

## *The NPS-HPL and Solar Farms*

In 2011, the Government gazetted the National Policy Statement for Renewable Electricity Generation (NPS-REG). The outcome sought is clear: amongst other matters, generate more energy from renewable resources in locations where it can efficiently connect into the local distribution network. This has been reinforced with the Climate Change Response (Zero Carbon) Amendment Act 2019, which sets a new domestic emissions reduction target to be achieved by 2050.

Over the subsequent years, there have been changes to the type of renewable energy sources that have been pursued, with solar becoming the latest growth area. Large-scale hydro has become harder to consent due to its often significant environmental impacts (battery projects notwithstanding). Further, there are a myriad of projects (especially wind farms) that have been consented and not constructed, although there appears to be renewed interest in these.

However, one more challenge has been added to the mix: the gazettement of the NPS for Highly Productive Land (NPS-HPL) in October 2022, which seeks to limit activities, other than primary production, on highly productive land (HPL). In essence, it seeks to prioritise and support the use of highly productive land for land-based primary production. Consequently, highly productive land is sought to be protected from inappropriate use and development. The NPS-HPL provides for the maintenance, operation, upgrade, or expansion of specified infrastructure (which includes renewable energy generation), if it can be proved that there is a functional or operational need for it to be on HPL. However, the exclusion (deliberate or otherwise) of

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the terms 'new' or 'establish' has led to issues in consenting solar farms on HPL.

The Canterbury Regional Policy Statement, for example, provides for energy production infrastructure as 'regionally significant infrastructure', which is consequently 'specified infrastructure' under the NPS-HPL. NPS-HPL Clause 3.9(j)(i) enables "maintenance, operation, upgrade, or expansion" of specified infrastructure on HPL. It is unclear whether clause 3.9(j)(i) provides for 'new' specified infrastructure. The Implementation Guideline published in December 2022 says it does, but the courts have held that implementation guides should not be relied on to interpret a NPS: *Gray v Dunedin City Council* [2023] NZEnvC 45 at [206]. They are not a substitute for legal advice, neither are they official government policy.

Clause 3.9(j)(i) is quite broad – it does not refer to 'existing' specified infrastructure, therefore is it referring to the expansion of existing, or the expansion of specified infrastructure in general, i.e. new? Expanding means to grow, make or become larger, to increase in extent or

number. There is seemingly no requirement for that expansion to be directly connected to or adjoin an existing facility. However, clarity in the policy on this matter would assist applicants, territorial authorities and decision makers alike, as without it a conservative approach is most likely to be taken. It could also seriously curtail the number of locations where solar generation could be established, given that there are extensive areas of LUC 1-3 land (highly productive) across New Zealand, alongside other possible constraints such as the location of existing transmission infrastructure, the cost of building new infrastructure, natural hazards and landscape and natural character values.

In addition, Clause 3.9(3) requires that territorial authorities minimise or mitigate any actual loss or potential cumulative loss of the 'availability' and 'productive capacity' of highly productive land in their district. Productive capacity is defined as 'the ability of the land to support land-based primary production *over the long term*, (emphasis added) based on an assessment of:

- (a) physical characteristics (such as soil type, properties, and versatility); and
- (b) legal constraints (such as consent notices, local authority covenants, and easements); and
- (c) the size and shape of existing and proposed land parcels.'

Read literally, a loss of productive capacity means a change to the properties of the soil, imposing a consent notice that restricted certain types of land uses, or subdividing the land into small parcels that would be difficult to farm. This clause does not refer to economic outputs. In fact nowhere in the NPS-HPL are there references to economics or even yield or output per hectare. However, loss of 'productive capacity' is being interpreted by councils as a loss of yield



Agri-voltaics in action, October 2021, Canterbury. Photograph taken by Boffa Miskell.

i.e. a dairy farm being replaced with a solar farm and sheep grazing resulting in a lower yield per hectare in terms of primary production.

One approach to 'productive capacity' is that the productive capacity is not altered by the installation of a solar farm. The land will still be available for primary production. Physical characteristics of the soil are not altered. Legal constraints are not imposed. The size and shape of any land parcels are not altered.

However, the interpretation of this clause to mean a loss of yield has resulted in at least one consent for a solar farm being declined. In that case, the loss of highly productive land was deemed to be significant, and it would likely be lost in perpetuity, therefore the commissioner determined that the application should have been publicly notified. There is nothing in the intent or purpose of the NPS-HPL to ensure that land is being used to its full potential, and it is not what Clause 3.9(3) appears to require. If the Government intended that NPS-HPL be farmed to produce its maximum yield, then this needs to be clarified in the provisions. This approach may also have implications that go beyond the development of renewable energy.

The current approach also undermines the ability for property owners to diversify income streams by installing solar farms on their land and enabling more innovation to take place including two-tier farming also known as Agri-Voltaics. "Agri-voltaic farming is the use of land for both agriculture and solar photovoltaic energy generation" (MFAT, October 2022). The development of agri-voltaics and other innovative farming techniques may result in

land being used in a highly productive manner. However, if not enabled and when considered in conjunction with operational requirements, the NPS-HPL could severely curtail the development of solar generation in New Zealand.

Unfortunately, none of these issues have been addressed by the proposed NPS-REG which the Government has sought comments on. The proposed NPS-REG stays silent on the relationship between the two NPSs. This leaves an area of uncertainty that will be addressed in a myriad of ways across local authorities, rather than by establishing a national approach, which is the intended purpose of national policy statements.

We believe that it would greatly assist applicants, investors and local government alike, if:

- The tension between the two national policy directions (REG and HPL) was resolved as soon as possible.

- The definition and application of 'productive capacity' is confirmed as not meaning yield per hectare.
- The NPS-HPL was amended to specifically provide for new specified infrastructure.



Grass growing around solar panels established in approximately 2017, Canterbury. Photograph kindly supplied by Keax Energy.