

In Confidence

Office of the Minister for the Environment

Chair, Cabinet Environment, Energy and Climate Committee

Consultation on the National Environmental Standards for Freshwater to not apply in coastal marine area

Proposal

- 1 This paper seeks agreement to publicly consult on proposed amendments to the wetland provisions within the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F), so that they do not apply to the coastal marine area (CMA).

Relation to government priorities

- 2 The NES-F is a core part of the Government's commitment to improving freshwater health and wetland protection through the Essential Freshwater work programme [CAB-18-MIN-0296]. The Labour Party 2020 manifesto reaffirms this commitment.
- 3 This paper does not affect the manifesto commitment to extend the National Policy Statement for Freshwater Management 2020 (NPS-FM) to cover estuaries.
- 4 The NPS-FM and NES-F comprise national direction made under the Resource Management Act 1991 (RMA). The Government is reforming the resource management system, including replacing the RMA with a Natural and Built Environments Act (NBA). Under the NBA, and along with other national direction, the proposed NES-F amendments will be transitioned into the proposed National Planning Framework and Natural and Build Environments Plans.

Executive Summary

- 5 The NES-F imposes conditions on, or requires consents for, certain activities in and around wetlands (with immediate effect); whereas the NPS-FM is directed at embedding long-term change through regional plans and includes policies to restore wetlands.
- 6 The CMA is covered by the New Zealand Coastal Policy Statement (NZCPS), for which the Minister of Conservation is responsible. The NZCPS is also national direction under the RMA, which regional councils are required to implement through regional coastal plans. The physical extent to which the NES-F applies in the CMA and overlaps with areas covered by the NZCPS and regional coastal plans is, however, currently unclear.
- 7 In November 2021 the High Court held that the NES-F's wetland provisions apply to all natural wetlands in the CMA, but the physical extent to which the NES-F applies in the CMA was not specified.¹ This means that NES-F wetland provisions overlap with regional coastal plan rules but to an uncertain extent.

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

- 8 Regional councils and others have raised concerns about the implications for planning, consenting, and compliance if the NES-F is applied on top of regional coastal plans in the CMA.
- 9 The Minister of Conservation and I therefore agree that it is appropriate to consult on a proposal to amend the NES-F so that its wetland provisions no longer apply to the CMA. I am seeking your agreement accordingly.
- 10 This would be achieved by the NES-F applying only to 'natural *inland* wetlands' rather than 'natural wetlands'.
- 11 Public consultation can begin immediately following Cabinet decisions and would occur over a six-week period and include engagement with regional councils, iwi authorities, and other key stakeholders.
- 12 I plan to align this consultation with a separate set of amendments I am currently progressing to provide additional wetland consent pathways (eg urban development, quarries, landfills). Following consultation, I intend to seek Cabinet approval to gazette both sets of wetland amendments in October 2022.
- 13 While coastal plans can provide adequate protection of wetlands in the CMA, more needs to be done to improve environmental outcomes in these areas. I therefore intend to progress further work to better protect CMA wetlands and estuaries.

Background

- 14 In August 2020, the Essential Freshwater regulatory package was gazetted. It included:
- 14.1 the NES-F, which imposes conditions on, or requires consents for, certain activities in and around wetlands (with immediate effect); and
- 14.2 the NPS-FM, which is directed at embedding long-term change through regional plans and includes policies to restore wetlands.
- 15 Cabinet agreed that the policy intent of the NES-F wetland provisions is to restrict the activities most likely to cause loss and degradation of natural inland and coastal wetlands [CAB-20-MIN-0231].
- 16 The recent High Court *Mangawhai* decision held that the NES-F wetland provisions apply to all natural wetlands in the CMA, and therefore to activities that are otherwise regulated by coastal plan rules developed under section 12 of RMA.²
- 17 The High Court noted it was unlikely that the wetland provisions were intended to encompass the entirety of the CMA (the seaward boundary of which is 12 nautical miles), but the physical extent of what constitutes a 'natural wetland' in the CMA was not part of the decision.
- 18 Regional councils and others have raised concerns about the implications for planning, consenting, and compliance if the NES-F is applied, on top of regional coastal plans, to the whole of the CMA.

² See note 1.

Analysis

The physical extent to which the NES-F applies in the CMA is unclear

- 19 Without further clarification, the NES-F wetland provisions apply to all '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'.³
- 20 This could be interpreted to apply to all shallow coastal margins of New Zealand. I consider this goes beyond the intended scope of the NES-F wetland provisions.

Overlap between the NES-F and regional coastal plans creates uncertainty

- 21 Activities in the CMA are primarily addressed by coastal plan rules which implement the NZCPS. Under coastal plan rules, a consent is required for certain activities such as reclamation/drainage, structures (eg jetties, wharfs, navigational structures) or for foreshore disturbance.
- 22 The NES-F regulates three activities – vegetation clearance, earthworks, and water takes/discharges for select purposes (eg construction of specified infrastructure, maintenance of wetland utility structures) – and has a non-complying/prohibited catch-all rules for other activities (ie constrains/prohibits any activity that drains the wetland).
- 23 Activities managed by coastal plans are also subject to the NES-F when they take place in wetlands or in specified setbacks (10m for vegetation clearance or earthworks, or 100m for takes/discharges of water).
- 24 Where an activity is covered by both the NES-F and a regional coastal plan rule, the more stringent rule or provision prevails.
- 25 Coastal activities such as reclamation, dredging, or mangrove management are unlikely to meet the conditions under existing or proposed consent pathways in the NES-F. They will therefore be captured as non-complying or prohibited activities.
- 26 This will create uncertainty for resource users, override coastal plan rules for activities that may be appropriate in the CMA, and increase the risk of legal challenge.

The RMA requires councils to amend coastal plans to remove any duplication or conflict with the NES-F

- 27 Section 44A (5) of the RMA requires councils to amend existing or proposed coastal plans to remove duplication or conflict with a NES-F provision, as soon as reasonably practicable.
- 28 Unless the NES-F is amended, councils are required to amend their coastal plans. This would involve a substantial amount of analysis for councils, require amendment to coastal plans, and generate costs for councils and resource users.

Amend the NES-F wetland provisions so they no longer apply to the coastal marine area

³ Definition of wetland in the Resource Management Act 1991

- 29 The Minister of Conservation and I agree that it is appropriate to consult on a proposal to amend the NES-F so that its wetland provisions no longer apply to the CMA. I am seeking your agreement accordingly.
- 30 This would be achieved by the NES-F applying only to natural *inland* wetlands, rather than natural wetlands. 'Natural inland wetland' would be defined by reference to its existing definition in clause 3.21(1) of the NPS-FM, ie 'means a natural wetland that is not in the coastal marine area'.
- 31 I consider this approach will better achieve the intent of the Essential Freshwater package, and prevent ambiguity.
- 32 Public consultation can begin immediately following Cabinet decisions, and would occur over a six-week period and include engagement with iwi authorities, regional councils, and other key stakeholders.
- 33 The proposed changes to the NES-F are set out in the discussion document *Managing our wetlands in the coastal marine area* in Appendix 1.

This consultation will align with other wetland amendments

- 34 I plan to align this consultation with a separate set of amendments I am currently progressing to provide additional wetland consent pathways (eg urban development, quarries, landfills). These amendments were the subject of the *Managing our Wetlands* consultation undertaken in October 2021, followed by an exposure draft process that closed on 10 July 2022.
- 35 I am seeking approval to issue drafting instructions to PCO for the amendments relating to the CMA following the close of the further consultation, and to seek Cabinet approval to gazette both sets of wetland amendments in October 2022.

Regional coastal plans provide protection for wetlands in the CMA, but more can be done

- 36 I am concerned by the loss of wetland ecosystems within the CMA, such as saltmarsh and seagrass – they are important habitats for many freshwater and marine species.
- 37 However, the risks to wetlands in the CMA are different from inland wetlands. The NES-F is well structured to address risks to inland wetlands but does not effectively address coastal risks specific to CMA wetlands (eg sedimentation, marine activities, climate change). It is therefore not the most suitable tool to achieve the ecosystem outcomes the Government seeks for wetlands in the CMA.
- 38 While regional coastal plans provide protection for wetlands in the CMA, more can be done to improve environmental outcomes in these areas. I therefore intend to progress work to better protect wetlands in the CMA through estuaries policy development. This work will also clarify the relationship between the NPS-FM and the NZCPS, and provide for better integration across freshwater and coastal management.

Financial Implications

- 39 There are no direct financial implications associated with this paper.

Legislative Implications

- 40 If a decision is taken to amend the NES-F following consultation, this will be done with amendment regulations made by Order in Council.

Impact Analysis

Regulatory Impact Statement

- 41 The Treasury's Regulatory Impact Analysis team has determined that the proposal to release the discussion document on amending the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 so that the wetland provisions no longer apply to the Coastal Marine Area is exempt from the requirement to provide a Regulatory Impact Statement (RIS). The exemption is based on advice that the discussion document includes the key features of an interim RIS.
- 42 The Ministry for the Environment's Quality Assessment panel has reviewed the discussion document and confirmed that it meets these requirements. A full RIS will be completed at a later date to inform Cabinet's final decisions on this proposal once it returns from consultation.

Climate Implications of Policy Assessment

- 43 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 44 There are no population implications associated with this paper.

Human Rights

- 45 Proposals in the paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Te Tiriti o Waitangi Implications

- 46 The NES-F currently overlaps with regional coastal plan rules that were developed with input from Treaty partners. Further engagement with Treaty partners will be undertaken in respect of future policy work on estuaries and wetlands in the CMA.

Consultation

- 47 In September 2021, I consulted on amending the NES-F wetland provisions. The extent to which the NES-F should apply in the CMA was not in scope of this consultation, but several regional councils raised this as an issue. These submissions and further correspondence on this matter have informed this proposal.
- 48 The Minister of Conservation and Department of Conservation were consulted in preparing this Cabinet paper given the Minister of Conservation's statutory role relating to the CMA under the RMA. Their views have been taken into account. The Department of the Prime Minister and Cabinet was informed.

Communications

- 49 I will make a public announcement following Cabinet approval and release the discussion document for consultation.

Proactive Release

- 50 I will release this paper following Cabinet decisions, including any redactions as appropriate under the Official Information Act 1982.

Recommendations

The Minister for the Environment recommends that the Committee:

- 1 **note** that the National Policy Statement for Freshwater Management 2020 (NPS-FM) and the National Environmental Standards for Freshwater 2020 (NES-F) comprise national direction made under the Resource Management Act 1991 (RMA)
- 2 **note** that the Government is reforming the resource management system, including replacing the RMA with a Natural and Built Environments Act (NBA)
- 3 **note** that under the NBA, and along with other national direction, the NPS-FM and NES-F will be transitioned into the proposed National Planning Framework and Natural and Built Environments Plans
- 4 **note** that the coastal marine area (CMA) is covered by the New Zealand Coastal Policy Statement (NZCPS), for which the Minister of Conservation is responsible
- 5 **note** that the NZCPS is also national direction under the RMA, which regional councils are required to implement in their regional plans
- 6 **note** that the physical extent to which the NES-F applies in the CMA is currently unclear
- 7 **note** that in August 2020, the Essential Freshwater regulatory package was gazetted, and included:
 - 7.1 the NES-F, which imposes conditions on, or requires consents for, certain activities in and around wetlands; and
 - 7.2 the NPS-FM, which is directed at embedding long-term change through regional plans and includes policies to restore wetlands
- 8 **note** that Cabinet agreed that the policy intent of the NES-F wetland provisions is to restrict activities most likely to cause loss and degradation of natural inland and coastal wetlands [CAB-20-MIN-0231]
- 9 **note** that the recent High Court *Mangawhai* decision⁴ held that the NES-F wetland provisions apply to all natural wetlands in the coastal marine area (CMA), but noted it was unlikely that the provisions were intended to encompass the entirety of the CMA
- 10 **note** that regional councils and others have raised concerns about the implications for planning, consenting, and compliance if the NES-F is applied on top of regional coastal plans in the CMA

⁴ *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113

The physical extent to which the NES-F applies in the CMA is unclear

- 11 **note** that the NES-F wetland provisions could be interpreted to apply to all shallow coastal margins of New Zealand, and that this goes beyond the intended scope of the NES-F wetland provisions

Overlap between the NES-F and regional coastal plans creates uncertainty

- 12 **note** that activities managed by regional coastal plans are also subject to the NES-F when they take place in wetlands or in specified setbacks (10m for vegetation clearance or earthworks, or 100m for takes/discharges of water)
- 13 **note** that coastal activities such as reclamation, dredging, or mangrove management are unlikely to meet the conditions under existing or proposed consent pathways in the NES-F and will therefore be captured as prohibited or non-complying

The RMA requires councils to amend coastal plans to remove any duplication or conflict with the NES-F

- 14 **note** that unless the NES-F is amended, councils will be required to amend their coastal plans to accommodate its wetland provisions

Amend the NES-F wetland provisions so they no longer apply to the coastal marine area

- 15 **note** that the Minister of the Environment and the Minister of Conservation agree that it is appropriate to consult on a proposal to amend the NES-F so that its wetland provisions no longer apply to the CMA
- 16 **note** that this would be achieved by the NES-F applying only to natural *inland* wetlands rather than natural wetlands
- 17 **note** that 'natural inland wetland' would be defined by reference to its existing definition in clause 3.21(1) of the NPS-FM, ie 'means a natural wetland that is not in the coastal marine area'
- 18 **note** that this approach will better achieve the intent of the Essential Freshwater package (to restrict activities most likely to lead to the degradation or loss of coastal wetlands), and prevent ambiguity
- 19 **agree** to publicly consult on the NES-F not applying in the CMA
- 20 **note** that public consultation can begin immediately following Cabinet decisions and would occur over a six-week period
- 21 **note** that the proposed changes to the NES-F are set out in the discussion document *Managing our wetlands in the coastal marine area* in Appendix 1
- 22 **approve** release of the discussion document by the Ministry for the Environment to inform public consultation on changes to the NES-F
- 23 **authorise** the Minister for Environment to make appropriate textual, editorial, design, and technical changes to the discussion document before public consultation commences

This consultation will align with other wetland amendments

- 24 **note** that the Minister for the Environment plans to align the consultation with a separate set of amendments the Minister is currently progressing (to provide additional consent pathways)
- 25 **authorise** the Minister for the Environment to instruct PCO to draft the proposed amendments to the NES-F following the close of public consultation
- 26 **note** that the Minister for the Environment intends to seek Cabinet approval to gazette both sets of wetland amendments in October 2022

Regional coastal plans provide protection for wetlands in the CMA, but more can be done

- 27 **note** that while regional coastal plans provide protection for wetlands in the CMA, more can be done to improve environmental outcomes in these areas
- 28 **note** that the Minister for the Environment therefore intends to progress work to better protect wetlands in the CMA through estuaries policy development
- 29 **note** that this work will also clarify the relationship between the NPS-FM and the NZCPS, and provide for better integration across freshwater and coastal management.

Authorised for lodgement

Hon David Parker

Minister for the Environment

Appendix 1: Draft Discussion Document: *Managing our wetlands in the coastal marine area*

Proactively released