

Essential Freshwater 2022

Amendments to the NES-F and NPS-FM

Report and recommendations



Ministry for the
Environment
Manatū Mō Te Taiao



Te Kāwanatanga o Aotearoa
New Zealand Government

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Contents

Introduction	4
Overview	4
Purpose of this document	4
Process for amending a national policy statement	5
Part 1: Managing our wetlands	7
Part 2: Exposure drafts of proposed changes to the NPS-FM and NES-F (including wetland regulations)	8
Part 3: Managing our wetlands in the coastal marine area	12
Appendix 1: Essential Freshwater 2021 amendments – seeking drafting decisions for wetlands [BRF-1004]	13
Appendix 2: Essential Freshwater – results of the exposure draft consultation on technical changes and wetland amendments [BRF -1889]	46
Appendix 3: Managing our wetlands in the coastal marine area [BRF-2072]	76

Introduction

Overview

In June 2018, the Government approved the *Essential Freshwater* work programme to stop further degradation of Aotearoa New Zealand's freshwater resources, start making immediate improvements, and reverse past damage within a generation.

In August 2020, the *Essential Freshwater* regulatory package was gazetted. It included:

- the [National Policy Statement for Freshwater Management 2020 \(NPS-FM\)](#), designed to embed long term changes to freshwater management through regional plans
- the [Resource Management \(National Environmental Standards for Freshwater\) Regulations 2020 \(NES-F\)](#), which regulates activities that can pose a high environmental risk to freshwater ecosystems and values and
- the Resource Management (Stock Exclusion) Regulations 2020.

Following gazettal, feedback received through ongoing engagement with councils and other stakeholders indicated the NPS-FM and NES-F would require modification to address issues and better support implementation.

The Government agreed to undertake public consultation on proposed changes to address implementation issues as follows:

- [Managing our wetlands](#), from 1 September to 27 October 2021
- [Exposure drafts of proposed changes to the NPS-FM and NES-F \(including wetland regulations\)](#), from 21 May to 10 July 2022
- [Managing our wetlands in the coastal marine area](#), from 10 August to 21 September 2022.

The above occurred alongside other consultation relating to [Freshwater farm plan regulations](#), [Intensive winter grazing regulations](#), and [Changes to the low slope map \(Stock exclusion regulations\)](#), which are not the focus of this document.

Feedback on earlier consultation, particularly in relation to wetlands, identified a broader range of issues that needed to be addressed. That is why further consultation on exposure drafts and wetlands in the coastal marine area proposed additional changes.

Purpose of this document

Because of iterative nature of consultation on proposed changes to the NPS-FM and NES-F, the report and recommendations referred to in section 46A of the Resource Management Act 1991 (**the report and recommendations**) comprises multiple documents provided by the Ministry for the Environment (**the Ministry**) to the Minister for the Environment (**the Minister**) as it was developed in response to feedback over time.

Documents comprising the report and recommendations which represent the Ministry's advice over time include:

- the '*Managing our wetlands: Report, recommendations and summary of submissions*' (published in May 2022) provided to the Minister following initial consultation (1 September to 27 October 2021) (Available on the [Ministry for the Environment website](#))
- the briefing '*Essential Freshwater 2021 amendments – seeking drafting decisions for wetlands*' (BRF-1004) provided to the Minister on 10 February 2022 following initial consultation (1 September to 27 October 2021) ([appendix 1](#))
- the briefing '*Essential Freshwater – results of the exposure draft consultation on technical changes and wetland amendments*' (BRF-1889) provided to the Minister on 30 August 2022 following exposure draft consultation (21 May to 10 July 2022) ([appendix 2](#))
- the briefing '*Managing our wetlands in the coastal marine area*' (BRF-2072) provided to the Minister on 14 October 2022 following consultation (10 August to 21 September 2022) ([appendix 3](#)).

Process for amending a national policy statement

The Resource Management Act 1991 (RMA) sets out the statutory process for amending national direction. The process must include:

- public consultation
- written submissions
- a report and recommendations which must be made to the Minister on the submissions and the subject matter of the national direction (this report).

This report fulfils requirements set out in sections 44, 46A, 51(1) and 52 of the RMA, as they relate to a report and recommendations.¹

Note there are additional requirements the Minister must satisfy before recommending the making of national direction to the Governor-General, for example, the preparation and consideration for an evaluation report in accordance with section 32 of the RMA. This document specifically relates to the report and recommendations made under section 46A(4)(c).

This report and recommendations has been prepared to inform the Minister for the Environment's decisions under 46A(4)(c) of the RMA, before the Minister recommends the Governor-General approve the regulations in Council.

As soon as practicable after the above decisions have been made, the Ministry will provide every person who made a submission with a summary of the recommendations and a

¹ Section 46A of the Resource Management Act 1991 sets out a single process for preparing national direction, including both national policy statements and national environmental standards. As part of this process, a report and recommendations must be made to the Minister on the submissions and the subject matter of the national direction. Section 51(1) specifies matters that must be considered in the report and recommendations, and sections 44 and 52 then set out additional requirements the Minister must satisfy before recommending the making of national direction to the Governor-General (eg, to consider the report and recommendations).

summary of the Minister's decision on the recommendations under s52(3)(c) (including reasons for not adopting any recommendations).

Part 1: Managing our wetlands

The provisions in the NPS-FM and NES-F that focus on wetlands and wetland ecosystem management, are together referred to as the 'wetland regulations'. The NPS-FM provides the overarching policy intent, while the NES-F contains rules, including consenting pathways for specific purposes, for certain activities in and around wetlands.

Following the gazettal of the NPS-FM and NES-F in September 2020, councils and sector groups raised concerns about emerging issues found when implementing the wetland regulations.

In August 2021, the Government agreed to consult on amendments to the wetland regulations after determining that the matters raised were not able to be resolved by guidance alone. The initial changes proposed were set out in the managing our wetlands discussion document, and included:

- clarification of the 'natural wetland' definition
- provision of a consenting pathway for specific sectors including quarries, fill sites, mining, and urban development
- refinement of the wetland restoration policies and inclusion of maintenance and biosecurity in those policies.

Consultation on proposed changes to the wetland regulations occurred between 1 September and 27 October 2021, supported by the [Managing our wetlands discussion document](#).

The Ministry then analysed submissions and prepared a report providing advice and recommendations to the Minister: [Managing our wetlands: Report, recommendations and summary of submissions](#). Additional advice and recommendations are provided in the briefing *Essential Freshwater 2021 amendments – seeking drafting decisions for wetlands* BRF-1004 ([appendix 1](#)).

Part 2: Exposure drafts of proposed changes to the NPS-FM and NES-F (including wetland regulations)

Following consultation on proposed changes to the wetland regulations that occurred between 1 September and 27 October 2021, and the Minister's subsequent decisions on the report and recommendations to the Minister, proposed amendments to national direction were subsequently drafted.

Exposure drafts of the NPS-FM and NES-F were consulted on between 21 May and 10 July 2022. Given the number and complexity of the proposed amendments to the wetland provisions, this consultation was supported by the [Managing our wetlands: Policy rationale for exposure draft amendments 2022](#) document.

In addition to changes to wetlands provisions, the Minister also proposed to progress a range of technical changes to the NPS-FM and the NES-F through the above consultation.

Since the NPS-FM and NES-F were gazetted in August 2020, officials have maintained a record of technical issues and provisions that require clarification. These changes improve clarity, reduce complexity, and correct some errors, without fundamentally changing the freshwater policy direction. Technical changes were supported by the [Overview of technical corrections and clarifications in the NPS-FM exposure draft](#) document.

Following consultation, the Ministry then analysed submissions and prepared a report providing advice and recommendations to the Minister for the Environment. This report is provided in [appendix 2](#).

Four outstanding matters required additional advice and recommendations to the Minister before final decisions could be made. Two identified from the exposure draft feedback as set out in BRF -1889 ([appendix 2](#)) on offsets and the pasture exclusion, with a further change to coal mining and consequential amendments to the stock exclusion regulations. That advice was provided to the Minister prior to approving the amendments for Cabinet consideration [BRF-2462 refers] and is summarised below.

1. Pasture exclusion – national list of exotic pasture species with a methodology for assessment

These amendments clarify the 'pasture exclusion' in the natural inland wetland definition. For the purposes of the regulations, a natural inland wetland is essentially the broad RMA definition of a wetland with a set of exclusions. To clarify the 'pasture exclusion' the Ministry removed multiple qualifiers and instead have incorporated by reference into the NPS-FM a national list of exotic pasture species and a methodology to standardise the assessment process. The pasture exclusion is as follows:

natural inland wetland means a wetland (as defined in the Act) that is not:

(a-d); or

(e) a wetland that:

- (i) is within an area of pasture used for grazing; and
- (ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless
- (iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply (NPS-FM cl 3.21).

The national list of exotic pasture species (the list) captures those species that contribute to productive pasture for the purpose of livestock grazing. Recommendations for the list were developed by pasture species experts at AgResearch, with review from NIWA's wetland weed expert to ensure these species were not over-represented. The Minister for the Environment had previously agreed to include this list in the NPS-FM/NES-F and it was tested via the exposure draft process.

On the advice of AgResearch and NIWA, only minor corrections were made to the list as consulted on. After Minister's final decisions, the list was formally incorporated by reference into the proposed NPS-FM. It will be periodically reviewed and updated as appropriate. A summary report of the analysis and literature review used to establish the list will be provided on the Ministry's website.

The pasture exclusion assessment methodology has been developed by Manaaki Whenua Landcare Research, as with the wetland delineation protocols, and these are designed to work in tandem. The methodology was not included in the exposure draft but was field-tested with practitioners including consultants, regional councils, and industry bodies. The final method outlines the key desktop and field steps to assessing and delineating areas of wet grazing land that are excluded from the definition of 'natural inland wetland' under the NPS-FM. It provides a nationally consistent assessment method.

The recommendations that were provided to the Minister on this point [BRF-2462 refers] are as follows:

- (a) Note that you have previously agreed to incorporate by reference into the NPS-FM a *national list of exotic pasture species* to support the pasture exclusion in the natural inland wetland definition [BRF-1004 refers]
- (b) Agree to incorporate by reference a pasture exclusion assessment methodology to provide a nationally consistent assessment method that will support the pasture exclusion in the natural inland wetland definition
- (c) Agree that the offset/compensation principles numbered 1-6 in appendices 6 and 7 of the NPS-FM must be complied with and the remainder had regard to by consent applicants
- (d) Agree that strengthened requirements to apply consent conditions on monitoring and management of offsets/compensation will apply to all consent pathways

2. Strengthening the offsetting provisions

The exposure draft of the NPS-FM (July 2022) contained new appendices with principles to guide offsets and compensation to ensure there is no loss of extent or values from consented activities in wetlands (NPS-FM appendices 6 and 7).

The requirement, or weight, given to the principles in the exposure draft was for councils 'to be satisfied that the applicant has had regard' to the principles. The rationale was that the principles would be in the NPS-FM to guide offset design but would not make the consent pathway unviable if every principle was not met (eg, engaging stakeholders in the design of the offset is not appropriate where offsets occur on private land).

Feedback from ENGOs was that at least some of the core principles should be compulsory for them to be meaningful – eg, the principle stating when offsetting is not appropriate. The Ministry agreed and recommended an approach where principles 1-6 must be complied with, and the remaining 'had regard to' by the applicant [BRF-2462 refers]. The proposed National Policy Statement for Indigenous Biodiversity will follow the same approach as the NPS-FM.

The Ministry also strengthened the direction to include consent conditions that require monitoring and long-term management of the offset/compensation. In the exposure draft this was applicable only to the urban development pathway. Submitters on the exposure draft sought for this to apply to all consent pathways. The Ministry agreed this is appropriate to ensure offsets for any purpose are managed to ensure no loss of extent or values are achieved.

The strengthened requirements for monitoring and management address findings from the National Wetland Trust report of 2020. It found that offsets required when consent conditions are not fulfilled cause wetland loss. In a July 2021 briefing where the Ministry identified this as being an issue, margin notes from the Minister for the Environment queried whether it was possible to implement standard monitoring requirements and timeframes [BRF-263 refers]. This amendment provides that strengthened direction (NPS-FM 3.22(3)).

The recommendations that were provided to the Minister on this point [BRF-2462 refers] are as follows:

- (a) Agree that the offset/compensation principles numbered 1-6 in Appendices 6 and 7 of the NPS-FM must be complied with and the remainder had regard to by consent applicants
- (b) Agree that strengthened requirements to apply consent conditions on monitoring and management of offsets/compensation will apply to all consent pathways

3. Consequential changes and corrections to the stock exclusion regulations

As a result of amendments to the natural inland wetland definition, a consequential change is required to the definition of natural wetland within the stock exclusion regulations. As the natural inland wetland definition no longer applies in the CMA [BRF-2072 refers], consequential changes are needed to the definition of natural wetland to keep them aligned as far as possible but without limiting stock exclusion requirements to natural inland wetlands only (eg, and therefore not the CMA).

Similarly, a correction to the definition of annual forage crop within the Stock Exclusion regulations is needed to align with that used in the NES-F. The definitions were previously identical, until the NES-F was amended as part of changes to intensive winter grazing

regulations (which clarified how the definition relates to pasture and crops that are grown for arable or horticultural land uses).

The recommendations that were provided to the Minister on this point [BRF-2462 refers] are as follows:

- (a) Note the consequential amendments to the Stock Exclusion Regulations in respect of definitions (appendix 4).

4. *Additional controls on the mining consent pathway – existing mines only*

The amendments provide a pathway for mining of minerals generally. The exposure draft consulted on whether additional controls should be placed on resource consent applications for mining.

After feedback through the exposure draft consultation, the Minister decided to restrict the consent pathway for coal mining to:

- only apply to the operation or expansion of existing mines, and
- for thermal coal (the operation or expansion of an existing mine), be subject to a sunset clause of 31 December 2030, this means that coking coal (the operation or expansion of an existing mine) may continue beyond this date.

Limiting the mining consent pathway for coal to the operation or expansion of existing mines will apply to any type of coal (thermal or coking) from the date the amendment regulations take effect.

Under the RMA, the NES-F will not impact existing consented activities and they may continue. Also, an application for consent where the council had made a decision to accept and notify the application for consideration may still proceed and be granted or not by the council.

The effect of the sunset clause will be that a consent application to operate or expand an existing mine for extracting thermal coal can only be lodged for consideration by the relevant consent authority until 31 December 2030.

This will provide for thermal coal resources required in the short-to-medium term eg, up to the 2037 date for the phasing out of low and medium temperature coal fired boilers. This will also provide the ability to apply for consent to expand an existing mine for the purposes of extracting coking coal beyond 31 December 2030, as there are not yet viable alternatives for steel and cement production.

The recommendation that was provided to the Minister on this point [BRF-2462 refers] is as follows:

- (a) Agree that the mining consent pathway for coal apply only to the operation or expansion of existing mines to any type of coal (thermal or coking) from the date the amendment regulations take effect.

Part 3: Managing our wetlands in the coastal marine area

The original policy intent of the NES-F, as agreed by Cabinet in 2020, was to restrict activities likely to cause the loss or degradation of all natural wetlands, including those in the coastal marine area (CMA).

Many councils and stakeholders, however, initially interpreted the NES-F as applying only to natural inland wetlands. In late 2021, a High Court decision² confirmed the NES-F applies to wetlands in the CMA. Subsequent analysis and feedback from councils revealed significant implications for consenting, compliance, and operational functions when the NES-F is applied to the CMA – including questions around where exactly in the CMA it applies.

The Government agreed that leaving this undetermined creates uncertainty for councils and coastal users undertaking activities within the CMA, and agreed to consult on proposals to address the issue from 10 August to 21 September 2022, supported by the [Managing our wetlands in the coastal marine area](#) discussion document.

Following consultation, the Ministry then analysed submissions and prepared a report providing advice and recommendations to the Minister. This report is provided in [appendix 3](#).

² Minister of Conservation v Mangawhai Harbour Restoration Society [2021] NZHC 3113 at [117].

Appendix 1: Essential Freshwater 2021 amendments – seeking drafting decisions for wetlands [BRF-1004]



Essential Freshwater 2021 amendments – seeking drafting decisions for wetlands

Date Submitted:	10 February 2022	Tracking #: BRF-1004	
Security Level	In-Confidence	MfE Priority:	Not Urgent

	Action sought:	Response by:
Hon David PARKER, Minister for the Environment	Indicate agreement (or otherwise) to the recommendations set out in Table 1 and sign this briefing	21 February 2022
Forward Hon Kiritapu ALLAN, Minister of Conservation	For discussion	n/a

Actions for Minister's Office Staff	Return the signed briefing to MfE. Forward this briefing and attached report to Hon Allan, Minister of Conservation.
Number of appendices and attachments - 1	Appendix 1: Report and recommendations: Essential Freshwater - Proposed amendments to the wetland regulations

Key contacts

Position	Name	Cell phone	1st contact
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Essential Freshwater 2021 amendments – seeking drafting decisions for wetlands

1. Public consultation on proposed changes to the wetland regulations in the National Policy Statement for Freshwater 2020 (NPS-FM), and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) closed on 27 October 2021.
2. This briefing provides you with a report containing a summary of submissions, with recommendations on the proposed amendments in response to submitter feedback (Appendix 1).
3. We seek your in-principle decisions to enable PCO to begin drafting amendments to the NPS-FM and NES-F.
4. This briefing also addresses three other matters:
 - A. Advice on additional requests from the Tauranga City Council Commissioners
 - B. Proposed changes for refuelling in sphagnum moss wetlands of the West Coast and
 - C. The applicability of the NES-F to coastal wetlands following the High Court decision.

Consultation

5. Proposed changes to the wetland regulations were consulted on to address feedback from local government, sector groups, ENGOs community groups and iwi/Māori on the challenges arising from the strong rules now in place for wetlands.
6. Public consultation on the proposed changes occurred over 8 weeks. A total of 262 substantial submissions, and approximately 5,860 form submissions from Forest and Bird, were received on the proposals.

Analysis of submissions

7. The report provided in Appendix 1 summarises submissions and provides recommendations on the proposed amendments set out in the discussion document. It also covers new issues raised in submissions.
8. The recommendations, and your decisions on these, will enable drafting to begin. As drafting progresses, we may provide additional recommendations for your agreement and will update the report accordingly.

Submission overview

9. **Natural wetland definition:** There are a wide range of views on the proposed changes to the wetland definition. Many supported simplifying it and removing the multiple qualifiers, but there are concerns that the change will remove protection for ephemeral wetlands in pasture areas and result in additional wetland loss.
10. **Consent pathways:** Views on the proposed consent pathways were mixed, with those that seek a consent pathway supportive of the proposals, but many others seeing the additional consent pathways as weakening the regulations. There was general opposition to the proposal to provide a consenting pathway for mining in wetlands. There was support for quarries, but less so for urban development.

11. **Restoration, maintenance and biosecurity:** All submissions support the intent to make restoration and maintenance of wetlands easier to undertake. However, there is a wide range of views on whether the proposed changes would achieve the policy intent, and concern about the extent to which limitations on activities, or oversight by councils, is actually required to protect wetlands from poorly designed restoration and biosecurity activities.
12. **General:** The National Wetland Trust stated *'it is perhaps unrealistic to expect that such major changes to our approach to wetland identification and management would not create some 'teething problems'. It may simply be too early to make a major change in direction, and what is actually required is guidance and support'*.
13. We agree that there is inevitably a bedding-in period with any significant regulatory change. MfE has provided guidance and support to assist implementation of the NPS-FM and NES-F. However, issues have been identified that cannot be effectively resolved through guidance and would therefore benefit from amendment.
14. The full summary of submissions, with associated recommendations, is attached as **Appendix 1** to this briefing. A summary of the campaign by Forest and Bird is provided on page 4-5 of the attached report.
15. **Table 1** in this briefing contains all the recommendations from the report with a signature block for you to note agreement, or otherwise. Page references to the relevant analysis in the Report are provided for each recommendation for easy reference. Please note your agreement or otherwise to the recommendations set out in Table 1 below.

A. Further correspondence from Commissioner Anne Tolley and Tauranga City Council

16. On 2 November 2021 you received a letter from Commissioner Tolley, which outlined concerns that the proposed changes to the NES-F were not sufficient to enable TCC to commence work on planned developments, and that they will not meet the requirements for Tier 1 urban development under the NPS-UD.
17. TCC has also corresponded with officials providing additional context around the matters raised and offering solutions. These additional matters were also raised in further letters from Commissioner Tolley to you dated 7 and 10 December 2021.
18. In summary, TCC have recommended the following (with our view on whether to progress):
 - A change to Policy 6 from 'no further loss' to 'no net loss' (**not recommended**)
 - A new policy in the NPS-FM for urban development (**not recommended**)
 - Proposed changes to the phrase 'plan enabled' (**options with recommendation**)
 - Urban development activity status - Restricted Discretionary (**recommended**)
 - Options for changes to the gateway test of 'functional need' (**options with recommendation**)
 - Size or other threshold for wetlands (**not recommended**)
 - Exclude 'induced wetlands' from the 'natural wetland' definition (**not recommended**).
19. The matters listed in paragraph 18 are discussed in full below.

Change Policy 6 from 'no further loss' to 'no net loss' (not recommended)

20. We agree with TCC (and others), that the current policy of 'no further loss of natural inland wetland extent' (Policy 6) is currently inconsistent with the provision of consenting pathways and attendant offsets. However, we consider that a change to 'no net loss' is too broad and may inadvertently enable other activities (not provided with a consenting pathway). We do, however, recommend the policy be amended to align it with the exemption for consented activities (currently set out at 3.22(1)(a) of the NPS-FM) and clarify that there will be no further loss of natural inland wetland extent, their values protected, and restoration promoted, except where loss is a consequence of consented activities to which the effects management hierarchy has been applied. See page 75-77 of the attached report and recommendation #62 in the table below.

A new policy in the NPS-FM for urban development (not recommended)

21. TCC have suggested that an additional policy be included in the NPS-FM which reads:
- Policy 16:** Freshwater is managed in a way that provides for urban growth requirements and associated infrastructure under the National Policy Statement for Urban Development 2020, and other national policy statements.
22. We do not consider this is appropriate as it is inconsistent with Te Mana o Te Wai and the general policy intent of the NPS-FM. The proposed consenting pathway for urban development acknowledges that, in some instances, development may need to occur within a natural wetland, however the intent of the NPS-FM remains that in the first instance, development must be planned for in a way that avoids the further loss of natural inland wetland extent. We do not recommend this change.

Proposed changes to the phrase 'plan enabled' (recommended with options)

23. In their submission, TCC emphasised that the use of the term 'plan-enabled' to define the consenting pathway for urban development would not allow them to develop sites at Tauriko West and Te Tumu in the immediate term, because these sites are not yet zoned in the Tauranga district plan (as is required to meet the definition of plan-enabled under 3.4 of the NPS-UD in the short term). A plan change is proposed for mid-2022, however, the time involved with a plan change, and likely appeal, means earthworks could not commence at these sites this year as planned.
24. To enable these developments to seek consent under the proposed pathway and alleviate the unique issue that TCC face, we have provided an option to add a further qualifier to the definition of 'plan-enabled' for the purposes of the wetland regulations. This option is to define '*plan enabled*' in the short term (three years as defined in the NPS-UD) if it meets the existing criteria set out in the NPS-UD (listed in an operative plan) or if it is identified for development in any relevant statutorily recognised document (eg, a Future Development Strategy).
25. If you agree, the proposed additional qualifier to the term 'plan enabled' will address a barrier identified by TCC to undertake the earthworks required in 2022 for the large-scale urban development projects at Te Tumu and Tauriko West.
26. We have residual concerns about amending an existing definition from another NPS for the purposes of providing for a single known instance of a council not meeting their obligations under the NPS-UD. There may, however, be similar situations where urban development not yet listed in an operative plan could commence under this change in the near term that we

are not aware of. This change would then also benefit those councils/developers with respect to enabling urban development in the immediate term.

Activity status – restricted discretionary activity (recommended)

27. TCC were not the only submitters to highlight that in order for urban development to meet the definition of ‘plan-enabled’ under the NPS-UD, it can only be permitted, controlled or a restricted discretionary activity in the plan (NPS-UD 3.42). The proposal in the discussion document to make ‘plan enabled’ urban development a discretionary activity, is therefore not feasible. This is one of several reasons why we recommend a restricted discretionary consenting pathway for urban development (see page 56 of the attached report for analysis and rationale; and recommendation #43 in the table below).

Options for changes to the gateway test of functional need – as applied to ‘fills’ and urban development (recommended with options)

28. TCC have expressed concern that even with a consent pathway, urban development will not pass the gateway test of **functional need**, because it will always be possible to locate it elsewhere. They have suggested the following alternatives:

- i. new gateway test to demonstrate that urban development is required in a particular location eg, no functional need test for urban development
- ii. remove functional need from gateway tests
- iii. replace functional need gateway test with ‘operational need’ test
- iv. keep functional need by modifying definition to address urban development
- v. keep functional need by modifying definition to address urban development and add operational need.

29. TCC prefer option i, as they consider that a separate test to *prove requirement* for urban development in a particular location will not then require an amendment to the current functional need test, or for it to be replaced with operational need.

30. We agree with TCC and consider that urban development (and landfills, cleanfills and managed fills) may be unable to meet the ‘functional need’ test due to the fact that they are able to be located elsewhere despite the location in question being preferred due to other considerations (ie, proximity). We consider there is a risk in relying on an (as yet) untested interpretation of ‘functional need’ for the provision of the proposed consenting pathways, as this may effectively lead to them being unimplementable.

31. Conversely, we consider that the test for ‘operational need’ is too broad and would lead to unnecessary loss of natural inland wetland extent. We therefore agree with TCC’s preferred option, to provide an alternative gateway test for ‘plan-enabled’ urban development and for landfill, cleanfill and managed fill activities. We consider that a fit for purpose test for these activities will enable them to be consented where appropriate, while continuing to provide a high level of protection for natural inland wetlands.

32. We consider that the best way to achieve this would be to introduce a ‘best practicable location’ test for ‘plan-enabled’ urban development, landfill, cleanfill and managed fill activities. This test would require that the council be satisfied that the location is the ‘best practicable location’ for that activity to occur in. We propose that ‘best practicable location’ be defined as follows:

Best practicable location: means the best location for an activity to be undertaken in, having regard, among other things to –

- a) in relation to ‘plan enabled’ urban development and landfill, cleanfill and managed fill activities
 - i) the scope and design of the activity, and
 - ii) the effects on the natural inland wetland of that activity compared to the effects on the environment in other locations, and
- b) in relation to ‘plan enabled’ urban development, the extent to which development is required to meet development capacity under the NPS-UD.

33. We consider that the ‘best practicable location’ test will strike a balance between enabling ‘plan-enabled’ urban development, landfill, cleanfill and managed fill activities to occur, and continuing to provide a high level of protection for natural inland wetlands. We have however, provided each option, including retaining functional need, or replacing the test with operational need, in recommendation sections for both fills and urban development.

34. The ‘functional need’ test remains appropriate for the existing consent pathway for specified infrastructure and for the proposed consent pathways for quarrying and mining.

Size or other threshold for wetlands (not recommended)

35. The initial letter from Commissioner Tolley proposed that a minimum size for natural wetland would free up more land for urban development while larger ‘significant’ wetlands continued to be protected under the regulations. We do not recommend applying any threshold to the NPS-FM wetland definition. Our reasoning is set out in full on page 8 of the attached report in Appendix 1).

Exclude ‘induced wetlands’ from the ‘natural wetland’ definition (not recommended)

36. In both the initial letter and the letter dated 10 December 2021, Commissioner Tolley proposed that ‘small wetland areas inadvertently caused by other works (eg induced wetlands) should not be considered a natural wetland’ and should be excluded from the definition.

37. Induced wetlands, regardless of their size or significance, are an important part of achieving the policy intent to prevent further wetland loss. We consider that induced wetlands caused by earthworks/infrastructure *should* be captured under the definition of a ‘natural wetland,’ as councils and others have told us that induced wetlands constitute some of the most ecologically significant wetlands remaining in their regions.

38. We do not recommend the change proposed by TCC. Instead, we recommend clarifying within the definition that ‘induced wetlands’ are also ‘natural wetlands’ (see analysis on pages 25-26 of the Report and recommendation #9 below).

B. West Coast Sphagnum moss and refuelling

39. On 7 December 2020 the Mayors of the Buller, Grey and Westland District Councils and the Chairs of the West Coast Regional Council, Te Rūnanga o Ngāti Waewae, Te Rūnanga o Makaawhio, and Development West Coast wrote to you and Minister O’Connor setting out their concerns with the Essential Freshwater package [2020-B-07463 refers].

40. One of their concerns centred on the refuelling requirements for sphagnum moss gathering. Prior to the introduction of the NES-F, the West Coast Regional Plan allowed refuelling in

wetlands of up to 20 litres. The NES-F requires containers of 20 litres or less to refuel outside a 10m setback from the natural wetland. The letter requested that NES-F be amended to allow containers of 20 litres or less to refuel machinery within a natural wetland.

41. We agree that there are likely to be actual effects from multiple vehicular movements to refuel, that outweigh the risk of a possible fuel spill and recommend that the requested change is made to the NES-F (see recommendation #68 in Table 1 below).
42. We consider, however, the matter raised in a further letter dated 14 May 2021 to disapply the requirement for a discretionary consent for new sphagnum harvesting sites post 2 September 2020, should not be progressed. Harvested sites prior to this date are a permitted activity. Sites that were not harvested, or actively managed for harvest at any time between 1 January 2010 and 2 September 2020 should be subject to discretionary activity status.
43. We remain of the view that the other changes requested with regard to the wetland provisions should not be progressed ie, amendment to regulations 52, 53 and 54 in the NES-FW for the West Coast region only, to become discretionary rather than prohibited and non-complying.

C. Coastal wetlands - court decision and possible clarification

44. The High Court has issued a judgment that the wetland rules in the NES-F apply to wetlands in the coastal marine area.¹ We provided a weekly update item on his decision to you in the week of 29 November 2021.
45. The outcome is consistent with the Government's stated policy intent when the NES-F was made. However, because the NES-F had not been applied in practice to CMA wetlands, implications are now emerging for consenting, compliance, and operations functions for local government and DOC.
46. We received four submissions from councils and letters from a number of councils² following the judgement seeking clarification about how the definition of a 'natural wetland' applies within the CMA. The concern is that there is no way of consistently determining the spatial extent of CMA wetlands that are subject to the NES-F. This leads to an uncertain consenting process for any activity in the CMA. There are also implications arising from the associated setback distances in the NES-F, which would extend inland of the CMA boundary if applied to their broadest extent.
47. We are working with DOC to determine the best way to proceed. We will provide further advice in early March on the implications for regional coastal plans and implementation of the New Zealand Coastal Policy Statement (NZCPS). Depending on the outcome of our conversations with DOC, we may also propose amendments to clarify application of the wetland rules to the CMA and the definition of a coastal wetland.

¹ Minister of Conservation and Royal Forest and Bird Protection Society of New Zealand Incorporated v Mangawhai Harbour Restoration Society Incorporated [2021] NZHC 3113.

² Bay of Plenty Regional Council, Auckland City Council, Hawkes Bay Regional Council

Department of Conservation

48. We have worked closely with DOC officials on the proposed changes, in particular DOC officials have led the work on the restoration provisions. We will continue to work together on advice regarding the application of the NES-F to the CMA due with you in March.
49. As the NES-F also applies to the coastal marine area and the drafting of the amendments will proceed on the basis of your in-principle decisions set out in the attached Report and Table 1 below, we recommend you discuss the material provided with Minister Allan.

Next steps and timing

50. Cabinet has agreed to provide you power to act, enabling drafting to begin subject to the in-principle decisions sought in this briefing [CAB-21-MIN-0500 refers]. Final decisions will be sought, supported by a RIS and section 32 impact analysis, following an exposure draft process (see below). We expect that Cabinet approval of the amended regulations will be able to occur early in the third quarter of this year.
51. The process has built in an opportunity to test drafting through an exposure draft. You have previously indicated your agreement to release an exposure draft to submitters [BRF-664 refers]. As Parliamentary Counsel Office's drafting is legally privileged, you will need to approve its release, as Attorney General, before it can be tested through an exposure draft process. We will initiate this step once drafting is completed.
52. Subject to your decisions on the recommendations provided here, officials will:
 - Instruct drafting changes through February/March 2022.
 - Test drafting with stakeholders through an exposure draft process in April/May 2022.
 - Seek your final agreement to the changes following this, supported with section 32 evaluation as required under section 52 of the RMA, with
 - Cabinet approval and gazettal in August 2022.

Recommendations

We recommend that you:

Note we have analysed submissions on the proposed changes to the wetland regulations and have provided recommendations and options for amendments set out in Table 1 of this briefing (copied to the attached report).

Note these are initial recommendations to enable drafting to begin on the basis of your in-principle decision; as drafting and analysis progresses, we may provide additional recommendations. The report will be updated accordingly.

Indicate your agreement (or otherwise) to the recommendations in Table 1 of this briefing below and sign this briefing

Direct officials to begin drafting changes to the wetland regulations, as set out in Table 1 of this briefing

Yes/No

Wetlands and the CMA

Note that we are working with DOC and will provide further advice, with recommendations, to you in March on the NES-F and how it relates to the coastal marine area

Next steps

Agree to forward this briefing and Report to Minister Allan and discuss, due to the application of the NES-F in the coastal marine area

Yes/No

Note that Cabinet has given you power to act, enabling drafting to begin subject to your decisions sought in this briefing, before seeking Cabinet approval of a final instrument later this year (CAB-21-MIN-0500 refers)

Note that you have previously indicated your agreement to test an exposure draft before final decisions are made

Note that the Parliamentary Counsel Office’s drafting is legally privileged, and that Attorney General approval will be need before an exposure draft can be tested with submitters and others

Agree that this briefing will be released proactively on the Ministry for the Environment’s website after final decisions are made and the amendments gazetted.

Yes/No

Signature


Hayden Johnston- Director Water and Land Use Policy Directorate	
Hon David PARKER, Minister for the Environment	
Date	



Table 1: Recommended amendments to the NPS-FM and/or NES-F

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 1: Changes to part (c) of the definition of a 'natural wetland'				
Part 1A: Replacement of 'improved pasture' with 'pasture'	1	<p>Proceed as proposed and delete the term 'improved pasture' from the NPS-FM definition of a 'natural wetland' and replace with 'pasture'; remove the definition of 'improved pasture' from the NPS-FM</p> <p>AND</p> <p>Note we do not recommend defining 'pasture' as this will be achieved by incorporating by reference a list of pasture species into the NPS-FM (see rec # 6 below)</p>	Pages 10-13	Yes/No/Discuss
Part 1B: Removal of 'at the commencement date'	2	<p>Proceed as proposed and delete 'at the commencement date' from part c) of the definition of 'natural wetland' in the NPS-FM</p>	Pages 13-16	Yes/No/Discuss
Part 1C: Clarification of 50% exotic pasture species	3 4	<p>Proceed as proposed and delete 'is dominated by (that is, more than 50% of) exotic pasture species' from part (c) the definition of 'natural wetland' in the NPS-FM</p> <p>Replace with 'that has 50 percent or more ground cover comprising exotic pasture species</p> <p>AND</p>	Pages 16 -22	Yes/No/Discuss Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
	5	<p>Incorporate by reference into the NPS-FM, under section 46B of the RMA, a national list of exotic pasture species that will define what is included and meant by the phrase 'exotic pasture species'</p> <p>Note that we will test the list currently employed by Greater Wellington Regional Council with all other regional councils to ensure its relevance nationwide</p> <p>Note you have agreed to release an exposure draft of the amendments and the list of species can be publicly consulted on at the same time [BRF-664 refers]</p>		Yes/No/Discuss
Part 1D: Removal of 'temporary rain-derived water pooling'	6	<p>Proceed as proposed and delete 'and is subject to temporary rain-derived water pooling' from part (c) of the definition of 'natural inland wetland' in the NPS-FM</p> <p>AND</p>	Pages 22-24	Yes/No/Discuss
	7	<p>Do not replace with an alternative measure of wetland hydrology within the exclusion for pasture-dominated wetlands in part (c) of the definition of 'natural wetland'</p>		Yes/No/Discuss
Part 1E: Requests for other amendments to definitions/policy - Artificial wetlands and induced wetlands	8	<p>(New) Amend part (a) of the definition of 'natural wetland' in the NPS-FM to specify that a natural wetland includes induced wetlands</p> <p>AND</p>	Pages 24-28	Yes/No/Discuss
	9	<p>Include definitions in the NPS-FM for:</p> <p>Wetlands constructed by artificial means – being wetlands and waterbodies that have been deliberately constructed, including areas of wetland habitat that have formed in or around any deliberately constructed waterbody, or words to that effect</p>		Yes/No/Discuss
				Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Threatened species	10	<p>Induced wetlands – being wetlands that have resulted from any human activity except the deliberate construction of a wetland or waterbody by artificial means, or words to that effect</p> <p>(New) Amend the definition of ‘natural wetland’ in the NPS-FM to specify that where a wetland is identified as having threatened species, then it is a ‘natural wetland’ and the exclusion under part (c) of the definition (in relation to pasture) does not apply</p>		Yes/No/Discuss
Amendments to Stock Exclusion ‘natural wetland’ definition	11	<p>Make a consequential amendment to the Resource Management (Stock Exclusion) Regulations 2020, to align the definition of ‘natural wetland’ with the amended definition in the NPS-FM</p>		Yes/No/Discuss
Principles for offsetting and compensation				
Include principles for offsetting and compensation into the NPS-FM	12	<p>Include principles for offsetting and compensation in an appendix of the NPS-FM as set out in Appendix 1 of the Summary Report and link the application of these principles to the effects management hierarchy</p> <p>Note that these can be tested through the exposure draft process.</p>	Pages 31 and 39 and Appendix 1 of Report	Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 2A: Proposed consent pathways – Quarries				
Part 2A: Quarries	13	<p>Proceed as proposed and include quarrying in the list of activities exempt from the general policy to avoid natural inland wetland loss, protect their values and promote their restoration in 3.22(1)(a) of the NPS-FM</p>	Pages 36-40	Yes/No/Discuss
	14	<p>AND</p> <p>Apply the same provisions to quarries as in the NPS-FM at 3.22(1)(b)(i), including the gateway test of significant national or regional benefit in 3.22(1)(b)(ii) and functional need in (iii); and the effects management hierarchy as per 3.22(b)(iv)</p>		Yes/No/Discuss
	15	<p>AND</p> <p>Amend the NES-F to provide for quarrying activities as a discretionary activity and subject to the same provisions already in place for the construction of specified infrastructure</p>		Yes/No/Discuss
Part 2A defining the scope of the consent pathway in the NPS-FM and NES-F	16	<p>Option 1: Include the definition for quarry and quarrying activities as set out in the National Planning Standards 2019 which also includes ancillary activities associated with quarrying</p>		Yes/No/Discuss
	17	<p>Or</p> <p>Option 2: Include a definition of quarrying that applies only to the extraction of aggregate at site and not to ancillary activities (recommended)</p> <p>Note that under this option the proposed consent pathway for cleanfill activities will provide for the adjacent disposal of overburden.</p>		

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 2B: Proposed consent pathways – clean/managed and landfills				
Part 2B: Clean/managed and landfills	18	<p>Proceed as proposed and include cleanfills, managed fills and landfills in the list of activities exempt from the general policy to avoid natural inland wetland loss, protect their values and promote their restoration in 3.22(1)(a) of the NPS-FM</p> <p>AND</p>	Pages 40-44	Yes/No/Discuss
	19	<p>Apply the same provisions to cleanfills, managed fills and landfills as in the NPS-FM at 3.22(1)(b)(i), including the significant national or regional benefit gateway test at 3.22(1)(b)(ii) and the effects management hierarchy as per 3.22(1)(b)(iv)</p> <p>AND</p>		Yes/No/Discuss
	20	<p>Option 1: Apply the current definition of ‘functional need’ as set out in the National Planning Standards as a gateway test to landfills, cleanfills and managed fills</p> <p>OR</p>		Yes/No/Discuss
	21	<p>Option 2: Apply the current definition of ‘operational need’ as set out in the National Planning Standards as a gateway test to landfills, cleanfills and managed fills</p> <p>OR</p>		Yes/No/Discuss
	22	<p>Option 3: Make the gateway test in the NPS-FM ‘best practicable location’ for landfills, cleanfills and managed fills (recommended)</p> <p>AND</p>		Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
	23	<p>Include the following definition, or words to that effect in the NPS-FM</p> <p>Best practicable location: means the best location for an activity to be undertaken in, having regard, among other things to–</p> <ul style="list-style-type: none"> a) in relation to ‘plan-enabled’ development, and landfill, cleanfill and managed fill activities <ul style="list-style-type: none"> i. the scope and design of the activity, so that adverse effects are avoided to the extent possible, and ii. the effects on the natural inland wetland of that activity compared to effects on the environment in other locations, and b) in relation to ‘plan-enabled’ urban development, the extent to which development is required to meet development capacity under the NPS-UD 		
	24	<p>AND</p> <p>Amend the NES-F to make landfill, cleanfill and managed fill activities a discretionary activity subject to the same provisions already in place for the construction of specified infrastructure</p>		
	25	<p>AND</p> <p>Provide for the following definitions in the NPS-FM and NES-F</p> <p>Landfill has the meaning given by the National Planning Standards 2019.</p> <p>Cleanfill has the meaning given by the National Planning Standards 2019</p> <p>Managed fill means an area used for the disposal of material with low-grade contamination, such as demolition material, received from existing infrastructure, or words to that effect</p>		

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 2B: Proposed consent pathways – Mining				
Part 2C: Mining – options to either include as a discretionary activity or not progress [Note that the term ‘ Mineral Mining ’ aligns with that used in the Crown Minerals Act 1991]	26	Option 1: Do not progress a consenting pathway for mining or associated activities in the NES-F	Pages 45-47	Yes/No/Discuss
	27	OR Option 2: Provide a consent pathway for mining by including mining in the list of activities exempt from the general policy to avoid natural inland wetland loss, protect their values and promote their restoration in 3.22(1)(a) of the NPS-FM (recommended)		Yes/No/Discuss
	28	AND Apply the same provisions to mining as in the NPS-FM at 3.22(1)(b)(i), including the gateway test of national or regional benefit in 3.22(1)(b)(ii) and functional need in (iii); and the effects management hierarchy as per 3.22(1)(b)(iv)		Yes/No/Discuss
	29	AND Provide for mining as a discretionary activity in the NES-F and subject to the same provisions already in place for the construction of specified infrastructure.		Yes/No/Discuss
Part 2C: Mining definition with options to include (if any) associated mineral mining operations	30	Option 1. Apply the Crown Minerals Act 1991 definition of ‘mining’ in the NPS-FM and NES-F but do not include ‘mining operations’ (recommended) OR	Pages 46-48	Yes/No/Discuss Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
	31	<p>Option 2. Apply the Crown Minerals Act 1991 definition for both ‘mining’ and ‘mining operations’ in the NPS-FM and NES-F</p> <p>Note the proposed consent pathway for cleanfill and managed fill activities will provide for the disposal of overburden</p>		
Part 2C: Defining ‘mining’ and the scope of the consenting pathway – Additional options for the type of minerals mined in wetlands	32	<p>Option 1 – Do not place any controls on minerals able to be mined under the proposed consenting pathway in the NES-F</p>	Pages 46 and 48-50	Yes/No/Discuss
	33	<p>OR</p> <p>Option 2- Exclude coal from minerals able to be mined under the proposed consenting pathway in the NES-F</p>		Yes/No/Discuss
	34	<p>OR</p> <p>Option 3 - Apply the following conditions to the ability to mine coal under the proposed consenting pathway in the NES-F (recommended)</p> <p>Condition (a) - Include a sunset clause for mining that makes thermal coal mining a non-complying activity after 1 March 2030 but;</p> <p>Condition (b) - Allow the mining of coking coal past 2030.</p> <p>Recommended option because:</p> <ul style="list-style-type: none"> • A deadline or sunset clause of 2030 would be consistent with the Government commitment to 100% renewable electricity generation by 2030 • Coking coal would only be able to be mined subject to the gateway tests for functional need and national/and or regional significance, which will ensure that natural wetlands are not disturbed where there are viable alternative sites for its extraction 		Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 2D: Proposed consent pathways – Urban Development (Plan-enabled)				
Part 2D: Urban development (Plan-enabled)	35	Provide a consenting pathway for ‘plan-enabled’ urban development in the NES-F and include ‘plan-enabled’ urban development in the list of activities exempt from the general policy to avoid natural inland wetland loss, protect their values and promote their restoration in 3.22(1)(a) of the NPS-FM	Pages 52-59	Yes/No/Discuss
	36	<p>AND</p> <p>Apply the same provision to ‘plan-enabled’ urban development as in the NPS-FM at 3.22(1)(b)(i), and the effects management hierarchy as per 3.22(1)(b)(iv)</p>		Yes/No/Discuss
	37	<p>AND</p> <p>Include a gateway test similar to that at 3.22(1)(b)(ii) which requires the plan-enabled urban development to provide significant national, regional or district benefits</p>		Yes/No/Discuss
	38	<p>Option 1: Apply the current definition of ‘functional need’ as set out in the National Planning Standards as a gateway test to ‘plan-enabled’ urban development</p>		Yes/No/Discuss
	39	<p>OR</p> <p>Option 2: Apply the current definition of ‘operational need’ as set out in the National Planning Standards as a gateway test to ‘plan-enabled’ urban development</p> <p>OR</p>		Yes/No/ Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
	40	<p>Option 3: Make the gateway test in the NPS-FM ‘best practicable location’ for ‘plan-enabled’ urban development (recommended)</p>		Yes/No/ Discuss
	41	<p>AND</p> <p>Include the following definition, or words to that effect in the NPS-FM</p> <p>Best practicable location: means the best location for an activity to be undertaken in, having regard, among other things to–</p> <ul style="list-style-type: none"> a) in relation to ‘plan-enabled’ development, and landfill, cleanfill and managed fill activities <ul style="list-style-type: none"> i. the scope and design of the activity, so that adverse effects are avoided to the extent possible, and ii. the effects on the natural inland wetland of that activity compared to effects on the environment in other locations, and b) in relation to ‘plan-enabled’ urban development, the extent to which development is required to meet development capacity under the NPS-UD 		Yes/No/ Discuss
	42	<p>Include a gateway test similar to that at 3.22(1)(b)(ii) which requires the plan-enabled urban development to provide significant national, regional or district benefits</p>		Yes/No/ Discuss
	43	<p>AND</p> <p>Provide for ‘plan-enabled’ development as a restricted discretionary activity in the NES-F subject to with the matters to which discretion is restricted, being those set out in existing regulation 56 of the NES-F</p>		

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 2D: Urban development – Options for defining Plan-enabled	44	<p>Option 1 - Utilise the definition of ‘plan-enabled’ urban development for the proposed urban development consent pathway in the NPS-FM and NES-F as set out in the NPS-UD</p>		Yes/No/Discuss
	45	<p>OR</p> <p>Option 2 - Add a qualifier to the definition of ‘plan-enabled’ for the purposes of the NES-F which clarifies that: ‘plan-enabled’ has the meaning given by the NPS-UD, except that for the purposes of the NPS-FM and NES-F:</p> <p>(a) plan enabled in the short term means land zoned for housing or business use (as applicable) in an operative district plan;</p> <p>(b) or land identified for development in any relevant statutorily recognised document eg, Smartgrowth plan (recommended)</p>		Yes/No/Discuss
Part 2D: Urban development – responsibility for on-going management of off-sets	46	<p>Require the consent authority to be satisfied for a ‘plan-enabled’ development that there is clear provision, including who is responsible, for the ongoing maintenance and management of aquatic offsets, once the development phase is completed.</p>		Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 2E: Additional consent pathways proposed by submitters				
Part 2E: Additional consent pathways proposed by submitters	47	<p>Water storage</p> <p>Provide for the construction and maintenance of water storage within the current definition of ‘specified infrastructure’ in the NPS-FM (recommended)</p>	Pages 59-60	Yes/No/Discuss
	48	<p>Ski areas</p> <p>Option 1: Do not provide a specific consent pathway for the construction and maintenance of infrastructure associated with ski areas on the basis that the existing consent pathway for ‘regionally significant infrastructure identified as such in a regional policy statement or regional plan’ is appropriate and would be available for this activity (recommended)</p> <p>Note that the recommendation to provide for water storage will address ski area needs for snowmaking and water treatment/supply</p> <p>OR</p>	Pages 61-63	Yes/No/Discuss
	49	<p>Option 2: Amend the consent pathway for ‘regionally significant infrastructure identified as such in a regional policy statement or regional plan’ to remove the requirement for the infrastructure to have prior listing in a regional policy statement or regional plan</p> <p>Note that this would apply generally, not just to ski areas and would allow the consent authority to make the determination of regional significance as part of their decision-making on a consent application</p>		

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
	50	<p>OR</p> <p>Option 3: Include infrastructure associated with, and for ski areas within the definition of 'specified infrastructure' including but not limited to, transport mechanisms such as lifts, roads, and tracks (for any purpose), associated facilities for the loading or unloading of passengers, sewerage system, water and electricity supply</p> <p>[intentional space]</p>		Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 3: Amendments to the restoration provisions				
Part 3: Definitions for maintenance and restoration and improving clarity of existing provisions	51	<p>(New) Include definitions for ‘maintenance’ and ‘biosecurity’ in the NPS-FM and NES-F. The definitions would be, or words to similar effect:</p> <p>Maintenance means managing threats such as weeds to prevent deterioration of wetland condition</p> <p>Biosecurity means activities to eliminate or manage a pest or an unwanted organism</p>	Pages 64-74	Yes/No/Discuss
	52	Amend the existing definition of ' restoration ' in the NPS-FM to remove the phrase ‘natural inland wetlands’ and replace with ‘natural wetlands’ and include the amended definition in the NPS-FM and NES-F		Yes/No/Discuss
Maintenance (weed control) and biosecurity	53	Wherever ‘is for the purpose of natural wetland restoration’ appears in regulations 38 and 39 change to ‘is for the purpose of natural wetland restoration, maintenance or biosecurity’, or words to that effect		Yes/No/Discuss
	54	Amend regulation 38(4)(b) to read that if the activity is vegetation clearance, earthworks, or land disturbance, the activity must not affect more than 500m ² or 10% of the area of the natural wetland, whichever is smaller.		Yes/No/Discuss
	55	<p>Amend 38(5) by adding exceptions to the area limit in subclause (4)(b) for the following activities:</p> <ul style="list-style-type: none"> i. non-indigenous vegetation clearance for biosecurity purposes and indigenous vegetation clearance demonstrably necessary for the biosecurity activity ii. non-indigenous vegetation clearance using hand-held tools for restoration and maintenance 		Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Restoration plans	56	Amend 38(5) by adding exceptions to the area limit in subclause 4(b) for non-indigenous vegetation clearance for restoration or maintenance in accordance with a restoration plan, provided to the council at least 10 working days prior to the activity commencing. A restoration plan must: <ul style="list-style-type: none"> i. assess the restoration and/or maintenance activities against relevant general conditions in regulation 55; and ii. address the matters in Schedule 2 of the NES-F relevant to the activity proposed- restoration plans for natural wetlands 		Yes/No/Discuss
Controls on removing/planting exotic species	57	In relation to planting exotic species, amend regulation 38(5) to clarify that it only applies to planting for restoration purposes		Yes/No/Discuss
	58	Make a consequential amendment to the permitted activities in regulation 40(5) (scientific research), regulation 43(5) (maintaining wetland utility structures) and regulation 46(5) (maintaining specified and other infrastructure) so that the exception relates to planting for restoration purposes.		Yes/No/Discuss
Amendments to regulation 55.	59	Amend regulation 55(3)(e) in the NES-F to provide that debris and sediment (excluding the consented disposal of overburden) must not be placed – <ul style="list-style-type: none"> i. within a setback of 10 m from any natural wetland; or ii. in a position where it may enter any natural wetland 		Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Charges for notification of activity	60	Amend regulation 75 so that councils cannot charge to receive and review notifications of intended permitted activity work (including restoration plans where required) for wetland restoration, maintenance and biosecurity		Yes/No/Discuss
Part 4: Additional matters raised				
Part 4A: Alignment with the RMA, Te Mana o te Wai and Policy 6	61	Include a requirement at 3.22(3) of the NPS-FM that council must be satisfied that where aquatic offsetting or compensation is being pursued, the applicant has given regard to the aquatic offsetting and compensation principles which will be appended to the NPS-FM	Pages 75-77	Yes/No/Discuss
	62	Amend Policy 6 in the NPS-FM so that it clarifies that there is to be 'no further loss of natural inland wetland extent, their values are protected, and their restoration is promoted, except where loss is a consequence of consented activities, to which the effects management hierarchy has been applied		Yes/No/Discuss
Part 4B: NES-F Drainage - Prohibited (r53) and non-complying (r52)	63	In the NES-F remove the words 'or discharge' from the chapeau in regulation 52(2) and regulation 53(2)	Pages 77-78	Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Part 4C: NES-F Discharges and the 100m setback	64	Amend every reference to 'discharges of water' in Part 3 – Subpart 1 of the NES-F to specify that they are only regulated if the activity has, or is likely to have, adverse effects on the hydrological regime or biodiversity values of a natural wetland	Pages 78-80	Yes/No/Discuss
Part 4D: Providing for Fish Passage	65	In the NES-F provide an exception to regulation 46(4)(b) (Maintenance of infrastructure) so that the activity may increase the size of a structure if it is for the purpose of providing for fish passage and complies with the regulations set out in NES-F Part 3, Subpart 3 – Passage of fish affected by structures	Page 80	Yes/No/Discuss
Part 4E: Alignment and clarification for 'specified infrastructure'	66	In regulation 46 of the NES-F (Maintenance and operation of infrastructure – permitted activities) disapply the following general conditions in regulation 55 (General Conditions): <ul style="list-style-type: none"> • regulation 55(2) (the requirement to notify the regional council 10 working days before commencing the activity) • regulation 55(3)(b) (c) and (d) • regulation 55 (5) 	Page 81	Yes/No/Discuss
	67	Amend regulation 47 (Maintenance and operation of infrastructure – restricted discretionary activities) to provide an exception to the general mandatory condition in regulation 47(5)(c) (that the bed and hydrological condition of a wetland must be restored within 30 days of the start of the activity) if the maintenance and operation of the infrastructure necessitates the ongoing taking, use, damming, diversion, or discharge of water		Yes/No/Discuss

Proposed amendment	Rec#	Recommendation and/or options	Page # in report	Yes/No/Discuss
Sphagnum moss refuelling within a wetland	68	Amend NES-F Schedule 4 (7) to allow containers of 20 litres or less to be used to refuel machinery within a natural wetland	BRF - 1004 Paras 39-43	Yes/No/Discuss
End of recommendations				



Appendix 1: Report and recommendations: Essential Freshwater - Proposed amendments to the wetland regulations



To support discussion of the wetland advice in BRF-1004 on 10 March 2022

Date Submitted:	9 March 2022	Tracking #: BRF-1316
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	Action sought:
To Hon David PARKER, Minister for the Environment	Sign and indicate agreement to recommendations

Actions for Minister's Office Staff	Return signed aide memoire to MfE officials
Number of appendices and attachments # 0	n/a

Ministry for the Environment contacts

Position	Name	Cell phone	1st contact
Principal Author	Vicki Addison	██████████	
Responsible Manager	Nik Andic	██████████	
Director	Hayden Johnston	██████████	✓

To support discussion of the wetland advice in BRF-1004 on 10 March 2022

Purpose

1. The purpose of this Aide Memoire is to support the policy discussion with officials on 10 March, regarding the recommendations set out in BRF-1004. It addresses the following matters:
 - A. Recommendations in BRF-1004 that require clarification/corrections
 - B. Additional advice on the gateway test options - as applied to 'fills'.

Advice

A. Recommendations in BRF-1004 that require clarification/corrections

2. There are three recommendations in BRF-1004 which require modification/corrections.

Clarification that the new consent pathways apply only to natural inland wetlands

3. Following the recent High Court decision that the NES-F applies to wetlands in the coastal marine area (CMA) we wish to clarify that new consent pathways set out in the NES-F only apply to 'natural inland wetlands'. This is necessary to avoid the unintended outcome of enabling these activities (eg, mining, urban development) in coastal areas.
4. We are preparing additional advice, due at the end of March, to clarify application of the NES-F to the CMA – including a definition of wetlands in the CMA.

Recommendation #4 correction:

5. Recommendation #4 currently reads: *Replace with 'that has 50% or more ground cover comprising exotic pasture species, or words to that effect. It should read 'that has more than 50 percent ground cover comprising exotic pasture species' (as consulted on).*
6. This change aligns with what was consulted on in the discussion document. It corrects a discrepancy with what is currently in recommendation 4 of BRF-1004. It signals that the ratio of pasture to wetland species cannot be 50/50, and that there must be *more* than 50 percent exotic pasture species to meet the exclusion.

Recommendation #66 clarification:

7. Recommendation #66 currently reads: *In regulation 46 of the NES-F (Maintenance and operation of infrastructure – permitted activities) disapply the following general conditions in regulation 55 (General Conditions):*
 - *regulation 55(2) (the requirement to notify the regional council 10 working days before commencing the activity)*
 - *regulation 55(3)(b) (c) and (d)*
 - *regulation 55 (5).*
8. The recommendation is currently silent on the aspects of specified infrastructure that we want this to apply to.

9. The recommendation in BRF-1004, currently refers to disapplying the general conditions to ‘infrastructure’ generally, but it should be explicit and refer only to flood and drainage infrastructure as set out in part (c) of the ‘specified infrastructure’ definition as follows:

(c) public flood control, flood protection, or drainage works carried out:

(i) by or on behalf of a local authority, including works carried out for the purposes set out in section 133 of the Soil Conservation and Rivers Control Act 1941; or

(ii) for the purpose of drainage by drainage districts under the Land Drainage Act 1908.

B. Gateway test options - as applied to ‘fills’

10. We provide three options for the gateway tests as applied to clean, managed and landfills in BRF-1004. These are: ‘operational need’, ‘functional need’ (both already defined in the National Planning Standards) and a new test ‘best practicable location’ (recommended option).
11. At a meeting with your office on Tuesday 8 March, further advice on the use of ‘operational need’ in respect of ‘fills’ was requested.
12. **Operational need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints. It is a lower “test” than **functional need** which means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.
13. We have undertaken further analysis of the options provided and our advice remains in line with the Report. This being, that while suitable, there is some risk that ‘operational need’ is too broad a test. We note the following additional points:
- Whether or not inconsistency between enabling landfills (if the operational need test was progressed) and ‘specified infrastructure’ (which would remain subject to the functional need test) is desirable.
 - In granting a recent consent on the Dome Valley landfill in Auckland, the Commissioners applied the test of “functional need” as set out in the Auckland Unitary Plan (in respect of streams and rivers). The Commissioners took a broad interpretation of functional need and granted the consent. This illustrates that this test can be successfully applied to consent applications for landfills. We note however, that this decision is being appealed (June) and a decision expected toward the end of 2022. We expect commentary of whether the Environment Court agrees the broader interpretation of functional need to be part of the decision.
14. If you do not agree that the new test of ‘best practicable location’ has merit, then choosing functional need would be consistent with the existing structure of the exceptions in 3.22 and the additional requirements for infrastructure in 3.22(b). Selecting operational need would still be appropriate and enable ‘fills’ to be consented. We note that whichever test is selected, this will very likely be challenged through the Courts when used in respect of consenting activities in wetlands.

Recommendations

We recommend that you:

15. **Agree** that the new consent pathways for quarries; mining; clean, managed and landfills; and plan enabled urban development will apply only to natural inland wetlands

agree/disagree

16. **Agree** to proceed as proposed and delete 'is dominated by (that is, more than 50% of) exotic pasture species' from part (c) the definition of 'natural wetland' in the NPS-FM, and replace it with 'that has more than 50 percent ground cover comprising exotic pasture species'


agree/disagree

17. **Agree** to amend regulation 46 of the NES-F (Maintenance and operation of infrastructure – permitted activities) as it relates to public flood control, flood protection or drainage works carried out under part (c) of the definition of specified infrastructure, to disapply the following general conditions in regulation 55 (General Conditions):

- regulation 55(2) (the requirement to notify the regional council 10 working days before commencing the activity)
- regulation 55(3)(b) (c) and (d)
- regulation 55 (5)

agree/disagree

Signature

Hayden Johnston, Director Water and Land Use Policy	
Hon David PARKER, Minister for the Environment	
Date:	

Appendix 2: Essential Freshwater – results of the exposure draft consultation on technical changes and wetland amendments [BRF - 1889]

Essential Freshwater – results of the exposure draft consultation on technical changes and wetland amendments

Date Submitted:	30 August 2022	Tracking #: BRF-1889	
Security Level	Policy and Privacy In-Confidence	MfE Priority:	Not Urgent

	Action sought:	Response by:
Hon David PARKER, Minister for the Environment	Sign and/or discuss with officials	5 September

Actions for Minister's Office Staff	Forward this report to Hon Poto Williams, Minister of Conservation Return the signed report to MfE.
Number of appendices and attachments # 5	Appendix 1: Table 1 – proposed amendments to the exposure drafts Appendix 2: Overview of technical corrections and clarifications in the NPS-FM exposure draft. Appendix 3: Concerns previously raised by Choose Clean Water Appendix 4: Exposure draft of the National Policy Statement for Freshwater Management 2020 Appendix 5: Exposure draft of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020

Key contacts

Position	Name	Cell phone	1st contact
Principal Author	Vicki Addison	██████████	
Responsible Manager	Nik Andic		
Director	Hayden Johnston	██████████	✓

Essential Freshwater – results of the exposure draft consultation on technical changes and wetland amendments

Key Messages


1. Public consultation on exposure drafts of the National Policy Statement for Freshwater Management 2020 (NPS-FM) and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) closed on 10 August 2022.
2. The proposed changes address technical and other corrections plus amendments to the wetland provisions. We received 157 substantive submissions on the exposure drafts.
3. In respect of the technical and other changes most agree that these improve clarity and will assist with implementation. In general, the drafting changes on wetlands were supported, albeit most submitters sought further clarification, and some sought additional policy changes.
4. This briefing provides recommendations for drafting changes. We have presented these in two ways depending on their significance. The most significant matters arising from feedback on the exposure drafts are discussed in detail in the following sections of the briefing:
 - i. Technical changes – Proposed change of ‘river’ to ‘river bed’*
 - ii. Technical changes – Nutrients (various)*
 - iii. Wetlands – Definition of a natural wetland*
 - iv. Wetlands – NZDF and ski areas in the definition of specified infrastructure*
 - v. Wetlands – Provision for ancillary activities associated with quarries and mining*
 - vi. Wetlands – Clarifying that the discharge rules are about changes in water level*
 - vii. Wetlands – NES-F definition of ‘vegetation clearance’ should not include grazing.*
5. For each of these a recommendation is provided at the relevant section, and we ask that you indicate your agreement, or otherwise, in the text box provided there.
6. Changes of a more minor nature are set out in Table 1 (Appendix 1). We have provided recommendations for you to indicate agreement, or otherwise, in Table 1. These changes relate mainly to the consent pathways for fills and urban development, the restoration provisions and technical corrections.
7. Minor wording changes to ensure the provisions are clear and internally consistent are also required, but for reasons of brevity are not included here. We will provide your office with the complete set of amendments to the regulations following an external review of the drafting for clarity and workability (see next steps section below).

Recommendations

We recommend that you:

- a. **Indicate** your agreement to the recommendations set out in text boxes throughout this briefing and in Table 1 (Appendix 1) as appropriate Yes/No
- b. **Note** that following receipt of your decisions we will instruct PCO accordingly
- c. **Meet** with officials for discussion on the content of this briefing Yes/No
- d. **Note** that a further briefing will provide the final *National List of Exotic Pasture Species* to be incorporated by reference to the NPS-FM, and the offset/compensation principles in Appendix 6 and Appendix 7 of the NPS-FM
- e. **Note** various minor wording changes are needed to ensure the provisions are clear and internally consistent, but for reasons of brevity are not set out in this briefing
- f. **Note** we are procuring an independent review of the drafting
- g. **Note** that following the results of the review we will provide a track change copy of both regulations showing all recommended changes for your approval
- h. **Note** that we expect final Cabinet decisions can be sought in early November
- i. **Agree** to forward this briefing to Hon Poto Williams, Minister of Conservation Yes/No

Signature

Hayden Johnston Director - Water and Land Use Policy	
Hon David PARKER, Minister for the Environment	
Date	

Purpose

8. The purpose of this briefing is to:
 - provide you with a summary of the feedback received on exposure drafts of the National Policy Statement for Freshwater Management 2020 (NPS-FM) and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F), and
 - seek your agreement to proposed changes arising from that feedback and instruct PCO accordingly.

Context

9. The NPS-FM and NES-F were gazetted in August 2020. Since then, the Ministry for the Environment has worked to support implementation and address any issues as they arise. Engagement with stakeholders highlighted that there were implementation issues with the wetland provisions which guidance alone could not resolve, and amendments were necessary.
10. That is why in 2021 Cabinet agreed to consult on amendments to the NPS-FM and NES-F [refer CBC-21-MIN-0075/ CAB-21-MIN-0338; CAB-21-MIN-0500 and ENV006/356].
11. Public consultation on exposure drafts of the NPS-FM and NES-F closed on 10 August 2022. This briefing provides you with a summary of the feedback received, with recommended changes to the proposed drafting in response to submitter feedback. We seek your in-principle decisions on the recommendations set out in this briefing to enable PCO to begin drafting amendments.
12. Consultation on the application of the NES-F to the CMA is also underway (closes 21 September). We expect to align these two sets of wetland amendments for final Cabinet decision-making. We anticipate final decisions can be sought from Cabinet on both matters in early November.

Analysis and advice

13. This briefing sets out the changes proposed following feedback on the exposure drafts. Where we have recommended substantial changes in response to feedback, these are discussed in detail below and the recommendation is set out in a text box at the end of the relevant section. Other changes are set out in Table 1 of this briefing. These relate mainly to the consent pathways for fills and urban development, adjustments to the restoration provisions and minor or technical corrections.
14. This briefing does not contain advice on the final *National List of Exotic Pasture Species* to be incorporated by reference to the NPS-FM (necessary for the pasture exclusion to the wetland definition). We are seeking specialist input from AgResearch on the feedback received on this list.
15. Advice on the offset principles is also still being finalised. We wish to do a compare/contrast exercise with feedback received on the NPS-Indigenous Biodiversity

principles before finalising proposed wording for both. We will provide a further briefing in due course on both these matters.

Overall submitter feedback

16. We received 157 substantial submissions on the NPS-FM and NES-F exposure drafts. In general, the drafting changes were supported, albeit most submitters seek further clarification, and some seek additional policy changes.
17. In respect of the technical changes, most agreed that these improve clarity and will assist with implementation, while some have raised specific issues and/or suggest ways proposed changes could be improved. Significant issues are discussed in detail below.
18. In respect of wetlands, most submitters support the changes to the definition and the restoration provisions. There remains (sometimes strong) opposition to the additional consent pathways from some submitters – particularly for mining and fills.

i. Technical changes - Proposed change of 'river' to 'river bed'

19. We proposed to amend 'river' to 'river bed', in relation to NPS-FM provisions aimed at avoiding the loss of river extent and managing deposited sediment. The term 'river bed' was intended to better capture the intent of Policy 7 (and associated clauses) aimed at avoiding the loss of river extent (for example, through reclamation and piping of streams), as well as managing deposited sediment. The NPS-FM policies complement NES-F regulation 57, which controls the *reclamation of the bed of any river*.
20. Submitters almost universally opposed this change. They were concerned the change from 'river' to 'river bed' would narrow the policy and have unintended consequences.
21. Most (particularly iwi/Māori submitters) were concerned the changes rely on problematic distinctions between a river and its bed. They viewed the distinction as unworkable when avoiding loss of values (which relate to the river and may be lost, but are not directly associated with its bed), and inconsistent with Te Mana o te Wai.
22. NIWA, councils and others based in the South Island noted that the change would make the policy particularly difficult to apply in relation to braided rivers, which have mobile beds that are difficult to delineate.
23. We agree with the concerns raised, and that there is no evidence current drafting is causing issues right now. Therefore, we do not recommend proceeding with the proposed change to refer to 'river bed', and instead recommend retaining the use of 'river' in NPS-FM Policy 7 and clause 3.24 (See text box below).

Recommendation: do not proceed with the proposed change to refer to 'river bed' and retain the use of 'river' in NPS-FM Policy 7 and clause 3.24

Yes/no/discuss

ii. Technical changes – Special provisions for attributes affected by nutrients

24. We proposed a number of amendments to NPS-FM clauses 3.11-3.14 to clarify special provisions for attributes affected by nutrients. The proposed changes:
- a. remove unnecessary distinctions between different attributes and attribute types, to better reflect Cabinet’s agreed policy intent that nutrients should be managed as needed to achieve desired outcomes for other ecosystem health attributes
 - b. clarify requirements to derive nutrient concentrations needed to achieve desired outcomes for other ecosystem health attributes, and to set limits on resource use to achieve those, and
 - c. ensure consistent use of terminology and clarify the meaning of ‘exceedance criteria’.
25. We have attached the document provided to submitters which sets out the provisions and proposed changes in more detail in Appendix 2. Most submissions support of the intent of proposed changes or do not comment on them, but some have raised specific issues and/or suggest ways proposed changes could be improved. These are set out (with recommendations) below.
26. You have previously received correspondence from Choose Clean Water, outlining a range of concerns with the provisions for attributes affected by nutrients. We feel these concerns have been adequately addressed by the proposed changes, or that they are otherwise out of scope. We do not recommend any further changes in response but have summarised their concerns and our advice in Appendix 3.

Referring to temporal exceedance criteria may not be helpful

27. NIWA’s submission notes technical issues with the proposed change, and the importance of various criteria – not just temporal exceedance criteria. They recommend further work to understand these issues and whether direction is needed beyond nutrient management (eg, in relation to other attributes).
28. We agree with the concerns raised and do not recommend proceeding the proposed change, which would limit references to only ‘*temporal* exceedance criteria’.
29. Guidance is already being developed and addresses a range of criteria that are important in relation to nutrient management. We will work with the drafter and relevant experts to confirm references to exceedance criteria are clear and appropriate, and whether any change is necessary.
30. ENGOs have previously commented on references to exceedance criteria, some of whom believe the NPS-FM should constrain how councils approach it (ie, rule out approaches that allow for inappropriate exceedances of thresholds). This request is described in more detail in Appendix 3 but is outside of the scope of proposed changes.

Recommendation: do not proceed with amending references to ‘temporal exceedance criteria’ and retain the existing reference to ‘exceedance criteria’

Yes/no/discuss

DIN and DRP may not always be the most appropriate forms of nutrients

31. One submission noted that DIN and DRP may not always be the appropriate forms of nutrient to manage. For example, total nitrogen (TN) and total phosphorous (TP) may be more appropriate for lakes or estuaries and clause 3.13 should provide for this.
32. We agree and recommend revising drafting to enable the use of other nutrient forms and will work with the drafter and relevant experts to ensure this is appropriate and technically correct.

Recommendation: revise the drafting to enable councils to use other forms of nitrogen and phosphorous as appropriate

Yes/no/discuss

Concern the changes have a greater impact than anticipated

33. The Fertiliser Association and its members believe councils currently have discretion about whether to manage nutrients to achieve target attribute states for some attributes (eg, for macroinvertebrates), and that proposed changes in the exposure drafts will remove this discretion. Their view is the relationship between nutrients and some attributes is very uncertain, making the policy difficult to implement (a view shared by some regional councils), and they request proposed changes be subject to a full policy process and impact analysis.
34. It is not the policy intent for councils to have discretion (see footnote for Cabinet decision¹) but we agree clause 3.13(3)(a) *as drafted in the existing NPS-FM* implies that if the FMU supports conspicuous periphyton growth, the regional council does not need to derive DIN and DRP to achieve other target attribute states (eg, for macroinvertebrates).
35. We note that the Fertiliser Association’s interpretation is not consistent with existing clause 3.13(1) and therefore their perceived shift in policy is incorrect, as follows:

¹ Agreed that the new NPS-FM will require regional councils to manage nitrogen and phosphorus as needed to achieve desired outcomes for other ecosystem health attributes, such as macroinvertebrates [DEV-20-MIN-0077/CAB-20-MIN-0231]

3.13 (1) To achieve a target attribute state for periphyton, any other nutrient attribute, and any attribute that is affected by nutrients, every regional council must, at a minimum, set appropriate instream concentrations and exceedance criteria”

36. As such, we recommend proceeding with proposed changes which better reflect the policy intent. Our view is they will correct drafting to address the interpretation issues set out above and will give effect to Cabinet’s decisions. In terms of the process supporting these changes, we consider the process is robust. We have publicly consulted on the proposed changes, and final decisions will be supported by the advice and recommendations contained in this briefing; an evaluation under s32 of the Resource Management Act 1991; and a regulatory impact statement.

Recommendation: Clarify that limits must be set for DIN/DRP concentrations once derived, not the attribute from which they are derived.

Yes/no/discuss

Proposed terminology used to refer to nutrient concentrations, once derived, adds confusion

37. A small number of submissions pointed out difficulties of treating nutrient concentrations as target attribute states once derived, as follows:

- a. whether more general requirements relating to target attribute states then apply (eg, being set at or above baseline state, specifying where and when they will be achieved, etc), and
- b. how to reconcile these target attribute states with those for DRP (which is already an attribute in its own right and mean there are overlapping target attribute states).

38. These issues can be avoided by referring to DIN and DRP concentrations in another way. We agree that derived nutrient concentrations should not be treated as target attribute states and recommend using different terminology to refer to them once derived, to avoid unnecessary confusion.

Recommendation: Ensure drafting makes clear that derived nutrient concentrations are not treated as target attribute states

Yes/no/discuss

iii. Wetlands – Definition of a natural wetland

39. Changes to the definition were well supported. Submitters did note the following issues:

- That reference to the effects management hierarchy in part (a) exempts wetlands created for offsetting purposes prior to 2020 from the regulations.
- It is unclear if the pasture exclusion in part (d) still applies if there is a change in land use. If the exclusion does apply, then development could occur without offsets being required.
- It is unclear whose responsibility it would be to identify the presence of threatened species in part (c)(iii) of the pasture exclusion.

40. We agree a clarification is needed to ensure wetlands created for offset purposes prior to 2020 are also protected by the regulations, and to ensure the pasture exclusion does not create an on-going carve out from the regulations where there is a change in land use.

41. In terms of identifying threatened species, we recommend cross-referencing an existing clause in NPS-FM 3.8 requiring councils to identify locations of threatened species habitat as part of identifying FMUs. The changes are set out in the definition below (shown as additional changes to the definition set out in the exposure draft as new or ~~deleted~~).

Recommendation: proceed as proposed but with the following changes to the definition of a **natural wetland** means a wetland (as defined in the Act) that is not:

- (a) a deliberately constructed wetland other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland ~~as part of giving effect to the effects management hierarchy~~; or
- (b) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or
- (c) a geothermal wetland; or
- (d) a wetland that:
 - (i) is within an area of pasture used for grazing and
 - (ii) has ~~ground~~ vegetation cover comprising more than 50% exotic pasture species (as identified in the *National List of Exotic Pasture Species* (see clause 1.8)); and
 - (iii) is ~~not known to contain threatened species~~ is not a habitat of a threatened species identified under 3.8 of this NPS

Yes/no/discuss

iv. Wetlands – NZDF and ski areas included in the definition of specified infrastructure

42. Several submitters sought to be included in the definition of specified infrastructure. Of these, we recommend provision for the New Zealand Defence Force (NZDF) and ski areas.
43. The NZDF has identified situations where the regulations may impact on its ability to construct new defence facilities. We note that there is provision for the NZDF within the proposed NPS-Indigenous Biodiversity as follows: (e) *defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990*. We recommend including the same within the definition of specified infrastructure under the wetland regulations. This will align with new national direction and ensure NZDF is able to continue to construct infrastructure as needed – subject to the gateway tests and offsetting requirements.

Recommendation: Include provision for the New Zealand Defence Force within the NPS-FM definition of specified infrastructure

Yes/no/discuss

44. The Ski Areas Association of NZ (SAANZ) and RealNZ submitted primarily on the recommendations in the *Managing our wetlands: Report, recommendations and summary of submissions* from earlier consultation in 2021.² That report contained three options for this sector.
45. Officials' recommendation was to rely on the ability for ski area infrastructure to be listed in a regional plan or RPS (therefore being regionally significant infrastructure under part (b) of the existing definition of specified infrastructure). SAANZ has provided feedback that this option may not be viable. Indications are that councils are using the RMA definition of infrastructure (roads/pipes) and consider ski areas to be a 'type of land use'.
46. The industry as a whole spans six regions, with significant ski areas situated in the Otago, Canterbury and Manawatu/Whanganui regions. We acknowledge that for this sector to access the consent pathway for constructing new or significant upgrades would require future involvement in six separate RPS and/or plan processes (none are currently listed) – and the outcome is uncertain.
47. Given this we recommend including ski areas within the definition of specified infrastructure.

² [Managing our wetlands: Report, recommendations and summary of submissions | Ministry for the Environment](#)

48. The only change to current policy is that they would not first need to be listed in the regional policy statement or plan to access the consent pathway. They would still be subject to the national/regional significance and functional need test, and the effects management hierarchy. We recommend, however, defining ski area infrastructure for the purposes of the wetland regulations. SAANZ has submitted that its needs primarily sit with linear infrastructure. We therefore recommend the following definition to capture what is necessary for this sector (developed in conjunction with the sector).

Recommendation: Include ski area infrastructure within the definition of specified infrastructure and define it as follows:

[Yes/no/discuss](#)

Ski Area infrastructure includes transport mechanisms (such as aerial and surface lifts, roads, and tracks for any purpose), facilities for the loading or unloading of passengers or goods, facilities or systems for water, sewerage, electricity, gas and communications networks, snowmaking and snow safety but excluding carparks or access roads to the ski area.

[Yes/no/discuss](#)

v. Wetlands – Provision for ancillary activities associated with quarries and mining

49. We previously provided advice that the consent pathways for both quarries and mining should apply only to the area of resource and not to the ancillary activities necessary for the extraction [BRF-1004 recs 17 and 30 respectively]. We are concerned, however, that this approach could result in consent pathways that are not viable.

Quarrying activities

50. The quarry pathway currently covers ‘expanding an existing, or developing a new, quarry for the extraction of aggregate’. You previously agreed to provide only for the extraction of aggregate and not for ancillary activities [rec 17 BRF-1004 refers].

51. In general submitters accept the need for this consent pathway. Many, however, seek clarification of what is in scope of the consent pathway and request that consistent definitions and terms be throughout. For example, the NES-F uses the term ‘quarrying’ (undefined) while the NPS-FM uses ‘quarry’ (defined in the National Planning Standards), and ‘extraction of aggregate’ (undefined).

52. Industry submitters considered that unless ancillary activities are included this would risk making the pathway unviable. They requested the National Planning Standards definition of ‘quarrying activities’ be relied upon as this definition was established to streamline the resource consenting process and prevent multiple consents being sought for essential activities associated with the extraction of aggregate. The New Zealand Planning Institute (NZPI) also noted the practical advantages associated with treating all related quarrying activities together under the same regulatory framework.

53. We agree that terms should be used consistently throughout the regulations. We also agree that the scope of the pathway needs to be clarified. The intent was to only provide for the extraction of aggregate and not ancillary activities, but current drafting is ambiguous. Additionally, in light of the exposure draft feedback we also acknowledge submitters points that not explicitly providing for ancillary activities risks making the consent pathway unviable.
54. We therefore recommend ensuring ancillary activities needed for the extraction of aggregate are also included in the consent pathway by using the term ‘quarrying activities’ defined in the National Planning Standards. The existing gateway tests – particularly the functional need test – and the effects management hierarchy will also apply to ancillary activities, ensuring that ‘quarrying activities’ are only granted consent where appropriate.

Recommendation: Proceed as proposed but refer to ‘Quarrying activities’ throughout the NES-F and NPS-FM to utilise the existing National Planning Standards definition

Yes/no/discuss

Note: The Planning Standards definition of **Quarrying activities** means the extraction, processing (including crushing, screening, washing, and blending), transport, storage, sale and recycling of aggregates (clay, silt, rock, sand), the deposition of overburden material, rehabilitation, landscaping and cleanfilling of the quarry, and the use of land and accessory buildings for offices, workshops and car parking areas associated with the operation of the quarry.

Mining

55. Many submitters remain opposed to a consent pathway for mining minerals – particularly for coal mining. NZPI, Environmental Law Initiative, Bioresarches NZ, and most industry submitters sought clarification of the scope of the consent pathway. They note that as with quarrying, inconsistent definitions and terms had been used between the NES-F and the NPS-FM. The NPS-FM, as drafted, refers to ‘activities associated with the extraction of minerals’(undefined) and the NES-F, as drafted, refers to ‘mining’ as defined in the Crown Minerals Act (ie, to take or extract a mineral).
56. Industry noted that the exposure draft reliance on the Crown Minerals Act definition of ‘mining’ does not provide adequate scope for the activities required for the extraction of minerals, as it is missing the accompanying definition of ‘mining operations’ (ie extraction, processing transport etc) and this may make pathway unviable.
57. As with quarries above you previously agreed to provide a consent pathway only for the extraction of the mineral and not for the ancillary activities necessary for the extraction [BRF-1004 rec 30 refers]. In light of feedback on the exposure draft however, we consider ancillary activities should be part of the consent pathway for mining. The new consent pathways should be viable, otherwise the current problem will remain.
58. However, unlike ‘quarrying activities’ in the National Planning Standards there is no equivalent definition under the RMA for ‘mining activities’. Reliance on the Crown Minerals Act definition of ‘mining operations’ is inappropriate as it applies only to

minerals owned by the crown and is broader than required for the consent pathways (eg covers operations in connection with exploring and prospecting).

59. We therefore recommend using the phrase ‘extraction of minerals and ancillary activities.’ We do not wish to add another (untested) definition for this sector and therefore do not recommend defining ‘ancillary activities’ but to address this through guidance. As with quarrying, we consider that the existing gateway tests and offsetting requirements will ensure that ancillary activities will only be granted consent where functional need and the effects management hierarchy are met. We tested this descriptor with the sector and this approach is supported by them.

Recommendation: Proceed as proposed for providing a consent pathway for mining but include ancillary activities by using the phrase the extraction of minerals and ancillary activities’ throughout

Yes/no/discuss

Do not define ‘the extraction of minerals and ancillary activities’ but address through guidance.

Yes/no/discuss

vi. Wetlands – Clarifying the discharge rules are about changes in water level

60. The 2020 NES-F rule structure is that ‘water take, use damming diversion and discharges of water’ are managed together for specific purposes, as well as in the catch-all non-complying rule (r54). In the exposure draft, discharges were removed from r52 (non-complying) and r53 (Prohibited) as this section regulates activities that would result in the drainage of wetlands and discharges are therefore not relevant.
61. All other references to discharges of water (except in the permitted rules) were set out in new subclauses – including a 100m setback. Qualifiers in the new drafting seek to ensure discharges are regulated either within, or within a 100m setback of a natural wetland only where they have a hydrological connection to the wetland and are likely to adversely affect the wetland hydrological functioning or the habitat, or biodiversity values.
62. Submitters were in support of the changes but consider further clarification is still required to achieve the full intent, as follows:
- The hydrological connection change is supported but not the extensive evaluation of adverse effect (eg on biodiversity values). Such an assessment is appropriate in the consideration of a consent but not as a test for the need for consent - greater certainty whether the rule applies is required.
 - Some discharges could still be captured unnecessarily (ie where they would not effect a wetland).
 - Some types of discharges, including of water from water treatment/sediment control measures or irrigation, could still be captured.

- ‘Hydrological connection’ should be further extended to the rules on water take, use, dam or diversion.

63. We acknowledge that greater certainty of whether the rule applies is desirable. We recommend that the assessment of effects is clarified to focus just on the effect the NES-F seeks to regulate - which is changes in water level (per s32 analysis NES-F 2020).³

64. To ensure the regulation only picks up discharges of water where there is potential for an effect on the wetland hydrology, we recommend retaining hydrological connection but replacing the reference to adverse effects on habitat or biodiversity values with *‘where the discharge will change or is likely to change the water level range of hydrological function of the wetland’*.

65. This terminology often appears in permitted plan rules and councils will be familiar with making this determination. While this could be viewed as a narrowing of the assessment from that set out in the exposure draft, we consider this better reflects the original policy intent. In assessing changes in water level as part of a consent application, the flow on effects to habitat etc will still be considered but is not suitable for the assessment of need for a consent.

66. This change will ensure that discharges of contaminants are not unintentionally captured by the NES-F, as these are already addressed by plans under s15 of the RMA. We also recommend adding the hydrological connection requirement to the rules on water take, use, damming and diversion to ensure these – and the 100m set back associated with these rules – only applies where there is the possibility of these types of activities impacting the wetland. (See recommendation below).

³ See page 257 <https://environment.govt.nz/assets/Publications/interim-regulatory-impact-analysis-for-consultation-essential-freshwater-part-2-v3.pdf>

Recommendation: Proceed as proposed with the following change:

- Amend all relevant regulations referencing the discharge of water to water to specify that the rule applies only:
 - i. within, or within a 100m setback from, a natural inland wetland; and
 - ii. in circumstances where there is a hydrological connection between the discharge and the wetland; and
 - iii. if the discharge will change, or is likely to change, the water level range, or hydrological function of the wetland

Yes/no/discuss

- Delete references to ‘there is likely to be adverse effects from the discharge on the hydrological functioning or the habitat or the biodiversity values of a natural inland wetland’, to remove the assessment of these types of effects in determining the need for consent

Yes/no/discuss

- Include ‘hydrological connection’ phrasing also to rules on water take, use, damming and diversions throughout the NES-F to ensure these rules apply only in circumstances where there is the possibility of impacting a wetland.

Yes/no/discuss

vii. NES-F Vegetation clearance – grazing can be interpreted as a non-complying activity

67. Submitters consider it is unclear whether the NES-F definition of **vegetation clearance** includes grazing. They note that if it does, grazing would be a non-complying activity under the NES-F – and that this would be “misaligned” with requirements in the Resource Management (Stock Exclusion) Regulations 2020.
68. As currently drafted, grazing *is* captured by the definition of vegetation clearance.⁴ Allowing any animal to graze in a wetland of any size is therefore a non-complying activity under the NES-F and requires consent.
69. We agree this is inconsistent with the Stock Exclusion Regulations which require exclusion of stock from wetlands greater than 500m² (does not apply to sheep).⁵ The Essential Freshwater RIS and s32 reports do not provide any analysis (or impact testing) that indicates grazing was intended to be captured by the NES-F definition of vegetation clearance. Where (and what) stock must be excluded from wetlands is the role of the

⁴ The definition describes what is *not* vegetation clearance by confirming the ability to graze within a set-back from a wetland, thus inferring that grazing within a wetland *is* vegetation clearance.

⁵ The regulations also require exclusion from natural wetlands identified in a regional/district plan, and those which support a population threatened species.

Stock Exclusion Regulations. Having a non-complying consent required for grazing by all stock in any wetland under the NES-F is impractical and unclear.

70. It is also misaligned with the underlying wetland policy intent, which recognises that grazing is an accepted method of managing weeds (in preference to chemical or mechanical methods).
71. We therefore recommend an amendment to the definition of vegetation clearance to clarify that it does not include grazing. The current explicit recognition of mob-stocking as a 'type' of vegetation clearance should remain, as this practice can irreparably damage wetlands both in terms of vegetation loss, and also damage to soil structure and ongoing sedimentation effects (See Appendix 3 for the NES-F definition of vegetation clearance – page 11).

Recommendation: clarify that the definition of vegetation clearance does not include 'grazing'.

[Yes/no/discuss](#)

Next steps

72. You have previously sought power to act in order to instruct PCO following consultation [CAB-21-MIN-0500 Minute refers]. Following receipt of your decisions in this briefing we will instruct PCO accordingly.
73. We are procuring an independent review of the regulations to be undertaken as soon as drafting is completed. The purpose of the review is to ensure the drafting is clear. We will provide the results, along with a track change version of the regulations to your office. We expect this will be in early October.
74. We will also finalise documents for Cabinet. These include a RIS and a s32 analysis, which you are required to have regard to under s52 of the RMA prior to making final decisions on any amendment to national direction. We are working toward a Cabinet date of early November and the regulations will come into effect 28 days later.
75. Consultation is also underway on the application of the NES-F to the Coastal Marine Area, (closes 21 September). We intend to align these amendments into a single Cabinet process. We will provide you with a summary of submissions and recommendations following the close of submissions on the application of the NES-F to the CMA. Cabinet authorised you to instruct PCO to draft proposed amendments to the NES-F following the close of this public consultation and noted that the two processes would converge for final decisions [ENV-22-MIN-0028 refers].

Appendix 1: Table 1 Proposed amendments, feedback/analysis, and recommendations

Proposed amendment:	Submitter feedback and Analysis:	Recommendation:	Yes/no discuss
A consent pathway for landfills and cleanfills			
<p>Landfills and cleanfills - discretionary consent pathway NPS-FM 3.22(1)(f) and NES-F 45B</p> <p>The pathway is subject to gateway tests, plus the requirements of the effects management hierarchy.</p> <p>The tests are:</p> <ul style="list-style-type: none"> • significant national or regional benefit' and • there is either no practicable alternative location, or every other location would have equal or greater adverse effects on a wetland. [Note: this phrasing aligns with that proposed for RMA reform] 	<p>Many submitters remain opposed to the consent pathway for landfills and cleanfills. However, overall, there was support for the provisions as drafted.</p> <p>The consistent issue raised by submitters was on the no practicable alternative location gateway test and the spatial application of the test (ie is it meant it occur at a site, district or regional scale).</p> <p>We consider that to achieve the policy intent, it is appropriate to apply the no practicable alternative location test at a <i>regional level</i> for landfills and cleanfills. This will ensure appropriate locations within a region are tested and selected for fill sites where the effects will be no greater than elsewhere. (See also below in respect of urban development to apply this to 'within the [urban] development area' below).</p> <p>Additionally, the aggregate sector was concerned that the significant national or regional benefit test would be too hard to meet for a cleanfill that was required as an ancillary activity to an urban development, quarry or mine site.</p> <p>We acknowledge this point and recommend an addition to the significance test to ensure that where a fill site is needed in relation to one of the other consent pathways, this can be considered by the consent authority.</p>	<p>Proceed as proposed with the following changes (new text underlined):</p> <ul style="list-style-type: none"> • Amend the consent pathway for fills at NPS-FM 3.2(1)(f) to ensure the following gateway test, <i>'there is no practicable alternative location for the activity, or every practicable alternative location would have equal or greater adverse effects on a natural inland wetland,'</i> <u>applies across a region</u> • Amend 3.22(1)(f)(ii) to read: 'the new or expanded landfill or cleanfill will provide significant national or regional benefits <u>or is required to support nationally or regionally significant extraction of aggregates and/or minerals or urban development that is of a significant national, regional or district benefit</u> 	<p>Yes/no Discuss</p> <p>Yes/no discuss</p>
A consent pathway for urban development			
<p>Urban development – restricted discretionary consent pathway - NPS-FM 3.22(1)(c) and NES-F 45C</p> <p>The proposal is to provide for urban development that contributes to well-functioning urban environments as required under the NPS-Urban Development.</p> <p>The pathway is subject to gateway tests, as well as</p>	<p>Submitters generally accept the need for a consent pathway for urban development. There are remaining concerns from ENGOs and some councils about the appropriateness of wetland loss for urban development and the consequences of building in wetland areas (flooding, liquefaction etc). We note that these matters can be addressed in considering the consent application.</p> <p>As with quarries above, much of the feedback focused on the spatial application of the no practicable alternative location gateway test (ie is it meant it occur at a site, district or regional scale). Submitters from the development sector emphasised that requiring authority status would be necessary to undertake an assessment at a regional level (which they are not) nor would it be practical to require consent authorities to undertake such assessments due to financial and resourcing constraints.</p>	<p>Proceed as proposed with the following changes (new text underlined):</p> <ul style="list-style-type: none"> • Amend the NPS-FM provision for urban development at 3.22(1)(c)(iv) to ensure the existing gateway test - <i>'no practicable alternative location for the activity, or every other practicable location would have equal or greater adverse effects on a natural inland wetland'</i> applies to <u>within the development area</u> 	<p>Yes/no discuss</p>

Proposed amendment:	Submitter feedback and Analysis:	Recommendation:	Yes/no discuss
<p>offsetting and other requirements of the effects management hierarchy.</p> <p>The tests are:</p> <ul style="list-style-type: none"> • The activity occurs on land identified for urban development in an operative plan • The development will provide significant national or regional benefit' [omitted from exposure draft but will be inserted] and • The activity does not occur on land zoned in a district plan as general rural, rural production or rural lifestyle • there is either no practicable alternative location, or every other location would have equal or greater adverse effects on a wetland. • The effects are managed by applying the effects management hierarchy and any offset/compensation will be managed over time. 	<p>We agree that the spatial scale to which the test applies needs to be specified. There are 2 options for that scale at which the no practicable alternative location gateway test could apply for urban development:</p> <ol style="list-style-type: none"> 1) within a district/region or 2) within the development site. <p>It is not appropriate to apply this test at the district/regional scale for urban development, as developers are unlikely to have several options available to them within a region.</p> <p>The intent of this test (in the urban context) is to drive developments that either avoid wetlands in the first instance or utilise them as part of good water-sensitive urban design. We recommend applying the test to the relevant 'the development area' to ensure it drives design of urban environments that enhance and utilise wetlands (for amenity, flood control and contaminant mitigation).</p>	<p>[Note, that it is appropriate for the same test in respect of landfills and cleanfills to apply across the <i>region</i> (as per the recommendations above)].</p>	
	<p>Submitters noted that some of the gateway tests set out at 3.22(1)(c) should also be taken into consideration by councils as part of the decision whether to grant consent and the conditions to include (rather than just as test of whether to accept the application as is the role of a gateway test).</p> <p>We agree that the gateway tests also are worth considering in the conditions that should be included and whether to grant the consent. The urban development pathway is a restricted discretionary activity under the NES-F, with a list of matters to consider set out in r56. We agree that the relevant matters set out at 3.22(1)(c) should be included in the list of matters to which discretion is restricted for this pathway</p>	<p>Include the following additional matters for discretion in r56 NES-F</p> <ol style="list-style-type: none"> a) Whether the activity is necessary for the purpose of urban development that will contribute to a well-functioning urban environment (as defined in the National Policy Statement for Urban Development); and b) Whether the urban development will be of significant national, regional or district benefit; and c) Whether there is no other practicable alternative location in the area of development for the activity, or every other practicable alternative location would have equal or greater adverse effects on a natural inland wetland; and d) The effects of the activity are managed through applying the effects management hierarchy and, if aquatic offsetting or aquatic compensation is applied, the offsetting or compensation will be maintained and managed over time; 	<p>Yes/no Discuss</p> <p>Yes/no Discuss</p> <p>Yes/no Discuss</p> <p>Yes/no discuss</p>

Proposed amendment:	Submitter feedback and Analysis:	Recommendation:	Yes/no discuss
	<p>The urban consent pathway in the exposure draft has a requirement for the council to be satisfied that there will be on-going management of any offset/compensation (beyond the life of the consent). Submitters sought for this to apply to all consent pathways.</p> <p>We agree that ongoing management of offsets will be an important part of achieving the policy intent of ‘no net loss’ and that this will likely be required beyond the consent period. We recommend this change.</p>	<ul style="list-style-type: none"> • Insert a general requirement into the NPS-FM to ensure that if offsetting or compensation is applied, the regional council is satisfied that the offsetting or compensation will be maintained and managed over time, ensuring that this applies to all consent pathways – not just urban development. 	Yes/no discuss
<p>Provision for Urban development in Tauranga - NPS-FM 3.34</p> <p>The gateway test for urban development requiring that development only occur on land identified in an operative plan, is not feasible for Tauranga in the short term.</p> <p>A regulatory 5-year ‘window’ was proposed so that the consent could pathway apply, and developments commence, at the same time as the plan change is prepared and progressed through to operative status.</p>	<p>Most submitters did not comment on the provision for Tauranga, other than the Bay of Plenty Regional Council (BoPRC), Tauranga City (TCC) and Western Bay of Plenty District Councils. The BoPRC opposed the Tauranga exception on principle (as the Smartgrowth programme has not been publicly tested). They do, however, acknowledge the difficulties faced in providing for urban development in Tauranga and signalled two key amendments that would address their concerns.</p> <p>This includes replacing ‘may’ in 3.34(1) with ‘must’, to clarify the regional council must include this in the plan without using a Schedule 1 process. Secondly, BoPRC and TCC agree the pathway should be limited to <i>planned urban growth areas</i> identified in the Smartgrowth programme (and therefore not to ‘<i>envisioned urban growth areas</i>’ as these areas would not be ready for inclusion in either a district or regional plan within the 5-year window).</p> <p>We agree that the clause needs to be clear that this provision <i>must</i> be inserted into plans using s55 of the RMA – that is, without using a Schedule 1 plan change process.</p> <p>As suggested by the councils we also recommend clarifying the scope of the Tauranga exception is for ‘planned urban growth areas’ identified in the Smartgrowth Urban Form and Transport Initiative Connected Centres Programme.</p> <p>Minor clarifications are required to ensure the tests and requirements in the general provision for urban development at NPS-FM 3.22 also apply to Tauranga at 3.34. The words ‘additional exception’ should be deleted from the NPS-FM as the provision is not an exception but a 5-year window within which the plan change must be undertaken – all other criteria apply.</p>	<p>Proceed as proposed with the following changes: (new text <u>underlined</u>)</p> <ul style="list-style-type: none"> • In 3.34(1) delete ‘may’ and insert <u>must</u>, to clarify that the Bay of Plenty Regional Council must include the Tauranga exception in their plan under s55 of the RMA • In 3.34(1)(a)(i) amend so that it reads: ‘the activity is necessary for the purpose of urban development in <u>areas</u> specifically identified as <u>planned urban growth areas</u> in the Smartgrowth Urban Form and Transport Initiative Connected Centres Programme’ • Clarify that clauses 3.22(1)(c)(i), (iii),(iv),(v) and (vi) continue to apply to applications for consent under the provision for Tauranga • 3.21(1) include 3.34 Urban development in Tauranga in the list of matters to which the Subpart 3 definitions apply • In 3.34(1) delete ‘additional exception’. 	<p>Yes/no Discuss</p> <p>Yes/no Discuss</p> <p>Yes/no Discuss</p> <p>Yes/no Discuss</p>

Proposed amendment:	Submitter feedback and Analysis:	Recommendation:	Yes/no discuss
NES-F: Allow an increase in the size of infrastructure (culverts) for fish passage			
<p>Fish passage - NES-F Regulation 46(4)(b) Rule 46 provides a permitted activity for the maintenance and operation for specified infrastructure. R46(4) sets out conditions to the PA rule including that it must not be for the purposes of increasing the size of the infrastructure.</p> <p>An amendment provides for a size increase where needed for fish passage.</p>	<p>Most submitters did not comment on this amendment. Those that do express support with some minor changes suggested. Some seek expansion to enable increases in the size of infrastructure, not for just fish passage, but for other reasons or activities as well. Auckland Council seeks to recognise that ‘replacements’ may be necessary to provide for fish passage - not just a bigger culvert - but of a different design.</p> <p>We consider these provisions are for the purpose of protecting fish and their habitats. Submissions that seek the expansion of exemptions from conditions on permitted activities are not about fish passage policy, they are arguments for the removal of restrictions on activities that require consent.</p> <p>We agree that the rule should recognise the need for full replacement and not only an increase in size.</p>	<p>Proceed as proposed with the following change (new text <u>underlined</u>):</p> <ul style="list-style-type: none"> Insert ‘or replacement’ to r46(4)(b): <i>‘(b) the activity must not be for the purpose of increasing the size of the specified infrastructure or other infrastructure unless the increase, <u>or replacement</u>, is to provide for the passage of fish in accordance with these regulations’</i> 	Yes/no discuss
Restoration provisions			
<p>Define ‘maintenance’ and ‘biosecurity’</p> <p>An amendment was drafted to define ‘maintenance’ and ‘biosecurity’ and include these activities in the NES-F’s restoration consent pathway.</p> <p>The amendment defines wetland maintenance as “activities, such as weed control, intended to prevent the deterioration of a wetland’s condition.”</p>	<p>A substantial number of submitters commented on this amendment, with varying perspectives.</p> <p>Taranaki Regional Council felt the word ‘intended’ in the definition was unclear on account of its subjectivity and would be problematic to enforce. Other submitters felt that the definition did not reflect the policy intent because it does not include activities intended to actively maintain current condition and values of wetlands. Not all maintenance activities will directly prevent deterioration, but they will still contribute to wetland preservation. Some submitters felt that the word ‘condition’ in the definition was unclear and lacked specificity. It could be interpreted in a variety of ways and could lead to the maintenance of a non-natural condition of a wetland.</p> <p>Analysis Although ‘intent’ is commonly used in definitions, we recognize that it could cause some enforcement issues. The definition can be effective without using ‘intent’. We also agree that the regulations should provide for activities that contribute to wetland preservation (not exclusively deterioration or improvement). We agree that ‘condition’ could be more specific. We don’t want to maintain a non-natural condition or stop natural succession or recovery. We agree with Forest & Bird that using the same factors referred to in the restoration definition (ecosystem health, indigenous biodiversity, or hydrological functioning) would be useful.</p>	<p>Proceed with defining ‘wetland maintenance’, but change the definition to:</p> <p>“Wetland maintenance means activities, such as weed control, which prevent the deterioration, or preserve the existing state, of a wetland’s ecosystem health, indigenous biodiversity or hydrological functioning.”</p>	Yes/no discuss
<p>Restoration Plans - NES-F Schedule 2</p>	<p>A general theme amongst some submissions was the feeling that there had not been enough provision for partnering with iwi.</p>	<p>Proceed as proposed but insert ‘including iwi partners’ to Sch 2(1)(b) as follows:</p>	Yes/no discuss

Proposed amendment:	Submitter feedback and Analysis:	Recommendation:	Yes/no discuss
Sch 2(1)(g) requires that restoration plans for natural wetlands include detail of partners or key stakeholders involved in the restoration plan.	Tasman District Council suggested that the restoration plan requirements in Sch 2 should better support the engagement and participation of mana whenua in wetland restoration. While we cannot make mana whenua participation a requirement of restoration plans, we agree that mana whenua participation could be better enabled.	<ul style="list-style-type: none"> the details of any management partners, including tangata whenua or key stakeholders, involved in the restoration plan. 	
<p>Restoration Plans - NES-F Schedule 2</p> <p>There is currently no link between the restoration plan requirements outlined in Sch 2, and other existing (or future) farm plans.</p>	<p>DairyNZ submitted that it is too onerous to require council notification if an activity is already included in a Farm Environment Plan (FEP) or Freshwater Farm Plan (FW-FP). This would result in unnecessary duplication and disincentivises restoration activities.</p> <p>We note that wetland restoration is not currently a requirement of freshwater farm plans under the RMA. However, unnecessary duplication should be avoided. We can enable freshwater farm plans to be an acceptable plan under the NES-F. We believe it should be possible to streamline freshwater farm plans with restoration plans, provided all the requirements of a restoration plan are met. We recommend removing the need for council notification of restoration if it is an action in an FW-FP approved under Part 9A of the RMA.</p> <p>We do not recommend enabling FEPs (made outside of Part 9A) in the same way as they fall under a regional system with varying objectives, requirements, and oversight, as opposed to under national direction.</p>	<p>Amend NES-F Schedule 2 to add a provision which removes the requirement under regulation 55(2) to notify a regional council of a restoration activity if:</p> <ol style="list-style-type: none"> The restoration activity meets the requirements of regulation 38 and regulation 55; and The restoration activity is specifically provided for in a FW-FP certified under s 217G of the RMA; and The FW-FP addresses the matters in schedule 2 and regulation 55. 	Yes/no discuss
<p>Restoration and Scale of disturbance - NES-F Regulation 38(4)(b)</p> <p>Regulation 38(4)(b) currently states that if the activity is vegetation clearance, earthworks, or land disturbance, the activity must not occur over more than 500m² or 10% of the area of the natural wetland, whichever is smaller.</p> <p>The proposed amendment replaces ‘occur over’ with ‘affect’.</p>	<p>Several submitters were confused by the application of ‘affect’ in the proposed amendment. It could be taken to mean either ‘directly affects’ or affects in the RMA sense. There was thought that ‘occurs over’ is more easily interpreted as being the sum of many small areas within a larger area.</p> <p>Bioresearches New Zealand submitted that it is unclear that area limits should be calculated as a cumulative total across wetland extent.</p> <p>The National Wetland Trust of New Zealand submitted that the application of Reg 38(4)(b) is confusing because it is not clear whether it is intended to be applied over a certain timeframe. The policy intent of this amendment is that the area limit applies only to the area where vegetation clearance, land disturbance or earthworks takes place. If sediment is released etc, so long as the activity complies with the general conditions in regulation 55, that area where sediment is released does not form part of the total area.</p> <p>We believe that using ‘occur over’ best communicates the policy intent based on a common understanding of the words.</p> <p>We agree that a timeframe would clarify the application of these provisions but consider that this was not consulted on so is beyond scope of these changes.</p>	<p>Do not progress proposed changes to Regulation 38(4)(b) – i.e., retain the following:</p> <p><i>“If the activity is vegetation clearance, earthworks, or land disturbance, the activity must not <u>occur over</u> more than 500m² or 10% of the natural wetland, whichever is smaller.”</i></p> <p>Guidance can be used to define and further explain the application of ‘occur over.’</p>	Yes/no discuss

Table 1 continued - technical amendments (feedback/analysis, and recommendations)

Technical Amendments			
Proposed amendment:	Feedback and analysis:	Recommendation:	Yes /no discuss
<p>NPS-FM clause 3.6 - Transparent decision making Amend clause 3.6 to apply to the NPS-FM generally, and clarify that this can be satisfied through planning processes such as a section 32 evaluation.</p>	<p>Submissions suggested clarifying the scope of this requirement. They also noted that evaluation reports under section 32 RMA are the appropriate vehicle to give effect to this provision. We agree that it would be helpful to clarify that this applies to decisions made <i>in giving effect to</i> the NPS-FM (rather than, decisions <i>made under</i> the NPS-FM). We also agree with the suggestion to clarify (eg, through an avoidance of doubt clause or otherwise) that this requirement to publish may be met through s32 report, or other publicly available documents.</p> <p>Submissions also suggested retaining reference to 3.4(3) and 3.15 for clarity. We agree it would be helpful to note examples, for the avoidance of doubt.</p>	<p>Amend to clarify that this applies to all decisions by regional councils when <i>giving effect to</i> this NPS-FM.</p> <p>Amend to clarify that this may be satisfied through evaluations under s32 of the RMA, or any other publicly available document.</p> <p>Amend to include examples of clauses to which this applies, for clarity.</p>	<p>Yes /no discuss</p> <p>Yes /no discuss</p> <p>Yes /no discuss</p>
<p>NPS-FM clause 1.6 - Best information Amend clause 1.6, to apply the requirement to use best information to apply to the NPS-FM generally.</p>	<p>Submissions noted concern that the term ‘local authorities’ would narrow the scope of this condition. We consider the term ‘local authorities’ to be appropriate, as already used in 1.6(2), but recommend clarifying that this clause applies to local authorities <i>in giving effect to</i> the NPS, to clarify that this requirement is still limited to that, and not applicable to every element of implementation.</p>	<p>Amend to clarify this applies to local authorities when <i>giving effect to</i> this NPS.</p>	<p>Yes /no discuss</p>
<p>NPS-FM 3.24 - Rivers Proposed amendments as set out above</p>	<p>There is a missing equivalent provision for rivers as set out in 3.22(3)(b) for wetlands which requires the council to be satisfied that where aquatic offsetting/compensation has been applied as per the effects management hierarchy the applicant for consent has had regard to the principles in Appendix 6&7 of the NPS-FM.</p>	<p>Include the requirement at 3.22(3)(b) also to 3.24(3) for the council to be satisfied that where aquatic offsetting or compensation has been applied the applicant has had regard to the principles in Appendix 6&7 of the NPS-FM.</p>	<p>Yes /no discuss</p>
<p>NPS-FM clause 1.4: Amend the definition of ‘baseline state’ to clarify the date first identified refers to the date an attribute is identified under clause 3.10(1)(b).</p>	<p>Submissions sought further clarity regarding (a) of ‘baseline state’. It was never meant to cover the date when compulsory values were specified in the NPS-FM, that is adequately covered in (b) and (c). It is meant to cover locally developed attributes, identified under clause 10(1)(b) in addition to the compulsory values. We recommend clarifying this.</p> <p>Clause 3.7 should refer to ‘identify’ baseline states (not ‘set’ baseline states).</p>	<p>Amend definition of ‘baseline state’ to refer directly to clause 3.10(1)(b).</p> <p>Amend clause 3.7 to refer to ‘identify’ (not ‘set’) baseline states.</p>	<p>Yes /no discuss</p> <p>Yes /no discuss</p>
<p>NPS-FM clause 1.4: Amend the definition of ‘limit’ to clarify that ‘over-allocation’ includes a situation where resource use exceeds environmental flows set under clause 3.16.</p>	<p>Submissions noted the change to ‘limit’ conflates a limit with a state, and suggested an amendment to ‘over-allocation’ instead. The proposed drafting has had unintended consequences. We can achieve the intent by amending ‘over-allocation’ to refer to environmental flows and levels. This avoids the need to add ‘environmental flows and levels’ to ‘limit’, or to define it separately.</p>	<p>Amend ‘over-allocation’ to include failing to achieve environmental flows and levels (and make link to clause 3.16).</p> <p>Do not progress with the change to ‘limit’, or the new definition of ‘environmental flows and levels’.</p>	<p>Yes /no discuss</p>

Technical Amendments			
Proposed amendment:	Feedback and analysis:	Recommendation:	Yes /no discuss
<p>Define 'environmental flows and levels'.</p> <p>No change was proposed to 'take limit'.</p>	<p>Submissions suggested amending 'take limit' to clarify that it is not only about volume, but can also include flow regime triggers. We agree the definition is narrower than what is provided under cl 3.17. This is unintended and risks narrowing the term. It should be clarified to align with clause 3.17.</p> <p>Clause 3.33 should just refer to 'limits on resource use', not 'limits'.</p> <p>Feedback has also indicated inconsistency between the terms 'degraded', 'degrading', 'over-allocation' and 'over-allocated'. 'Degraded' relates to something other than a naturally occurring process. 'Degrading' does too (as noted in clauses 3.19 and 3.20), however that is not clear in the definition of 'degrading'. This should be clarified. 'Over-allocation' is defined, and over-allocated is not, but both terms are used. We recommend clarifying the definition of over-allocation applies to over-allocated too.</p>	<p>Amend 'take limit' to align with clause 3.17 to ensure the definition doesn't narrow the scope of a take limit.</p> <p>Amend clause 3.33 to 'limits on resource use', not 'limits'.</p> <p>Amend 'degrading' to be as a result of something other than a naturally occurring process, for consistency with 'degraded' and clauses 3.19 and 3.20.</p> <p>Clarify the definition of 'over-allocation' to clearly apply to over-allocated too.</p>	<p>Yes /no discuss</p> <p>Yes /no discuss</p> <p>Yes /no discuss</p> <p>Yes /no discuss</p>
<p>NPS-FM clause 1.4 and 3.21: Definitions sections. <i>[Under the proposed wetlands amendments, a new definition of 'zone' was proposed.]</i></p>	<p>Submissions suggested it would be clearer to refer to a 'type' of zone, and noted the new definition of zone is not appropriate for all instances in the NPS-FM. We agree, and note it is only relevant to clause 3.22.</p> <p>Clause 3.21 should also apply to the proposed new clause 3.34 (proposed under the wetlands amendments).</p>	<p>Move the proposed definition of zones from clause 1.4 to clause 3.21 and restrict it to applying to that relevant part. Amend to refer to 'type of zone'.</p> <p>Amend clause 3.21(1) to refer to clause 3.34 too, so these definitions also apply there.</p>	<p>Yes /no discuss</p>
<p>NPS-FM Policy 5 Amend Policy 5 to clarify that NOF is not the only way to manage freshwater.</p>	<p>Submissions noted the amendment could be read as meaning NOF is optional and one of several options. This was not the intent: NOF is still compulsory, and there may also be other ways to manage freshwater <i>in addition to</i> NOF.</p>	<p>Amend Policy 5 to clarify that NOF is compulsory, and that there may be other ways to manage freshwater as well as NOF.</p>	<p>Yes /no discuss</p>
<p>NPS-FM, Appendices 2A and 2B: Amend attribute tables</p>	<p>The submission from NIWA (and further review from their submission in 2019) highlighted several further points of inconsistency across the tables, and where further clarity is needed regarding sampling and statistical specifications for attributes.</p>	<p>Review and if necessary, amend the attributes tables to address sampling and statistical specifications for attributes. We will work with the drafter and relevant experts to assess NIWA's submission.</p>	<p>Yes /no discuss</p>
<p>NES-F, regulation 24: Amend to clarify that granting the consent cannot lead to either of the contaminant increases specified in regulation 24(1)(a) and (b)</p>	<p>Submissions suggested aligning regulation 30 with these changes to regulation 24, for consistency and clarity. We agree.</p>	<p>Amend regulation 30 to align with the changes to regulation 24.</p>	<p>Yes /no discuss</p>

Technical Amendments			
Proposed amendment:	Feedback and analysis:	Recommendation:	Yes /no discuss
NES-F, regulation 38: <i>[Under the proposed wetlands amendments, several amendments were proposed to regulation 38.]</i>	One submission noted both 'exotic' and 'non-indigenous' are used. We agree terminology should be consistent.	Amend all instances of 'non-indigenous' to 'exotic'.	Yes /no discuss
Misunderstanding on the requirement around limit setting	Some have misunderstood clarifications to the requirement to set limits, Federated Farmers appear to be concerned the changes now require limits be set for action-planning attributes. This was not the intention. The requirement to set limits relates to nutrient concentrations once derived, not the attribute from which they are derived, but it seems this is not clear. Conversely, Choose Clean Water is concerned the requirement to set limits to achieve nutrient concentrations, once derived, is not clear. We note other submitters have interpreted proposed drafting as intended.	We do not recommend specific changes, however, we will review the relevant provisions with the drafter and address the concerns to the extent possible through guidance.	Yes /no discuss
References to instream loads queried	One submission queried the rationale for referring to instream loads is unclear, and likely problematic. Note that proposed changes only aim to make existing references to instream loads more consistent. While we agree that loads are harder to measure than concentrations and introduce uncertainty, they can be more appropriate to manage the effects of nutrients in some situations (eg, in receiving environments like lakes or estuaries, where the total mass of nutrient being discharged is more relevant than concentration). Guidance and planning processes will determine whether to manage nutrient concentrations or instream loads in specific situations.	We do not recommend any specific changes in response to the submission but will work with the drafter and relevant experts to ensure all references to instream loads are consistent and appropriate.	Yes /no discuss

Appendix 2: Overview of technical corrections and clarifications in the NPS-FM exposure draft

[overview-of-technical-corrections-and-clarifications-in-npsfm-exposure-draft.pdf \(environment.govt.nz\)](#)

Appendix 3: Concerns previously raised by Choose Clean Water

A. Request to define periphyton more broadly, and concern that soft-bottomed streams won't be managed

1. The periphyton attribute table specifically uses "milligrams chlorophyll-a per square metre" (ie, plant matter) as its unit of measurement.
2. In our view this is clear and will not benefit from further definition - including in relation to clause 3.13 (which is about managing nutrients to achieve target attribute states for periphyton).
3. This may preclude some wider interpretations of periphyton, as suggested by the submission. However, changing the unit of measurement or broadening the periphyton attribute more generally, would be a significant policy change from what was consulted on in 2019, and is beyond the scope of technical changes being proposed.
4. Note that technical changes also propose to remove any references to conspicuous periphyton growth. This should remove some ambiguity.
5. Soft-bottomed rivers are not exempt from the periphyton attribute (subject to the unit of measurement, ie, periphyton being measured as "milligrams chlorophyll-a per square metre", and the river supporting growth). However, some river types will not support periphyton growth to the same extent, and this is why direction on monitoring states that "At low risk sites monitoring may be conducted using visual estimates of periphyton cover" (refer to Appendix 2A, Table 2 of the NPSFM)."

B. The periphyton lookup tables should be included within the NPS-FM itself

6. In our view, the periphyton lookup table should not be incorporated into regulation. It is based on national-level modelling and limited information, and liable to change often (and has done so through recent work to update the table). This makes it unsuitable for inclusion in regulation at this time. For similar reasons, the proposed technical changes do not address the suggestion to include a look-up table for MCI.
7. Proposed technical changes to clauses 3.12 and 3.13 will assist by simplifying the policy direction and clarifying how nutrient concentrations relate to limit setting.

C. Spatial exceedance criteria should be constrained by the NPS-FM

8. A nutrient concentration cannot guarantee that a target attribute state for periphyton will be achieved. There is always some risk it will be exceeded. The periphyton lookup table describes this risk as "spatial exceedance criteria". The table provides nutrient concentrations that vary according to different spatial exceedance criteria.
9. We received feedback that higher spatial exceedance criteria allow for higher nutrient concentrations and risk poor environmental outcomes. In recognition of the risk this

poses, the highest (30%) spatial exceedance criteria has been removed from the periphyton lookup table.

10. Regardless of the spatial exceedance criteria regional councils accept, they still have to achieve target attribute states for periphyton (and any other attributes for that matter). Otherwise, councils risk having to revise their regional plans, either at the plan hearing on direction from Freshwater Commissioners, or when it becomes apparent they might not achieve a target attribute state.

D. MCI should be a compulsory limit-setting attribute (ie, shifting it to Appendix 2A of the NPSFM)

11. Currently regional councils must work towards target attribute states for MCI by developing action plans, and are able to rely on non-regulatory methods such as funding and restoration.
12. Regional councils can still limit resource use to achieve target attribute states for MCI, but it is not compulsory. This approach acknowledges that MCI responds to a wide range of factors, and that limit-setting may not be possible/may not always be appropriate to achieve desired outcomes.
13. Changing the MCI attribute type now would be a significant policy change from what was consulted on in 2019, and is beyond the scope of other technical changes being proposed.
14. To the extent that concerns relate to the need to manage nutrients, other proposed changes will clarify that regional councils must manage nutrients as needed to achieve target attribute states for attribute affected by nutrients (including for MCI) – ie, they must derive nutrient concentrations needed to achieve the target attribute state, and then set limits on resource use to achieve that nutrient concentration.

Appendix 4: Exposure draft of amendments to the National Policy Statement for Freshwater Management 2020 with track changes following consultation

[exposure-draft-changes-to-npsfm-2020.pdf \(environment.govt.nz\)](#)

Appendix 5: Exposure draft of amendments to the National Environmental Standard for Freshwater 2020 with track changes following consultation

[exposure-draft-changes-to-rm-nesf-regulations-2020.pdf \(environment.govt.nz\)](#)

Appendix 3: Managing our wetlands in the coastal marine area [BRF-2072]

Managing our wetlands in the coastal marine area

Date Submitted:	14 October 2022	Tracking #: BRF-2072	
Security Level	Policy and Privacy In-Confidence	MfE Priority:	Urgent

	Action sought:	Response by:
Hon David PARKER, Minister for the Environment	Indicate agreement (or otherwise) to the recommendations and sign this briefing	19 October 2022
CC Hon Poto Williams, Minister of Conservation	No action required	

Actions for Minister's Office Staff	Provide a copy of this briefing to the Minister of Conservation's office. Return the signed report to MfE.
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Key contacts

Position	Name	Cell phone	1st contact
Principal Author	Régis Lapage		
Responsible Manager	Nik Andic		
Director	Hayden Johnston	██████████	✓

Managing our wetlands in the coastal marine area

Purpose

1. Public consultation on how the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) apply to wetlands in the coastal marine area (CMA) closed on 21 September 2022.
2. This briefing:
 - a. provides you with a summary of the feedback received, and
 - b. seeks your agreement to proposed amendments to enable officials to instruct PCO accordingly.

Context

3. The original policy intent of the NES-F, as agreed by Cabinet in 2020, was to restrict activities likely to cause the loss or degradation of all natural wetlands, including those in the CMA.
4. Many councils and stakeholders initially interpreted the NES-F as applying only to natural inland wetlands. In late 2021, a High Court decision confirmed the NES-F applies to wetlands in the CMA¹. Officials subsequently provided you and the Minister for Conservation with a briefing setting out the implications of the High Court's decision, and proposed options to clarify how the NES-F wetland provisions apply in the CMA [BRF-1282].
5. Two key issues have been identified:
 - a. the physical extent to which the NES-F wetland provisions should apply within the CMA is unclear, as the 'natural wetland' definition can be interpreted as capturing a far greater area of the CMA than was the initial policy intent, and
 - b. applying the NES-F wetland provisions in the CMA could prevent or constrain activities unlikely to cause the loss or degradation of natural wetlands, which goes beyond the original policy intent.
6. Following Cabinet approval in August 2022, officials consulted on three possible approaches, presenting Option 2 as the Ministry's preferred approach:
 - a. Retain the status quo: The NES-F continues to apply to the CMA unchanged.
 - b. Option 1: Amend the NES-F to clarify where and how it applies to the CMA.
 - c. Option 2: Amend the NES-F so its wetland provisions do not apply to the CMA.

¹ *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113 at [117].

Summary of feedback received

7. Public consultation on the *'Managing our wetlands in the coastal marine area'* discussion document occurred from 10 August – 21 September 2022. A total of 72 submissions were received. Two-thirds of submissions supported the preferred option (Option 2). The key points are summarised below.
8. Officials will provide your office with copies of submissions referenced in this briefing and are able to discuss these in more detail if desired.

Submissions supporting the preferred option (Option 2)

9. Option 2, the Ministry's preferred option, is to amend the NES-F wetland provisions to not apply to wetlands in the CMA.
10. Councils, businesses, and industry bodies almost universally supported this option, citing the two key issues identified above (see paragraph 5) as key reasons for change. They indicated this option is a straightforward and effective way to resolve issues with the status quo.
11. We note that the submission from Te Uru Kahika (Regional and Unitary Councils Aotearoa) is representative of regional councils' submissions and provides a useful summary of the general positions held by local government (see Appendix 1).

Submissions supporting Option 1

12. Option 1 is to amend the NES-F wetland provisions to clarify where and how they apply to the CMA. This would mean the NES-F would continue to apply to wetlands in the CMA, but would be amended to:
 - a. clarify the physical extent to which the natural wetland definition (and therefore the wetland provisions) applies in the CMA, and
 - b. identify which rules apply in the CMA.
13. Feedback from ENGOs generally supported the NES-F continuing to apply to wetlands in the CMA. They considered the degree of scrutiny imposed by the NES-F to be appropriate given the vulnerable status of wetlands (including those in the CMA), and considered this is consistent with the original policy intent. They did not agree that applying the NES-F in the CMA could prevent or constrain activities unlikely to cause loss or degradation.
14. Several submitters noted that regional coastal plans cannot be relied upon to safeguard against further loss of coastal wetland extent. They supported managing coastal wetlands through bespoke provisions within national environmental standards, and suggested changes to the New Zealand Coastal Policy Statement (NZCPS) and the NES-F.
15. The Parliamentary Commissioner for the Environment (PCE) supported development of Option 1 through further work to identify and address specific conflicts, gaps and ambiguities in application of the NZCPS, National Policy Statement for Freshwater Management 2020 (NPS-FM), NES-F and current coastal plans.
16. The Māori Trustee supports this option, submitting that clearly defining where and how the NES-F wetland provisions apply in the CMA would give better effect to and align with

Te Mana o te Wai and ki uta ki tai. All iwi submitters were of the view that Option 2 would not give effect to Te Mana o te Wai.

17. Forest & Bird supported Option 1 in principle, but felt that the clarifications would be a partial removal of rules, rather than rules being tailored to coastal wetlands.
18. The Resource Management Law Association noted the option chosen should not allow an activity that would have significant adverse effects.²
19. Overall, most submissions preferring Option 1 considered that not applying the NES-F in the CMA would result in insufficient environmental protection. These submitters, such as the PCE, perceive changes to NES-F as unjustified and high-risk in the absence of a comparative analysis and impact assessment between existing and proposed policies.

Comments on the status quo

20. Submissions that neither supported Option 1 or Option 2 generally supported the need for policy change. However, most of these suggested the status quo should be retained until policy changes can be developed, to ensure continued protection of coastal wetlands in the interim.

Broader issues facing coastal wetlands, and forward policy work on estuaries

21. Submissions also described broader issues facing coastal wetlands and how they are currently managed.
22. A significant number of submitters, including some regional councils, considered that the NZCPS should be reviewed to ensure that it adequately and consistently protects coastal wetlands.
23. Some submitters also emphasised that reliance on the NZCPS would not provide adequate protection for coastal wetlands. They considered that bespoke regulations should be developed and include:
 - a. an improved definition of coastal wetland
 - b. mapping tools and delineation protocols for coastal wetlands, and
 - c. flexibility for regionally specific approaches where appropriate.
24. Addressing these issues is beyond the scope of proposed amendments to the NES-F in relation to option 1. Officials will consider these issues and how best to address them as part of forward policy work on better protection for estuaries and wetlands in the CMA.
25. We will work with your office to arrange a time to discuss options and next steps for this work.

² Under section 43A(3) of the RMA, national environmental standards cannot permit an activity that has significant adverse effects on the environment.

Advice

26. We recommend proceeding with the Ministry's preferred option (Option 2), which is to amend the NES-F so the wetland provisions do not apply to wetlands in the CMA [refer BRF-1282]. This can be achieved by amending all references to 'natural wetland' in the NES-F to 'natural inland wetland'.
27. While the initial policy intent was for the NES-F to protect wetlands in the CMA, the focus was on natural wetlands found around the margins of estuaries and intertidal areas. The application of the NES-F goes beyond this by preventing appropriate coastal activities from occurring, especially those with minor effects.
28. It is important to note that Option 2 is temporary measure to address issues we have identified with the status quo, and should be seen in the context of forward policy work on estuaries. This work will address issues facing coastal wetlands and how they can be managed in the near future.

We do not recommend retaining the NES-F as an interim protection

29. While we acknowledge the NES-F provides some level of protection, officials consider the existing NES-F will continue to have significant unintended impacts on activities in the CMA (see Appendix 2 for specific examples), and as highlighted by council submitters will be difficult and costly to implement. We also note that any additional protection provided by the NES-F is not targeted, and that further work is needed to identify and address specific risks faced by wetlands in the CMA.
30. The NPS-FM, NZCPS, existing coastal plans, and section 12 of the RMA will continue to apply regardless of decisions taken in this briefing. In particular, councils have ongoing requirements under the NPS-FM to adopt an integrated catchment approach, and manage freshwater and land use to address impacts on receiving environments, which include estuaries and the coastal marine area.
31. Submissions supporting Option 1 suggest changes that would limit scope for unintended consequences. For example³:
 - a. Boffa Miskell suggested providing specific activity status for natural coastal wetlands, and supported the proposed definition of 'natural coastal wetland' with further limitations on its scope based on landward and seaward boundaries.
 - b. Te Ao Mārama similarly suggested an amended definition of 'natural coastal wetlands' that would only include those associated with coastal lakes and lagoons in specific geomorphic classes, and then to limit the application of the NES-F to those wetlands.
32. We are concerned the NES-F will continue to have other unintended outcomes, and the submission from Te Uru Kahika provides a useful overview of these (Appendix 1 page 18 of their submission), in addition to the examples described in Appendix 2.

³ Note the above examples focus on suggestions that would limit scope for unintended outcomes. However, these submissions also suggested other changes – for example Boffa Miskell would not exempt mangroves from vegetation clearance rules.

33. If you wish to discuss submitters' suggestions for retaining the NES-F as an interim protection or progressing Option 1 in some form, officials can arrange a policy session to do this in coming weeks.

Not applying the NES-F to the CMA is a temporary measure or reset, we can include iwi/Māori and others in future work to improve how coastal wetlands are managed

34. Iwi/Māori raised concerns through consultation that Option 2 does not give effect to Te Mana o te Wai because it will remove protections for wetlands in the CMA.
35. The NPS-FM still applies with its requirements for councils to develop plans that give effect to Te Mana o te Wai, and actively involve tangata whenua. Wetlands in the CMA would also still be covered by NPS-FM requirements to take an integrated catchment approach. For example, this includes councils having to recognise receiving environments and the cumulative effects of land-use on these, when developing freshwater plan content.
36. The NES-F inherently limits scope for local decision-making. We heard from councils that it may override existing MOUs and other formal agreements that exist between tangata whenua and councils in the CMA. Forward policy work on estuaries provides an opportunity to engage with wider iwi/Māori to understand what provisions are already in place (that need to be recognised and retained), and any additional protections they see as appropriate. Development of any new regulations will need to consider their role in local decision making in respect of coastal wetlands.

Next steps


37. Please return this signed briefing indicating your decisions.
38. Subject to your decisions, officials will:
 - a. Instruct PCO to draft changes to the NES-F.
 - b. Seek final Cabinet agreement and Gazette amendments before the end of the year.
39. Note that Cabinet has agreed to provide you power to act, enabling drafting to begin subject to your decisions sought in this briefing, before seeking Cabinet approval of a final instrument later this year [CAB-21-MIN-0500 refers].
40. We are currently preparing a final Cabinet package [CAB-157 refers] to seek agreement to amend wetland provisions and make technical changes to the NES-F and the NPS-FM, and update the map of low slope land that is incorporated by reference in stock exclusion regulations.
41. This includes a RIS and s32 analysis, which you are required to have regard to under s52 of the RMA, prior to decisions on any amendment to national direction. Subject to your agreement here, proposed amendments relating to wetlands in the CMA can be incorporated into this Cabinet package for lodging in November 2022.
42. We will provide advice on providing better protection for estuaries and wetlands in the CMA in November-December.

Recommendations

We recommend that you:

- a. **Agree** to progress Option 2 to amend the NES-F so that it no longer applies to wetlands in the CMA, and for officials to instruct PCO to draft changes to the NES-F on this basis.
Yes/No
- b. **Discuss** submitters' suggestions for retaining the NES-F as an interim protection or progressing Option 1 in some form, officials can arrange a policy session to do this in coming weeks.
Yes/No
- c. **Note** that Cabinet has agreed to provide you power to act, enabling drafting to begin subject to your decisions sought in this briefing, before seeking Cabinet approval of a final instrument later this year [CAB-21-MIN-0500 refers].
- d. **Note** amendments relating to wetlands in the CMA will be incorporated into the Cabinet package that is seeking agreement to amend wetland provisions and make technical changes to the NES-F and the NPS-FM, and to update the map of low slope land that is incorporated by reference in stock exclusion regulations, for lodging in November 2022.
- e. **Note** that we are preparing additional advice to come to you before the end of the year on the future work programme around estuaries, including estuary case studies, and coastal wetland protection.

Signature

Hayden Johnston Director - Water and Land Use Policy	
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Hon David PARKER, Minister for the Environment	
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Appendix 1: submission from Te Uru Kahika (Regional and Unitary Councils Aotearoa)

7 SEPTEMBER 2022

REGIONAL SECTOR OF LOCAL GOVERNMENT SUBMISSION ON: “MANAGING OUR WETLANDS IN THE COASTAL MARINE AREA”

To: WetlandsTeam@mfe.govt.nz

On: “Managing our wetlands in the coastal marine area” discussion document

Submitter: Te Uru Kahika – Regional and Unitary Councils Aotearoa
C/- Auckland Council
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Contact: [REDACTED]
[REDACTED]

Introduction

1. Te Uru Kahika Regional and Unitary Councils Aotearoa represents the sixteen regional councils and unitary authorities of New Zealand.
2. Te Uru Kahika made a submission on 6 July 2022 in relation to the “*Exposure draft of proposed changes to the NPS-FM and NES-F (including wetland regulations)*” seeking that the National Environmental Standards for Freshwater (NES-F) be amended so that the wetlands provisions applied to only ‘natural inland wetlands’ and not in the coastal marine area (CMA). That submission is included in **Attachment 1**.
3. We are very pleased that the current consultation process addresses the issues that were noted in our July 2022 submission, and in prior correspondence with MfE.
4. Te Uru Kahika strongly supports MfE’s preferred option: Option 2 – Amend the NES-F so the wetland provisions do not apply to the CMA.
5. The points below respond to the questions raised in the discussion document.



1. Do you agree that the current application of the NES-F to the CMA requires amendment? Why/why not?

6. The regional sector strongly agrees that amendment to the NES-F is required.
7. We agree with the two points set out in the discussion document as the key reasons for change:
 - the physical extent to which the NES-F wetland provisions should apply within the CMA is unclear, as the 'natural wetland' definition can be interpreted as capturing a far greater area of the CMA than was the initial policy intent.
 - applying the NES-F wetland provisions in the CMA could prevent or constrain activities unlikely to cause the loss or degradation of natural wetlands, which goes beyond the original policy intent.
8. The extent of where the current NES-F wetlands provisions apply cannot be determined from the wording of the NES-F. As noted in the discussion document, the RMA definition of 'wetland' can be interpreted as applying to large areas of the CMA. The NES-F use of 'natural wetland' does not provide any greater certainty for CMA activities. The exclusions for constructed wetlands, geothermal wetlands and improved pasture do not typically apply in the CMA. The term 'natural wetland' has caused debate about whether there is a relevant degree of 'naturalness', particularly where a coastal edge is highly modified, but the area is part of an inlet or estuary that is a natural feature and so is part of a 'natural wetland'.
9. At present, the spatial extent of CMA wetlands is being resolved through the internal policies of respective councils and through site-by-site decisions. Staff from respective councils liaise with each other to help shape their approaches such that relevant commonalities are identified. However, the current definition of 'natural wetland' could potentially lead to inconsistent decisions around New Zealand and that would be contrary to the purpose of having national regulation.
10. The recent need to determine the relevant spatial extent of a wetland, and whether the NES-F applies to any activity proposed in the CMA (or adjacent to the CMA), is causing unreasonable costs and delays for councils and consent applicants. It also creates a risk of being caught up in long litigious processes regarding whether the NES-F applies when there is no clear environmental benefit being achieved by applying the NES-F regulations.
11. There are numerous activities which are being prevented or constrained by the NES-F but are unlikely to cause the loss or degradation of natural wetlands. These activities have been provided for in regional coastal plans as being appropriate where relevant conditions or standards are met. Generally, this issue is because the consenting pathways in the NES-F were developed for activities in inland wetlands and do not address the range of relatively minor activities that occur in the CMA. Development of the



Essential Freshwater package did not consider the needs of coastal activities and developments such as marinas, ports, marine farms, boat berthing and management of coastal erosion.

12. The NES-F is also preventing beneficial activities. The discussion document highlights the Rangitane Maritime Development which was found to include a prohibited activity although it had earlier been accepted for the fast-track consenting process by the Environmental Protection Agency (EPA). Another example is that the NES-F prohibited activity (regulation 53) is stopping people trying to authorise historical unlawful reclamations as they must be considered in accordance with the current rules that would apply to the formation of that reclamation. That regulation is also stopping beach renourishment projects as they result in partial drainage of a wetland. This is directing people towards hard engineering responses to coastal erosion which can be consented as a non-complying activity although that is contrary to the NZCPS policy 27(2) direction to 'focus on approaches to risk management that reduce the need for hard protection structures'.
13. Our July 2022 submission includes a list of activities that have a new consent requirement, or an unreasonably onerous activity status, under the NES-F. These include mangrove seedling removal, installation of navigation aids, river mouth clearance, minor alterations to existing structures, and others. Development of a full list of relevant activities would require a detailed comparison of regional coastal plans and the NES-F. It also requires assessment of all the land-based activities that are now over-regulated where they are within 10m of the coastline (for vegetation clearance or earthworks) or within 100m of the coastline (for taking, use, damming, diversion or discharge of water).
14. The NES-F does not recognise that the risk profile for inland and CMA wetlands is different. Inland wetlands are generally highly sensitive to changes in the amount of water being fed into or out of the wetland. Wetlands in the CMA are tidal and seldom sensitive to changes in the water quantity regime.
15. Inland wetlands are generally small and highly sensitive to small changes in extent from edge modification or reclamation. In contrast, CMA wetlands are generally extensive and more resilient to change. Inland wetlands are generally in private ownership and under pressure for development or farming activities. CMA wetlands are generally within the common marine and coastal area and are subject to the Marine and Coastal Areas (Takutai Moana) Act.
16. The NES-F does not recognise the different regulatory regime under the RMA for inland and CMA wetlands. There is no RMA restriction on vegetation clearance or earthworks in an inland wetland. The RMA s13 restrictions relate to 'the bed of any lake or river' but not to the bed of a wetland. Works in an inland wetland will only be regulated if there is a relevant rule in a regional or district plan (under RMA s9) or it involves a water take, use, dam or diversion (under RMA s14). In contrast, the CMA has the s12 presumption that



consent is required for vegetation removal and earthworks unless it is expressly allowed by a national environmental standard or a rule in a regional coastal plan.

17. The narrow range of activities controlled under the NES-F (earthworks, land disturbance, vegetation clearance, and take, use, divert, dam and discharge of water) means that most activities in the CMA trigger a mix of rule infringements under both regional coastal plans and the NES-F. In many cases, the NES-F consent triggers simply replace rule infringements that would otherwise occur under the relevant regional coastal plan. They do not trigger any new or different assessment except where a regional coastal plan process has determined that there should be a permitted or controlled activity. The High Court's determination that 'earthworks and land disturbance' includes disturbance of the foreshore and seabed means that very minor activities that are provided for in regional coastal plans become non-complying under the NES-F.
18. Reclamation has historically been one of the greatest threats to CMA wetlands, but it is not explicitly addressed in the NES-F. It is presumed to be covered by the provisions for 'earthworks' and 'drainage' but confusion is created by the use of 'reclamation' in the NES-F provisions relating to rivers (regulation 57).
19. The activity status hierarchy in the NES-F is inconsistent with the policy framework for CMA wetlands. In the CMA, the policy framework is provided by the New Zealand Coastal Policy Statement 2010 (NZCPS) and regional coastal plans. For inland wetlands, the policy framework is the NPS-FM and regional plans. The NZCPS has policies that relate to coastal wetlands, but these correspond to matters (such as natural character and defences against natural hazards) that are not addressed in the NES-F. The NZCPS 'avoid' policies require regional coastal plans to have restrictive provisions that will prevail over the NES-F consenting pathways where the additional NZCPS matters apply.
20. The NES-F is regulating activities that have been provided for through other national direction. The National Environmental Standards for Marine Aquaculture provide for various minor changes to existing marine farms as a restricted discretionary activity. Where these involve vegetation clearance, discharges or earthworks, the NES-F makes those activities a non-complying activity. The Resource Management (Marine Pollution) Regulations 1998 permit various discharges as part of the normal operations of a ship. The NES-F makes these discharges a non-complying activity.

2. Do you agree with the proposal to amend the NES-F wetland provisions to no longer apply to the CMA? Why/why not?

21. We agree with the proposal to amend the NES-F wetlands provisions to replace 'natural wetlands' with 'natural inland wetlands' so that they do not apply in the CMA.



22. This is the simplest means of addressing the issues related to applying the natural wetland provisions of the NES-F within the CMA. Future work on estuaries management can consider whether CMA-specific regulations are required, and how that relates and integrates with measures in other regulatory tools.

3. Do you think the wording changes proposed in the preferred option make it clear that the NES-F would no longer apply in the CMA? Why/why not?

23. Yes. The wording change to refer to 'natural inland wetlands' makes it clear that the NES-F wetlands provisions do not apply in the CMA. It provides a clear linkage with the demarcation between regional coastal plans and other regional plans.

4. Are there any reasons to prefer other options? If so, what are they?

24. No. There are significant issues with both the status quo and option 1 'amend the NES-F to clarify where and how it applies to the CMA'.

25. The issues with the status quo are outlined above in the reasons why change to the NES-F is needed.

26. Option 1 requires amendment to be workable and it is not clear whether it would provide any significant benefits given the costs that would be involved in developing new consenting pathways for the full range of applicable activities.

27. The discussion document (page 12) sets out a new definition of 'natural coastal wetland' as:

natural coastal wetland (coastal wetland) means a natural wetland that:

- is within the coastal marine area (CMA);
- is part of a tidal estuarine hydrosystem¹; and
- does not exceed a depth of six metres at low tide.

The boundaries of a natural coastal wetland would be:

- the **inland boundary** of a natural coastal wetland is the inland boundary of the CMA; and
- the **seaward boundary** of a natural coastal wetland is drawn at the geographic line between the inlet constriction or the outer headlands and the 6-metre bathymetry contour within the coastal hydrosystem.

¹ Hume T, Gerbeaux P, Hart DE, Kettles H, Neale D. 2016. A classification of New Zealand's coastal hydrosystems. Prepared for the Ministry for the Environment by the National Institute of Water and Atmospheric Research. Wellington: Ministry for the Environment.

28. The inclusion of 'coastal wetland' in brackets in the proposed definition is likely to generate confusion about natural vs non-natural 'coastal wetlands'.
29. The proposed definition uses 'part of a tidal estuarine hydrosystem' and refers to Hume et al (2016). That report does not have a classification of 'tidal estuarine hydrosystem'. It includes:
- 'Estuarine' systems which include the sub-classifications of '6. Tidal river mouth' and '7. Tidal lagoon' and
 - 'Estuarine/marine' systems which include '8. Shallow drowned valley' and '9. Deep drowned valley'.
30. The proposed definition would need to be amended to clarify whether it includes all of classifications 6 to 9 or only 6 and 7 which are 'tidal'. Alternatively, the 'tidal' in the definition could mean the tidal parts of any of classifications 6 to 9. For the shallow and deep drowned valleys it may be just the area between high tide and low tide marks which is 'tidal'.
31. The proposed definition also needs to be amended to clarify whether any areas outside of the relevant hydrosystems are coastal wetlands or not. The discussion document states on page 13 that 'habitats such as saltmarsh, mangroves, seagrass, and mud/sandflats would be included in the definition of natural coastal wetland. Marine environments such as open coast beaches, rocky reef and kelp forests would be excluded.'
32. Saltmarsh, mangroves, seagrass and mud/sandflats can be found fringing coastal embayments or beaches which are not within the 'estuarine' hydrosystems in the definition wording. They are in 'marine – 11. coastal embayment'. Such areas would not be subject to the NES-F under this definition. So, there is an issue of whether the habitat types are mutually exclusive, and even where they are, they may be found adjacent to each other such that activities undertaken in one area may be of consequence to another nearby area.
33. The use of the 6m water depth limit also requires further consideration. For large areas such the Kaipara and Manukau Harbours it means that most of the harbour would be subject to the NES-F but not the main channels. A channel dredging operation from harbour mouth to upper inlet would be subject to the regional coastal plan in some parts and then the NES-F in other parts. It is not clear whether the 6m depth is the historical depth or the current depth. If a channel is being dredged to below 6m, an applicant will need to know if the 6m criterion is to be applied before or after the dredging.
34. The discussion document notes that option 1 would include amending the NES-F to clarify which rules apply to 'natural coastal wetlands' and proposes that the regulations relating to the take, use, damming, diversion or discharge of water would only apply to



natural inland wetlands. On page 13 it is noted that ‘water takes and discharges have minimal impacts on CMA wetlands’. This is correct in terms of water quantity but not with respect to water quality. Discharges can have a significant effect on water quality within CMA wetlands. If option 1 is pursued, there may be a need to remove the rules relating to water quantity issues, but to retain water quality considerations relating to discharges.

35. Option 1 will require considerable additional policy analysis to be effective. The discussion document recognises that ‘the full implications for coastal activities and structures (eg, wharfs, jetties or sea walls) are not fully understood at this stage. A detailed analysis of how, or if, coastal activities or structures can be incorporated into existing consent pathways (eg, ‘wetland utility structures’ or ‘specified infrastructure’) would be required’ (page 14)’.
36. The existing NES-F consent pathways would require significant change and there may need to be new pathways that only apply in the CMA. For example, the scope of ‘wetland utility structures’ is currently limited to structures for ‘recreation, education, conservation, restoration, or monitoring’ and would need to also include ports, moorings and marinas. The scope of ‘specified infrastructure’ would need to be expanded to include parks and beaches. The scope of ‘natural hazard works’ would need to include seawalls and beach re-nourishment as well as ‘removing material, such as trees, debris, and sediment’.

5. Is there any additional relevant information that you think the Ministry should consider?

37. See submission to the July 2022 consultation on the NES-F exposure draft (Attachment 1).

Conclusion

38. The regional sector of local government welcomes the current proposals to amend the NES-F to exclude wetlands in the CMA. The regional sector and consent applicants have borne considerable costs and time delays arising from the ‘natural wetland’ provisions included in the NES-F, where little benefit has been added.
39. We look forward to working with MfE on future policy development relating to coastal wetlands and estuaries, including in the estuaries work programme noted in the discussion document. We re-iterate our July 2022 submission point that there is room for improvement in the management of New Zealand’s coastal wetlands, but the NES-F is not the right tool to achieve this.
40. The development of the National Planning Framework will be a further opportunity to ensure that national planning direction is integrated across domains while recognising the range of activities and risks in different areas. The issues with CMA wetlands under the NES-F have demonstrated the difficulties in applying regulations that are developed



for one environment (inland wetlands) to another (coastal wetlands). The process for developing the National Planning Framework will need to include a wide range of expertise to appropriately reconcile the provisions currently included in issue-specific direction such as the National Policy Statement on Urban Development, the National Environmental Standards for Plantation Forestry, National Policy Statement for Freshwater Management, National Policy Statement for Indigenous Biodiversity, and the NZCPS. Greater clarity will assist all parties in reducing legal arguments about development versus enhancement and protection.

41. The need for this amendment to the NES-F also illustrates that integrated management should be a key consideration in the development of the new Natural and Built Environments Act, Spatial Planning Act and subsequent council plans and regional spatial strategies. These will all apply to the CMA but it is unclear how they will integrate with Department of Conservation and Ministry for Primary Industries work on marine protection under the Conservation and Fisheries Acts, or with the MPI responsibilities relating to aquaculture. The new interdepartmental executive board (the Spatial Planning Reform Board) that has been established to oversee the development of the proposed Spatial Planning Act does not include representation of MPI². We hope this will not become another example of planning processes for land being applied to the CMA without involving all the relevant parties.
42. More broadly, the regional sector reiterates the clear value to central government if policy development is co-designed with those that inherit these outputs at place, particularly regional and unitary councils. Collaborative policy development can avoid implementation problems and advance our common interest in ensuring that wetland management provisions achieve their policy intent.

Contact details

43. This submission is made with the approval of Michael McCartney of behalf of Regional CEOs.
44. On matters arising from this submission, contact in the first instance should be made with:

██████████
Senior Policy Planner, Regional Planning
Auckland Council

██
██████████

² <https://environment.govt.nz/news/new-interdepartmental-executive-board-for-spatial-planning-act/>



Attachment 1 – copy of July 2022 submission on the NES-F exposure draft



6 JULY 2022

REGIONAL SECTOR OF LOCAL GOVERNMENT SUBMISSION ON:

LIMITING SCOPE OF THE NES-F EXPOSURE DRAFT TO EXCLUDE COASTAL WETLANDS

To: WetlandsTeam@mfe.govt.nz

On: Exposure draft of proposed changes to the NPS-FM and NES-F (including wetland regulations)

Submitter: Te Uru Kahika – Regional and Unitary Councils Aotearoa
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INTRODUCTION

1. Te Uru Kahika Regional and Unitary Councils Aotearoa¹ represents the sixteen regional councils and unitary authorities of New Zealand.
2. Te Uru Kahika is underpinned by a network of subject-matter experts organised into Special Interest Groups or “SIGs”. The role of SIGs is to provide the regional CEOs with tactical advice and expertise on a range of issues, as well as working with central government to achieve outcomes. The SIG network also plays a vital role in championing best practice, information sharing and collaboration across councils.
3. In relation to the “*Exposure draft of proposed changes to the NPS-FM and NES-F (including wetland regulations)*” this sector submission is based upon input from several SIGs – specifically Coastal Management, Policy, Consents, Compliance and Enforcement Special Interest Groups.
4. Many of the councils are making submissions on matters in the exposure draft. This joint submission relates to the inclusion of wetlands within the coastal marine area (CMA) in the current scope of the National Environmental Standards for Freshwater (NES-F).



SUMMARY

Requested amendment to the exposure draft of proposed changes to the NES-F

Amend the NES-F to specify that the NES-F applies to only “inland natural wetlands” in the same way as the National Policy Statement for Freshwater Management (NPS-FM). The NES-F should not regulate wetlands in the CMA by using the term “natural wetlands”.

5. The regional sector supports the protection of coastal wetlands. There is room for improvement in the management of New Zealand’s coastal wetlands, but the NES-F is not the right tool to achieve this. The application of freshwater regulations to the CMA adds a level of uncertainty and complexity that is inconsistent with the government’s general intent to reduce the legislative burden on activities. Including the CMA wetlands in the NES-F is creating minimal environmental benefits when regional coastal plans can appropriately address the desired outcomes.
6. To assist MfE, we would like to take this opportunity to reiterate several technical points that have been previously made in discussions with MfE staff and in formal consultation processes². If our recommendations are addressed, they will:
 - provide clarity for both regulators and developers
 - avoid unnecessary potential legal proceedings, and
 - provide for appropriate environmental outcomes.
7. The NES-F exposure draft has no proposals to address the coastal wetlands issue. The supporting ‘Report recommendations and summary of submissions’ document published by MfE in May 2022 (‘the report’) (page 26) includes a section ‘Clarify wetlands within the Coastal Marine Area’ which notes that four councils had requested that “*the definition clarify how a natural wetland applies within the Coastal Marine Area (CMA)*” as it was leading to unintended and perverse outcomes. The Auckland Council submission did not seek ‘clarification’. It sought that the NES-F be amended to “*exclude natural wetlands within the coastal marine area*”.
8. The report notes the recent High Court judgment³ declaring that the NES-F applies to all natural wetlands within the CMA, and states (on page 28):

We agree that what constitutes a natural wetland in the CMA is ambiguous at present.

A clear definition of what does constitute a natural wetland in the CMA is required and a delineation protocol similar to that used for inland wetlands may be required for wetlands within the CMA. The Ministry will work with DOC to establish a working definition of ‘natural coastal wetland’ for the purposes of the regulations.



Activities in the CMA being inadvertently captured as non-complying will be addressed, in part, through changes proposed here to the non-complying regulations (set out in Part 4B: Drainage – prohibited (r53) and non-complying activities (r52)) and guidance. Further work is needed to scope the implications emerging for consent, compliance, operations and planning functions for DOC and local government entities.

9. We welcome the Ministry's recognition that some change is needed. However, we oppose this proposal for further work. The focus on a 'clear definition' indicates a pre-determination that wetlands within the CMA will continue to be subject to the NES-F.
10. A few council staff worked with MfE and DOC staff earlier this year on options for definition wording and amendments to the NES-F to provide for the activities that occur in the CMA. That work was set up to develop a definition for wetlands in the CMA. It did not attempt to consider the risks to coastal wetlands and then address those risks. It was based on addressing the known risks to inland wetlands, assuming they would also be the key risks in the CMA.
11. The central government position on delineating coastal wetlands was based on a 'coastal hydrosystems' approach that classifies all estuaries and harbours as wetlands⁴. This includes extensive areas such as the Manukau Harbour and Kaipara Harbour, and many of the estuaries and harbours in Northland, Waikato and Bay of Plenty. The issues with this approach are set out below. Approaching this delineation as solely a scientific question does not adequately consider the management regime in which decision-making is made and which must encompass other considerations.
12. There are adequate tools to manage coastal wetlands through the RMA, the NZCPS and regional coastal plans. Some DOC staff have said that the NES-F is needed because not all councils have updated their plans to give effect to the NZCPS 2010. This argument may justify some national-level regulation in the coast, but it should not be through a freshwater planning regulation. The government has acknowledged that a proper analysis of how to provide for coastal activities has yet to be completed. To attempt to try and retrofit carve-outs for marine activities, amend definitions, or develop guidance in the absence of a good case for intervention, is extremely poor practice and likely to make matters worse.
13. Our position is based on the following points:
 1. No rationale has been provided for the inclusion of coastal wetlands in the NES-F
 2. Inland and coastal wetlands are not the same and require different management regimes, and a more appropriate route is already available for coastal wetlands
 3. The NES-F is imposing unnecessary costs on councils and coastal activities
 4. There is considerable uncertainty regarding how to delineate coastal wetlands
 5. The NES-F conflicts with other national direction.



ANALYSIS

No rationale has been provided for the inclusion of coastal wetlands in the NES-F

14. The NES-F has in effect extinguished carefully crafted coastal plan provisions across New Zealand with no clear case for intervention. The lack of analysis on the regulatory impact is evident in the documents outlined in Attachment A. It is now acknowledged by MfE that *“further work is needed to scope the implications emerging for consent, compliance, operations and planning functions for DOC and local government entities”* (page 28 of the report). This suggests to us that the Ministry was unaware of the implications at the time of drafting. In discussions between council, MfE and DOC staff, no information has been provided of the problem within the CMA that this new layer of regulation is intended to address. The NES-F is imposing complexity and costs on applicants and councils for no specified purpose.
15. In the absence of any evidence of what the problem is, our strong view is that the NES-F should not apply to wetlands in the CMA, especially now that we know the process costs are likely to be very significant but environmental benefits are minimal (i.e. it is now obvious that there is a strongly negative cost / benefit ratio). This was illustrated by the recent decision by an EPA hearing panel on a proposed reclamation and boat ramp development in the Bay of Islands. The commissioners found that the reclamation was a prohibited activity under regulation 53 of the NES-F⁵. Prior to the High Court decision, the project had been accepted for the Government’s ‘fast track’ consenting process. A similar proposal at Kopu in the Coromandel has been granted consent because the applicant was able to establish that the project was a form of ‘regionally significant infrastructure’. The NES-F is stopping desirable projects and is not achieving national consistency.
16. The current exposure draft process continues the past Essential Freshwater approach of applying freshwater provisions to the CMA without considering how the CMA is different to an inland wetland. The development of the NES-F and the wider Essential Freshwater package was based on an extensive analysis and consultation process. However, at each stage there was only brief consideration of the need to include wetlands in the CMA.
17. The need for Environment Court declaration proceedings⁶ with respect to the Northland Proposed Regional Plan demonstrated that councils and community groups were not aware that the NES-F applied in the CMA and could not reach agreement on where it applied. The fact that the NES-F does not include any mention of *“coastal wetlands”* or *“estuaries”* and has the wetlands provisions under a heading of *“standards for other activities that relate to freshwater”*, leads to debate and confusion about the intent of the drafting. We are having to inform very experienced planners that their client’s consent application for a structure in the CMA is also *“earthworks in a wetland under the NES-F”*.



18. The Environment Court took a pragmatic approach and determined that the coastal wetlands provisions applied to areas between the river mouths and the CMA boundary, although that was not stated in the NES-F. This judgment was appealed by the Department of Conservation and Royal Forest and Bird Protection Society of New Zealand, arguing that the NES-F applies to natural wetlands in the entirety of the CMA.
19. The High Court judgment allowed the appeals and agreed that the NES-F “*applies to natural wetlands in the coastal marine area*”. This was based on a strict legal interpretation of the meaning of the NES-F. It did not state that there was a need to regulate coastal wetlands or that the process to develop the regulations had been reasonable or adequate.

Inland and coastal wetlands are not the same and they require different management regimes, and a more appropriate route is already available for coastal wetlands

20. National regulations relating to works in inland wetlands can be justified on the basis that there is no RMA restriction on vegetation clearance or earthworks in a wetland. The RMA s13 restrictions relate to ‘*the bed of any lake or river*’ but not to the bed of a wetland. Works in an inland wetland will only be regulated if there is a relevant rule in a regional or district plan (under RMA s9) or it involves a water take, use, dam or diversion (under RMA s14). In contrast, the CMA has the s12 presumption that consent is required for vegetation removal and earthworks unless it is expressly allowed by a national environmental standard or a rule in a regional coastal plan.
21. The planning regime for inland wetlands includes a mix of district and regional provisions, and it is accepted that such consenting regimes can develop in a non-integrated manner. This can lead to gaps or duplication. This does not happen in the CMA. All matters are regional provisions and are subject to a single planning and consent processing regime.
22. The NES-F wetlands provisions have been developed without any regard to the type of activities that occur in the CMA. Almost every activity currently regulated by a regional coastal plan is affected by the NES-F, and the NES-F has a far less nuanced approach. The High Court determined that “*earthworks or land disturbance*” in the NES-F includes RMA s12(1) disturbance of the foreshore and seabed. Together with the regulations relating to vegetation clearance and discharges, this means that the wide range of activities that can take over a hundred different rules in a regional coastal plan are managed through only seventeen regulations in the NES-F⁷.
23. The narrow range of activities controlled under the NES-F (earthworks, land disturbance, vegetation clearance, and take, use, divert, dam and discharge of water) means that most activities trigger a mix of rule infringements under both regional coastal plans and the NES-F. The NES-F consent triggers simply replace rule infringements that would



otherwise occur under the relevant regional coastal plan. They do not trigger any new or different assessment except where a regional coastal plan process has determined that there should be a permitted or controlled activity.

24. Several of the options that have been considered by MfE and DOC staff are based on amending the NES-F to include exceptions for various activities in the same way that the NES-F currently has exceptions for scientific research, wetland utility structures, specified infrastructure and sphagnum moss harvesting. There are considerable risks of creating a hugely complex, and overly burdensome, regulatory regime with significant unintended consequences for minimal environmental gain. It will take considerable work to retrofit the NES-F, and if done quickly, there is high risk of getting it wrong.
25. The new regulations will need to cover the full range of coastal works and structures, including dredging, moorings, seawalls, wharves, boatsheds, marine farms, ferry terminals, ports and marinas. The amendments required to make this approach work would be complex and would require a wide range of detailed thresholds and conditions. Such rules are already in place in regional coastal plans and have been developed to give effect to the NZCPS and therefore provide a high level of protection for biodiversity, including CMA wetlands.
26. Regional councils produce regional coastal plans through considerable regional-scale analysis of the problem followed by detailed engagement with tangata whenua, communities and users of the CMA. Regional coastal plans include a complex array of region-wide rules, zones and overlays that recognise the range of values and activities in the CMA. In contrast, inland natural wetlands do not require zones for marinas, ferry terminals, moorings and ports. They do not commonly have development on this scale that has a functional need to be in a wetland. Regional coastal plans also have well established provisions that address the occupation of the common marine and coastal area, navigation and safety, natural character, landscape values, noise and lighting. There is no mention of these considerations in the NES-F as they are not relevant to inland natural wetlands.
27. The NES-F is so poorly suited to coastal activities that it has internal inconsistencies. For example, small scale mangrove removal is a non-complying activity whereas reclamations for new motorways are a discretionary activity; installation of a new navigation sign is a non-complying activity whereas dredging a channel to a port is a discretionary activity.
28. An example of the complexity involved in applying the NES-F in the CMA is the sand mining in the Kaipara Harbour. This is subject to the NES-F as the entire harbour may be a wetland. If wetlands were to extend to an arbitrary 6m water depth, rather than to the harbour entrance, the current sand mining would have part of the operation under the NES-F and part under only the regional coastal plan. NES-F regulation 54 means sand mining is a non-complying activity as earthworks within a natural wetland that does not have another activity status.



29. Hearing commissioners have recently declined a consent application to continue sand mining at Pakiri on Auckland's east coast. The sand supply necessary for Auckland's infrastructure and residential development is now more dependent on sand from the Kaipara Harbour. When the current consents need to be renewed or expanded, the activity status will be non-complying (and the Pakiri applications will be a discretionary activity as they are in a wider embayment, not a wetland) although it is preferable to use sand from the Kaipara due to the amount of sand and understanding of adverse effects. The amendments proposed in the exposure draft means that the council and applicants will need to determine if the sand is to be used for constructing urban development (restricted discretionary), for specified infrastructure (discretionary) or is quarrying (discretionary) or mining (discretionary).
30. The justification for the NES-F has been based on the loss of 90% of New Zealand's wetlands. This risk largely relates to inland wetlands. The percentage would be much lower for coastal wetlands. There has been historical loss of coastal wetlands from filling inlets to create flat land, but this has been rare in recent decades. The most common reason for reclamation in coastal wetlands is now probably infrastructure (e.g. roads and ports). This is facilitated in the NES-F through a specific discretionary activity, whereas there is a strong policy direction to avoid reclamation in the NZCPS.
31. As noted earlier, all harbours and estuaries in the Northland and Auckland regions (excluding deep channels) for example, are wetlands. Other large areas such as parts of the Marlborough Sounds and Otago Harbour are probably also wetlands. We do not understand how the risks for an inland wetland can be considered the same as for a whole harbour.
32. The risk profile for inland wetlands and wetlands in the CMA are completely different (with some exceptions of coastal wetlands on the fringes such as saltmarsh). For example, inland wetlands are generally small and consequently sensitive to disturbance and activities such as water takes and diversions. Wetlands in the CMA are extensive and very rarely affected by water takes and diversions. Inland wetlands are also often in private ownership so are under different development pressures to the CMA.
33. The NES-F regulations for vegetation removal are based on the sensitivity of inland wetlands and do not recognise that mangroves are rapidly expanding and displacing other ecosystems. There needs to be more flexibility in providing for limited mangrove removal. After extensive engagement, the northern councils have developed appropriate vegetation management regimes in their regional coastal plans over recent years and these regimes have now been quashed by the NES-F (other than where they are more restrictive than the regulations).
34. Continuing with the current drafting approach will only add regulatory complications and compliance costs and produce a less than integrated regulatory approach across the environmental domains in question.



35. There has been no consideration of whether the issues at question are already addressed through more appropriate avenues (i.e. the RMA, NZCPS and regional coastal plan rules). The regional coastal plans already have provisions that specifically protect the values of wetlands as they give effect to relevant NZCPS policies such as:
- the policy 11 requirement to **avoid** significant adverse effects on coastal wetlands
 - the policy 13 requirement to **preserve** the natural character of landforms such as wetlands
 - the policy 26 recognition that wetlands can be a **defence** against natural hazards, and
 - the policy 10 requirement to **avoid** reclamation unless certain criteria are met.
36. All use of these regional coastal plan provisions will now require an additional step of working out whether the NES-F applies and prevails over the relevant plan provision. This is not a simple step as we cannot show applicants exactly where the NES-F applies, or explain why the NES-F uses such different terminology to a regional coastal plan.
37. Reclamation is one of the key threats to coastal wetlands, but it is not explicitly addressed in the NES-F natural wetland regulations. The High Court judgment provided clarity that the NES-F use of '*earthworks or land disturbance*' includes disturbance of the foreshore and seabed in terms of RMA s12(1)⁸. However, the NES-F does use 'reclamation' in regulation 57 which states that '*reclamation of the bed of any river is a discretionary activity*'. Reclamation in the CMA is usually distinguished from '*drainage*'. Applicants will use the difference between natural wetlands and rivers to argue that the regulations for natural wetlands do not apply to reclamation.

The NES-F is imposing unnecessary costs on councils and coastal activities

38. The cumulative financial costs to resource users and councils to administer the regulation could be substantial (e.g. the costs of processing resource consents required for activities that are otherwise permitted activities).
39. The uncertainty and ambiguity in the NES-F is creating costs relating to the time it is taking to determine whether a proposal is subject to the NES-F, and in determining which regulation applies. These costs are affecting major infrastructure works and small-scale community activities. The ambiguity is creating a risk for councils of being inadvertently caught up in long litigious processes with an uncertain outcome. The litigious nature of the consenting process means there will be challenges to any new definition or guidance. If the purpose of this regulation is to protect coastal wetlands, that will not be achieved by imposing freshwater rules onto the coast.
40. The NES-F is over-regulating activities in the CMA and imposing an unnecessary consenting burden on people. Some of these activities may have no or minimal actual or potential adverse effects, but will result in onerous and costly consenting processes and



require significant resourcing from council to process or monitor. Imposing a consent requirement for these minor activities (many of which in the absence of the NES-F would be permitted activities) requires applicants to pay an application deposit of \$1000 to \$7,000 (depending on the deposit required for infringement of a regional rule at the relevant council). Activities in the CMA which have a new consent requirement, or an unreasonably onerous activity status, under the NES-F include:

- mangrove seedling removal and mangrove clearance adjacent to existing facilities
- installation of navigation aids and signs
- river mouth clearance
- minor alterations or extensions to structures (including at ports, ferry terminals and marinas that are zoned specifically for this purpose)
- realignment and extensions of marine farms
- dredging to access existing wharves
- minor reclamation to upgrade an existing seawall
- moving sand from one end of a beach to the other
- minor discharges of clean water
- treatment and removal of marine pests.

41. This is not a comprehensive list. We could provide comparisons between the NES-F and regional coastal plans if that would help further analysis, but we think the significant consequences of the current approach are reasonably clear.
42. The NES-F is over-regulating drainage activities by making it a prohibited activity unless it has another status under another regulation. This regulation is stopping developments (e.g. relating to boat ramps) with small reclamation components with only minor adverse effects. The prohibited activity could apply to works associated with seawalls, and other structures which do not meet the 'wetland utility structure' or 'specified infrastructure' definitions and result in draining (removing) part of a natural wetland from the CMA. This has potentially significant implications, especially in times of climate change and an increasing awareness of the need for coastal protection structures. The prohibited activity is also stopping people trying to authorise historical unlawful reclamations as they must be considered in accordance with the current rules that would apply to the formation of that reclamation.
43. The ambiguity and uncertainty in the NES-F means that councils and applicants are looking for ways to minimise the over-regulation of minor works. For example, for extensions to jetties on islands, we are having to ask the applicant if they use the jetty for 'recreation' so that it can be classed as a 'wetland utility structure' (restricted discretionary) rather than being earthworks not covered by another regulation (non-complying).
44. The NES-F is also over-regulating activities adjacent to the CMA. These activities include earthworks, erosion and sediment control at earthworks sites, on-site wastewater and



stormwater discharges within 100m of natural wetlands. This issue may be reduced if the exposure draft proposals relating to discharges are adopted. That will depend on the interpretation of the proposed wording in regulation 54, the non-complying activity status for activities that do not have another status, *'there are likely to be adverse effects from the discharge on the hydrological functioning or the habitat or the biodiversity values of a natural wetland'*. It is very unusual, uncertain and not good practice to use 'likely' in setting an activity status.

There is considerable uncertainty regarding how to delineate coastal wetlands

45. The High Court recognised that the RMA definition of wetland is so broad that it could apply to the entire CMA. The scope of a wetland was not the subject of the appeal and the judge commented that he was *"reasonably confident it does not encompass the entirety of the CMA, the seaward boundary of which is the outer limits of New Zealand's territorial sea"*⁹.
46. As noted in Appendix A (in the section on the "Action for Healthy Waterways" (2019) discussion document), coastal wetlands can be regarded as the "margins of estuaries and intertidal areas", predominantly where there are saltmarsh and mangrove areas. Some councils have maps of these wetland areas in our terrestrial and wetland ecosystem mapping¹⁰.
47. In contrast, MfE and DOC staff are now focusing on applying a "coastal hydrosystem" approach with a seaward boundary of 6m water depth at low tide. This means that all harbours and estuaries will be classed as coastal wetlands (apart from the deep channel areas). The NES-F will apply to almost all of the area in which coastal permits are generally sought. We do not dispute this classification as a scientific approach, but do dispute it being used as a basis for applying regulations without adequate justification, and without adequate recognition of the legislative instruments that are already in place, and how they work cognisant of the environmental domain in question.
48. The use of the 6m water depth criterion relates to the definition of wetlands under the Ramsar convention 1971¹¹. The definition's use of *"including areas of marine water the depth of which at low tide does not exceed six metres"* means that such areas can be categorised as internationally significant wetlands. It does not justify a national regulatory regime that applies in all such water depths. If wetlands are considered to be entire estuaries and harbours, there is very little reason for distinguishing these areas from the rest of the CMA. It is creating arbitrary boundaries that do not reflect issues or sensitivity.
49. The issues that ecologists can have in agreeing on the delineation of coastal wetlands was demonstrated in the EPA hearing panel decision noted above. There was considerable debate regarding whether mudflats and mangroves meant the site was a wetland or not.



50. More complex guidance on CMA wetland delineation will not address the issues with the NES-F. Guidance is not binding in legal processes and can create another layer of complexity and uncertainty on top of the regulations and regional coastal plans.
51. Including a new definition of coastal wetlands in the NES-F would create new problems and inconsistencies. It would enshrine a particular management regime on extensive areas before there is an understanding of the issues it is addressing. Regional coastal plans can identify sensitive or significant areas that require a different regulatory regime more effectively than a definition applying to the whole country. If there is a need for a consistent regulatory regime for coastal activities, the NZCPS should be amended to re-introduce restricted coastal activities.

The NES-F conflicts with other national direction

52. The NES-F is a clear example of why a more integrated form of national direction (the National Planning Framework) has been proposed for the Resource Management reforms. The NES-F was developed with some regard to the NES for Plantation Forestry, but it ignored the other national directions that apply in the CMA. More sensibly, the exposure draft of the National Policy Statement for Indigenous Biodiversity generally does not apply in the CMA. It has policies relating to wetlands and areas used by shorebirds, but those policies can be resolved with the policy direction of the NZCPS as coastal plans are developed.
53. The NES-F is inconsistent with the NZCPS. The activity statuses applied by the NES-F do not allow for implementation of NZCPS policies which require that certain activities or effects are avoided. The NZCPS has nuanced policies relating to the wide range of matters to be managed in the coast. The NES-F ignores this and applies an activity status to a set of prescribed activities without any policy support.
54. At present, this issue is mitigated as the NES-F allows plans to have a more restrictive activity status. However, RMA s32 requires that when a new plan is developed, specific justification will be needed for why the plan is more restrictive than the regulations. The lack of any supporting policy guidance or justification for the application of the NES-F to the CMA will make the drafting of s32 reports much more difficult, and the development of regional coastal plans currently under review will have less certainty. Every council will need to prepare a statement explaining which of their coastal plan rules are more restrictive than the NES-F because of the NZCPS.
55. Processing consents under the NES-F is difficult for coastal wetlands because of the disconnect between the regulations and the policies of the NZCPS. It is not possible to refer back to the NPS-FM policies on wetlands which correlate to the NES-F as these do not apply in the CMA. Similarly, these challenges will introduce additional complexity and



litigation risks when monitoring and enforcing compliance with NES-F provisions in relation to coastal wetlands.

56. The NES-F controls on earthworks upset the comprehensive regime for re-consenting marine farms under the National Environmental Standards for Marine Aquaculture (NES-MA). The NES-MA was developed over several years to give certainty to marine farmers with a clear and consistent process for considering new consents when their current consents expire. The NES-MA establishes that re-consenting existing farms, and various specific changes to farms, are restricted discretionary activities. The NES-F now means that several of those activities will be non-complying activities because they include earthworks within a natural wetland.
57. The NES-F also conflicts with the Resource Management (Marine Pollution) Regulations 1998. The Marine Pollution Regulations permit the discharge of treated sewage, ballast water and discharges related to the normal operation of a ship, for example stormwater drainage, greywater, and discharges from engine cooling systems and condensers. These discharges are now all non-complying activities where they are within wetlands. The rules for untreated sewage discharges are more confusing as the Marine Pollution Regulations prohibition will prevail over the NES-F from shore to 5m water depth and then the NES-F will apply to 6m depth. These issues may be addressed by the exposure draft's proposed amendments relating to discharges. However, that depends on how anyone applies the proposed wording of '*likely to be adverse effects from the discharge on the hydrological functioning or the habitat or the biodiversity values*'.

CONCLUSION

58. The regional sector of local government has strong concerns about the current application of the NES-F to wetlands in the CMA. The uncertainty the NES-F has created cannot be addressed by inserting a definition of coastal wetland and accommodating some coastal activities with new regulations. The simplest and most effective way of addressing this issue is to restrict the NES-F to only apply to "natural inland wetlands". This would make it consistent with the NPS-FM.
59. We can work with MfE if any further analysis of this issue is required.

CONTACT DETAILS

60. This submission is made with the approval of Michael McCartney of behalf of Regional CEOs.



61. On matters arising from this submission, contact in the first instance should be made with:

[REDACTED]
Senior Policy Planner, Regional Planning
Auckland Council

[REDACTED]
[REDACTED]



Attachment A – The limited extent of consideration of coastal wetlands in the development of Essential Freshwater

1. The **Interim Regulatory Impact Analysis for Consultation: Essential Freshwater (2019)**¹² (RIA) had an appendix on wetlands that discussed both inland and coastal wetlands. Its assessment of the need to regulate activities in coastal wetlands and the cost implications was very generic and simplistic. It had no consideration of how coastal wetlands might be spatially defined, or of the conflicts between the NES-F and regional coastal plans. It noted that the estimated area of coastal wetland was an underestimate as it was based on the vegetation extent of saltmarsh and mangroves only, and not the wider coastal wetland habitat (page 250). There was a brief mention that the NZCPS had “*directive policies that tend to be stronger (i.e. use the term avoid) than the NPS-FM and may result in a differentiated approach to the management of wetlands in the coastal environment and those found inland*” (page 251).

There was no mention that the NES-F conflicted with the National Environmental Standards for Marine Aquaculture with respect to disturbance of the seabed associated with maintaining or realigning a marine farm, or of the conflict with the Marine Pollution Regulations with respect to discharges from ships.

The document noted several groups who had been consulted about wetlands proposals, then stated:

‘Including coastal wetlands into the NES rules was not discussed with these groups. Therefore, we would need to test the general agreement and implications of this through the discussion document when going out to public consultation’ (page 260).

The report stated that “*over all the proposed NES rules would incorporate a more stringent and consistent approach on regional coastal plans than is currently the case*” (page 266). This appears to be based on a one sentence comparison of the West Coast and Auckland coastal plans on page 250.

The presence of ports and marinas within coastal wetlands was acknowledged in terms of implementation costs with:

“The impacts of the NES rules on coastal wetlands would likely affect the renewal of consents for the existing management of lagoons and coastal lakes level regimes including river mouth and coastal lagoon openings (i.e. rules around natural water level regimes). If mangroves were to be included in the NES vegetation clearance rules local management of mangrove areas would be affected. Existing ports would operate under existing consents; however, port reclamation such as Northland Forestry Port (Marsden Point) could be affected if it is not considered Nationally Significant Infrastructure; as would any local roading or other potential infrastructure extending out into tidal flats. Expansion or development of marinas, which are generally located on intertidal flats and saltmarsh areas, would also be affected” (page 267).



2. The **“Action for Healthy Waterways”** (2019) discussion document¹³ was 105 pages long and had one page that noted the intention to regulate coastal wetlands (page 44). It noted that *“coastal wetlands are natural wetlands found around the margins of estuaries and intertidal areas and include saltmarsh and mangrove areas”*. There was no indication that the NES-F would apply to entire estuaries and harbours or that it would prevail over the many regional coastal plan provisions that are more enabling than the NES-F for minor activities. The focus of the document was on controls relating to freshwater and activities that typically happen on *“land”*.

The text that was included in the discussion document regarding *“reclamation, or disturbance of the bed”* might have triggered concerns about activities in the CMA, but the text of the draft NES used the term *“earth disturbance”* with a definition that appeared to be limited to activities that occur on land¹⁴.

There was no suggestion that the NES-F would apply to all RMA s12(1) disturbance of the foreshore and seabed. Although the Interim Regulatory Impact Analysis (page 267) had noted that NES-F regulations would have implications for ports and marinas, this was not noted in the discussion document. There was no actual *“test [of] the general agreement and implications”* as recommended in the Interim Regulatory Impact Analysis.

3. The **summary of submissions on national direction for our essential freshwater** (May 2020)¹⁵ noted that there was a mix of opinions on the inclusion of coastal wetlands in the NES-F including that *“Auckland Council thinks coastal wetlands should fall squarely within the ambit of the NZCPS”* (page 102).

If it had been clearer that the NES-F would duplicate and prevail over regional coastal plans, many other councils would have submitted on this point and on the need for additional analysis, given the breadth of activities within the CMA. It is also strongly suspected that many other submissions on this point would have been received from the public, particularly those with interests in the coastal marine area and adjoining land.

4. The **final Regulatory Impact Analysis for Action for Healthy Waterways** (2020)¹⁶ included an update to the Interim Analysis. This noted that *“there are recognised limitations within the national maps, and coastal wetland area maps are incomplete, covering only saltmarsh and mangrove wetland types”* and that *“some [submitters] are also concerned that proposed NES wetland provisions are weaker than the NZCPS and therefore the management of coastal wetlands should remain there”* (page 206). A lack of knowledge regarding mining in coastal wetlands was noted (page 211), an indication that there has been no analysis of impacts on activities such as the sand mining in the Kaipara Harbour.

Again, there was no acknowledgement of the scope of activities regulated in the CMA that would be affected by the NES-F. The summary of costs and benefits of the NES-F protection of wetlands does not acknowledge that coastal wetlands are already protected under the NZCPS and regional coastal plans, or that there are significant new costs for minor activities in the CMA that are provided for through regional coastal plans.

5. The **section 32 report** (July 2020)¹⁷ relies on the options assessment of the Interim Regulatory Impact Analysis and identifies that the ecosystem benefits of coastal wetlands are estimated nationally at around \$17 billion per year, whereas there are only \$1.5 billion of benefits for inland wetlands on fertile land (page 119). This difference should have highlighted the differences



between the two environments and the irrationality of managing activities in the CMA through a package called “*Essential Freshwater*”.

Section 8 of the report identifies the relevance of the NZCPS, but never refers to the conflict between the NES-F and regional coastal plans, or to the additional costs that the NES-F would place on consent applicants and on people currently relying on permitted activities. There is also no mention of the extent of land affected by including discharges and earthworks on land adjacent to entire estuaries and harbours.

¹ Collectively, the sixteen regional councils and unitary authorities have responsibilities for integrated management of land, air, and water resources, supporting biodiversity and biosecurity, providing for regional transport services, and building more resilient communities in the face of climate change and natural hazards. To fulfil these responsibilities, regional authorities engage extensively with tangata whenua and communities, and prioritise maintaining strong, on-going relationships. Te Uru Kahika reports to the Regional Sector Group of Local Government New Zealand.

² This issue has been raised with MfE several times. Soon after the High Court decision, the implications were highlighted in a letter from Northland Regional Council to the Minister for the Environment, and in letters to MfE from Auckland Council, Waikato Regional Council and Bay of Plenty Regional Council. The view that coastal wetlands should not be included within the scope of the NES-F was supported by senior managers from all sixteen regional councils at a Resource Managers Group meeting on 3 March 2022. That meeting was attended by MfE staff. A joint letter from Auckland Council and the Northland, Waikato and Bay of Plenty regional councils was sent to MfE and DOC on 25 March 2022.

³ Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated [2021] NZHC 3113 [18 November 2021]. Available at <https://www.nrc.govt.nz/media/c5tlyt5s/high-court-decision-on-jurisdiction-of-nes-f-in-cma-2021-nzhc-3113-18-november-2021.pdf>

⁴ The hydrosystem classification system is explained at <https://environment.govt.nz/assets/Publications/Files/a-classification-of-nz-coastal-hydrosystems.pdf>. Application of this approach to defining coastal wetlands is set out in: Gerbeaux, P. & Hume, T.M. (2022): What constitutes a wetland in the New Zealand Coastal Marine Area? – a scientific perspective, New Zealand Journal of Marine and Freshwater Research, <https://doi.org/10.1080/00288330.2022.2085309>.

⁵ <https://www.epa.govt.nz/fast-track-consenting/referred-projects/rangitane-maritime-development/the-decision/>

⁶ Bay of Islands Maritime Park Inc v Northland Regional Council [2021] NZEnvC 6. <https://www.nrc.govt.nz/media/kfzn2zrw/declaration-of-the-environment-court-on-jurisdiction-of-nes-f-in-cma-10-february-2021-2021-nzenvc-006-bay-of-islands-maritime-park-inc-v-northland-regional-council.pdf>



⁷ NES-F Part 3 “Standards for other activities that relate to freshwater”, Sub-part 1 – Natural wetlands (excluding the regulations relating to ‘sphagnum moss harvesting’ and ‘arable and horticultural land use’).

⁸ Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated [2021] NZHC 3113, paragraph [83].

⁹ Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated [2021] NZHC 3113, paragraph [117]. The RMA definition of wetland is ‘wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions’.

¹⁰ For example, Auckland’s wetland ecosystems are described in Singers et al (2017) ‘Indigenous terrestrial and wetland ecosystems of Auckland’. Available at <https://knowledgeauckland.org.nz/publications/indigenous-terrestrial-and-wetland-ecosystems-of-auckland/>. Maps of the wetlands are available at <https://www.tiakitamakimaurau.nz/conservation-map/>

¹¹ The Ramsar Convention’s definition of wetlands (Article 1) is “areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.”

¹² <https://environment.govt.nz/what-government-is-doing/cabinet-papers-and-regulatory-impact-statements/interim-regulatory-impact-analysis-for-consultation-essential-freshwater-part-ii-detailed-analysis/>. See Appendix 13: Wetlands from page 248.

¹³ <https://environment.govt.nz/assets/publications/Files/action-for-healthy-waterways.pdf>. Consultation period of 5 September 2019 to 17 October 2019.

¹⁴ earth disturbance means the disturbance of earth (including soil, clay, sand, rock, and peat),: a) including by moving, removing, placing, blading, cutting, excavating, cultivating, filling, excavating, or gardening it; <https://environment.govt.nz/assets/publications/Files/proposed-nes-for-freshwater-2019.pdf>

¹⁵ <https://environment.govt.nz/assets/Publications/Files/action-for-healthy-waterways-summary-of-submissions.pdf>

¹⁶ <https://environment.govt.nz/publications/action-for-healthy-waterways-part-2-detailed-analysis/> Chapter 13 Preventing further loss or degradation of wetlands – Update on Interim Analysis (from page 205).

¹⁷ Harrison Grierson (2020) Action for Healthy Waterways Section 32 Evaluation for MfE, <https://environment.govt.nz/assets/Publications/Files/action-for-healthy-waterways-section-32-evaluationreport.pdf>



Appendix 2: activity types identified by councils

NES-F effect managed	Coastal activity impacted	Issues raised
Take, use, damming, diversion, or discharge of water	Take, use, damming, diversion, or discharge of water from: <ul style="list-style-type: none"> -domestic use -infrastructure -stock watering -irrigation - stormwater - wastewater - industrial water - Earthworks 	Concern has been raised that coastal activities or land based activities occurring near coastal wetlands will all be captured as non-complying by the NES-F reg. 54(c), creating numerous conflicts with coastal plan rules where activities range from permitted to non-complying. Additionally, concerns were raised in regards to water quality of discharges from these sources into the CMA.
Take, use, damming, diversion, or discharge of water	Vessel discharges	Discharge from recreational vessels may occur within an area defined as coastal wetland and could be captured as non-complying under discharge regulations in NES-F, unless otherwise specified. It is not in the scope of the policy intent of the NES-F to manage marine pollution.
Vegetation Clearance	Mangrove Management	Mangrove removal and mangrove seedling removal is managed under regional coastal plans but as stands would be captured as non-complying under the NES-F as mangroves are indigenous vegetation.
Earthworks	Maintenance existing structures or construction of new structures including but not limited to: <ul style="list-style-type: none"> -seawalls 	Earthworks for the construction or maintenance of existing structures within the CMA ranges from permitted to restricted discretionary in regional coastal plans but would be captured as non-complying under Reg. 54(b) as coastal structures are not adequately captured under the definition of wetland utility structure or specified infrastructure

	<ul style="list-style-type: none"> -jetties -wharfs -marinas -roads -boardwalks 	
Earthworks	Navigation channels (dredging), buoys, signage	Earthworks associated with the dredging of navigation channels and instalment of buoys or signage may be captured as non-complying in coastal wetlands under Reg 54.
Earthworks	Mooring and anchoring	Minor earthworks associated with mooring and anchoring may be captured as non-complying in coastal wetlands under Reg 54.
Earthworks	Construction and maintenance of aquaculture structures	<p>Marine aquaculture farms that presently exist or may be developed within an area defined as coastal wetland that have a land disturbance aspect could be captured as non-complying under earthworks regulations in NES-F, unless otherwise specified.</p> <p>It is not in the scope of the policy intent of the NES-F to manage marine aquaculture related activities.</p>
Earthworks	Recreational fishing -Scallop dredging	<p>Customary, recreational and commercial fishing may occur within an area defined as coastal wetland and some fishing methods may have a land disturbance aspect that could be captured as non-complying under earthworks regulations in NES-F, unless otherwise specified.</p> <p>It is not in the scope of the policy intent of the NES-F to manage fishing related activities.</p>
Earthworks and Vegetation clearance	Restoration	Restoration withing the CMA is currently managed through RCP's and restoration plans overlaying the NES-F regulations may lead to onerous consenting processes or for existing projects to be captured as non-complying
All	Reclamation	