

In the Original Opinion, I noted that the NPS-UD definition of "business land" is consistent with the definition of "urban rezoning" in the NPS-HPL, which also covers industrial zoned land. In this respect, and on the face of it, the definition of 'business land' (under the NPS-UD) and the definition of 'urban rezoning' (under the NPS-HPL) align or coincide. Simply put, industrial land is covered in both references ('urban rezoning' and 'business land' as applied under clause 3.6(4) of the NPS-HPL).

The issue raised specifically however is that the coincident definition of 'business land' in the NPS-UD (as also covering industrial zoned land) is (strictly speaking) confined to "urban environments", with the introductory wording to the definition recording:

> **Business land** means land that is zoned….for business use *in urban environments*, including but not limited to the following:
>
> (a) An industrial zone.
>
> ….

As I understand it, Southland District does not contain (or comprise) an "urban environment" as defined under the NPS-UD, with there being no township or area that is, or is intended to be, part of a housing or labour market of at least 10,000 people.

It could therefore be argued (on a strict interpretation) that because Southland District does not currently contain or comprise an *urban environment*, the reference to 'business land' under clause 3.6(4) of the NPS-HPL[16] does not apply, and the clause is not engaged to support the proposed industrial rezoning of the BSM site under the Plan Change.

This interpretation would in effect assume that Clause 3.6 (4) contains the following significant qualification, by implication:

> (4) Territorial authorities *within Districts that are or contain urban environments but which* ~~that~~ are not Tier 1 or 2 may allow urban rezoning of highly productive land only if:
>
> (a) The urban zoning is required to provide sufficient development capacity for housing or business land in the district; and.
>
> …
>
> (additional 'implied' wording in italics)

In my opinion, the 'shorthand' reference under the NPS-HPL to the definition of 'business land' in the NPS-UD (rather than the NPS-HPL having its own definition), was not intended to have such a significant consequential drafting effect.

This is particularly so given that such a strict interpretation of what amounts to 'business land' under the NPS-HPL, would lead to absurd results.

[15] Clause 1.3(3) of the NPS-HPL.
[16] As draws on the NPS-UD definition.

It would mean that a Tier 3 territorial authority with no *current* urban environments, could never rezone highly productive land for a range of urban purposes (i.e. commercial and industrial), even where this was necessary (or essential) to provide sufficient development capacity for such land in their districts, as there would be no pathway under clause 3.6 to do so.[17]

Conversely, Tier 3 authorities such as Southland District *could* rezone highly productive land for housing,[18] creating in effect 'dormitory' accommodation areas rather than town or other centres with both housing and employment opportunities (associated commercial and industrial land).

The reference to 'urban rezoning' in clause 3.6(4) of the NPS-HPL would essentially serve no purpose for provision of industrial and commercial land in such districts under this interpretation, and be confined to rezoning for housing. This interpretation would also frustrate the ability for territorial authorities in such districts to fulfil their function under s 31(1)(aa) of the RMA (i.e. meeting demand for both housing and business land), particularly where their districts currently contain extensive areas of rurally zoned highly productive land (as is the case for Southland District).

In my opinion, by every measure or approach (purposive, contextual or otherwise[19]), such an interpretation should not be preferred, and would not be by the Courts.

Instead, and as signalled by the wording of clause 1.3(3) of the NPS-HPL noted above, the express reference to industrial land within the definition of 'urban rezoning' in clause 3.6(4) should prevail, and the term 'business land' should not be confined to NPS-UD 'urban environments' in a clause 3.6(4) context.

Interpreted in that way, the two policy instruments align as to what is covered by clause 3.6 (in referring to 'urban rezoning' and 'business land'), consistent with the Environment Court's approach in *Save the Maitai*.

In short, in my opinion, and regardless of whether the Southland District currently includes urban environments as defined in the NPS-UD, rezoning the BSM site to industrial land qualifies for application of clause 3.6(4)(a) of the NPS-HPL.

Yours sincerely

**Martin Williams**

[17] At least for a 'greenfields' rezoning, noting that in this case, the rezoning would give effect to clause 3.11 regardless.
[18] With 'housing' as referred to in clause 3.6(4)(a) being undefined in either NPS.
[19] Refer *Powell v Dunedin City Council* [ 2004] 3 NZLR 721 (CA), *Nanden v Wellington City Council* [200] NZRMA 562, and *Drinnan v Selwyn District Council* (at [85]).