

Regulatory Impact Statement: Changes to wetland regulations (wetlands in the Coastal Marine Area)

Coversheet

Purpose of Document

Decision sought:	Cabinet approval for amendments to the wetland provisions in the National Policy Statement for Freshwater Management 2020 and Resource Management (National Environmental Standards for Freshwater) Regulations 2020, in respect of wetlands in the Coastal Marine Area (CMA).
Advising agencies:	Ministry for the Environment
Proposing Ministers:	Hon David Parker, Minister for the Environment
Date finalised:	17 November 2022

Problem Definition

Three issues of concern have been identified relating to the overlap between (a) provisions in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) that relate to wetlands in the Coastal Marine Area (CMA), and

(b) the New Zealand Coastal Policy Statement (NZCPS) and regional coastal plan rules:

- [1] the physical extent to which current NES-F wetland provisions should apply within the CMA is unclear, as the 'natural wetland' definition in the NES-F can be interpreted as capturing a far greater area of the CMA than the initial policy intent
- [2] applying the NES-F wetland provisions in the CMA could prevent or constrain activities unlikely to cause material loss or degradation of natural wetlands, including activities currently permitted under coastal plan rules
- [3] there are ongoing challenges to wetlands in the CMA, and an appropriate regulatory system is needed to address these challenges.

Executive Summary

This Regulatory Impact Statement is intended to assist Ministers in making decisions about the regulation of natural wetlands in the CMA.

The NPS-FM and the NES-F were introduced in 2020 as part of the Essential Freshwater regulatory package. The overall policy direction set out in the NPS-FM is that natural wetlands are important and should be protected; it aims to embed long-term change through regional plans, including policies to protect and restore wetlands. The NES-F sets out consent pathways for certain activities in and around natural wetlands.

After the NPS-FM and the NES-F were introduced, councils had effectively been applying the natural wetlands provisions only to natural inland wetlands, relying on coastal plan

rules to regulate natural wetlands in the CMA. A decision by the High Court in 2021 confirmed that the NES-F provisions apply in the CMA; after this decision, councils advised the Ministry for the Environment that they considered applying the NES-F provisions to the CMA would be problematic if not impractical.

Consenting requirements under the NES-F can significantly exceed what would be required for the same activities under coastal plans, resulting in much higher costs to councils and entities operating in the CMA. Some of the NES-F requirements are considered disproportionate to environmental impacts of the activities in question.

Moreover, there are specific, ongoing regulatory challenges to wetlands in the CMA (eg climate change impacts), which raises the question: what is the best regulatory instrument(s) to address these challenges in the future?

In response to these issues, the Ministry engaged in consultation with affected parties during 2022.

Two options were identified:

Option 1: Amend the NES-F to clarify where and how it applies to the CMA. This would require a clear definition of a 'natural coastal wetland', in order to clarify the physical extent to which the definition (and therefore NES-F wetland provisions and consent pathways) apply in the CMA with some modification to the rules. **(Not recommended)**

Option 2: Amend the NES-F so its wetland provisions do not apply to the CMA, through a simple amendment to replace references in the NES-F to 'natural wetlands' with references to 'natural inland wetlands'. Protection of natural wetlands in the CMA would rely on the NZCPS and coastal plan rules. **(Recommended)**

We assessed the options against the following criteria:

- consistency with the obligations of Te Mana o te Wai and the NPS-FM
- stakeholders can readily identify which provisions in NES-F and/or coastal plans apply to any given activity in natural wetlands in the CMA
- activities are regulated proportionately to potential environmental impacts
- no unnecessary or unfair costs to stakeholders from uncertain, onerous and/or inappropriate legal requirements in the NES-F
- 'future proofing' - ensuring regulatory arrangements are sufficiently flexible to address future challenges to wetlands in the CMA.

We concluded that option 2 is the preferred option, as:

- it would be almost as effective as option 1 in terms of consistency with the obligations of Te Mana o te Wai and the NPS-FM
- it is comparable in terms of proportionate regulation
- it provides more clarity as to which provisions apply to any given activity, and greater 'future proofing'.

Councils, businesses, and industry bodies almost universally supported option 2, indicating that they considered this to be a straightforward and effective way to resolve issues with the status quo.

Support for option 1 was received from environmental NGOs, iwi/Māori organisations and others, on the basis that removing coverage of the NES-F from the CMA and relying on coastal plans would result in insufficient protection for these natural wetlands.

Overall, we recommend option 2 as we conclude that it would best address the problems with the status quo. It would better enable some activities to be undertaken in natural wetland areas in the CMA, while continuing to deliver no less protection for these areas than prior to the introduction of the NES-F, and with lower costs than Option 1. It will be complemented by policy development for enhancing protection of estuaries that will include some coastal wetlands.

An amendment to the NES-F will be required to implement this recommendation to exclude natural wetlands in the CMA (by restricting coverage to inland natural wetlands).

Limitations and Constraints on Analysis

There is anecdotal evidence of loss of wetlands, and this is accepted by the Ministry and stakeholders as an ongoing problem. However there are no comprehensive estimates of the extent of loss of coastal wetlands, the causes of the losses and the effectiveness (or otherwise) of existing regulation.

We analysed the two options upon which we consulted as alternatives to the status quo. We would have considered other options had they been raised during the consultation, but no alternatives were offered.

During consultation, some information about the effects of the current regulation was provided. This has been incorporated in the document where relevant.

However, there are no reliable estimates of the magnitude of the issues identified in this analysis and the total resulting costs among councils, regulated parties and the community. Nor is it feasible to estimate the number or value of activities that do not proceed as a result of the issues identified.

A critical assumption throughout this analysis is that if regulation of natural wetlands in the CMA is primarily through the NZCPS and coastal plans (as was the case prior to the introduction of the NES-F in 2020), this will provide a satisfactory level of protection to those wetlands.

This assumption is subject to material uncertainty. A significant minority of submissions on the proposed changes considered that relying purely on these instruments poses an unacceptable risk of further wetland losses.

We acknowledge this argument, but consider that on balance, the risks are manageable, and are acceptable in light the need to address the problems identified.

We consider that Option 2 would result in a robust level of protection, no less than prior to the introduction of the NES-F; and note that councils have significant experience drafting and applying provisions in coastal plans (since 2010). This view is reinforced by provisions in the NPS-FM, for councils to develop regional plans that give effect to Te Mana o te Wai, actively involve tangata whenua, and to take an integrated catchment approach; and by section 12 of the RMA which requires resource consents for activities not specifically permitted in coastal plans.

We propose to monitor the impacts of these changes through ongoing engagement with councils and other stakeholders. This is intended to assess whether the changes are working as intended, or whether they are resulting in unacceptable impacts on natural wetlands.

On balance we consider the evidence is sufficiently robust for Ministers to be confident of the conclusions of this analysis.

Responsible Manager(s) (completed by relevant manager)

Nik Andic
Manager, Land and Water Systems
Ministry for the Environment



17 November 2022

Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry for the Environment

Panel Assessment & Comment:

The Regulatory Impact Analysis Review Panel (the Panel) at the Ministry for the Environment has reviewed the Regulatory Impact Statement on changes to wetland regulations (wetlands in the CMA).

The panel considers this RIS partially meets the quality assurance criteria. The RIS clearly sets out the problem definition, proposed options, assessment criteria, and the analysis is informed by consultation with key stakeholders and the public.

The RIS does not provide adequate evidence to support the assumption that the environmental risks of the change are low. However, the panel notes the Ministry have consulted with experts in the sector, and their advice has informed the analysis.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. While the loss of wetlands in the CMA is accepted by the Ministry and stakeholders as an ongoing problem, there are no comprehensive estimates of the extent of loss of these wetlands, the causes of the losses etc.¹
2. Te Uru Kahika Regional and Unitary Councils Aotearoa noted in its submission² that:
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 (eg roads and ports)."

Relevant prior government decisions, legislation, and consultation

3. The National Policy Statement for Freshwater Management 2020 (NPS-FM) and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) are the primary instruments through which wetlands are managed and protected.
4. The NPS-FM and NES-F were developed as part of the *Essential Freshwater* package in 2020. Further background detail and analysis relating to the development of natural wetlands policy and regulations can be found on the Ministry for the Environment (the Ministry) website. In particular, the regulatory impact assessment³ and section 32 evaluation report⁴ prepared as part of that wider programme explained the intent of natural wetland protection, and analysis of options at that time.
5. The package is now being implemented. The Ministry has been engaging with stakeholders to identify issues as they arise, and to ensure councils (as regulators) and others have the support needed to effectively implement the package.
6. The over-arching policy framework for the Essential Freshwater package is *Te Mana o te Wai*. This refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and wellbeing of the environment. *Te Mana o te Wai* is about preserving the balance between water, the wider environment and the community.
7. There is a hierarchy of obligations in *Te Mana o te Wai* that prioritises:
 - first, the health and wellbeing of waterbodies and freshwater ecosystems
 - second, the health needs of people (such as drinking water)
 - third, the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future.

¹ The Ministry's most recent report on the marine environment provides detailed information on changes in the CMA, including many longstanding problems; but does not separately identify issues relating to wetlands in the CMA..

See **Ministry for the Environment & Stats NZ (2022) *New Zealand's Environmental Reporting Series: Our marine environment 2022*** October 2022 [Our-marine-environment-2022.pdf](#).

² Not yet published

³ [Action for healthy waterways part 2: Detailed analysis | Ministry for the Environment](#)

⁴ [Action for healthy waterways: Section 32 evaluation report | Ministry for the Environment](#)

8. The NPS-FM uses a subset of the definition of wetlands in the Resource Management Act 1991 (RMA)⁵ to define 'natural wetlands':

"Natural wetland means a wetland (as defined in the Act) that is not:

- (a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or*
- (b) a geothermal wetland; or*
- (c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling."*

9. Note that it is proposed to amend this definition to clarify its interpretation, as part of the policy work relating to inland natural wetlands (see paragraph 22 below); and, if the option recommended in this analysis is accepted, to exclude wetlands in the CMA from the definition so that it would cover only inland natural wetlands.
10. The NES-F regulates vegetation clearance, earthworks and water takes/discharges in natural wetlands. It sets out the status of certain activities within natural wetlands and associated buffers as permitted, discretionary, or restricted discretionary activities. This status determines whether a resource consent is required for the activities and if so, what processes that must be followed ('consent pathways'). For example, construction of specified infrastructure is specified in the NES-F as 'discretionary' and must follow RMA consent processes (pathways) for discretionary activities.
11. Activities undertaken for purposes not specifically provided for in the NES-F are prohibited or non-complying. In the latter case it may be possible to obtain a consent to undertake the planned activity, but the processes can be demanding, time-consuming and expensive.
12. Activities in the Coastal Marine Area (CMA)⁶, including those in and around wetlands, are regulated by the New Zealand Coastal Policy Statement (NZCPS) 2010 and addressed under regional coastal plans.
13. The NZCPS is a national policy statement under the RMA, the purpose of which is to state policies in order to achieve the purpose of the RMA in relation to the coastal environment of New Zealand. It is intended to guide local authorities in their day-to-day management of this environment.
14. All regional councils and unitary authorities are required to prepare a regional coastal plan, include objectives, policies and rules that govern the activities these councils will allow, control or prohibit in the coastal environment. Under section 30 of the RMA they have the principal role in managing and enforcing the provisions of regional coastal plans.
15. Activities in the CMA such as reclamation, drainage, building, maintenance of structures and foreshore/seabed disturbance, are addressed via coastal plan rules, which specify whether an activity is permitted or whether consent is required.

⁵ The definition of 'wetland' in section 2 of the RMA is:

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.

⁶ The CMA comprises the foreshore, seabed and coastal water, and the air space above the water. The seaward boundary of the CMA is 12 nautical miles (the boundary of the territorial sea) and the landward boundary is the line of mean high water springs, except where that line crosses a river (s2, RMA).

Section 12 of the RMA requires resource consents for activities not specifically permitted in coastal plans.

16. To ensure consistency and integration of the management of the coastal environment throughout New Zealand, regional coastal plans must give effect to the NZCPS.
17. Where both the NES-F and a coastal plan regulate an activity, the more stringent regulation prevails. In the case of duplication or conflict between coastal plans and the NES-F, section 44(A)(5) of the RMA requires that councils amend existing or proposed coastal plans to remove the duplication or conflict as soon as is reasonably practicable.
18. The original policy intent of the NES-F in respect of wetlands was to restrict activities likely to cause the loss or degradation of all natural wetlands, including those in the CMA, with a particular concern about natural wetlands found around the margins of estuaries and intertidal areas. In November 2021, the application of the NES-F to the CMA was confirmed by the High Court.⁷ Prior to that decision, many councils and stakeholders interpreted the NES-F as applying only to natural inland wetlands and continued to rely on coastal plan rules to regulate natural wetlands in the CMA. They have subsequently raised concerns about the implications of applying the NES-F wetland provisions to wetlands in the CMA, especially through conflicts, inconsistencies and uncertainties about the interaction with coastal plan rules.
19. The issues raised included lack of clarity about the physical extent to which the NES-F wetland provisions should apply within the CMA; and the possibility that applying the NES-F wetland provisions in the CMA could preclude or constrain activities that are unlikely to cause material loss or degradation of natural wetland. These issues are discussed in the next section.
20. A discussion document *Managing our wetlands in the coastal marine area: A discussion document on the application of the National Environmental Standards for Freshwater to the coastal marine area*⁸ was published by the Ministry for the Environment (MfE) on 10 August 2022. Consultation on the discussion document closed on 22 September 2022.
21. The discussion document included two options to amend the NES-F to address the problem:
 - 1) to clarify where and how it applies to the CMA
 - 2) to exclude its wetland provisions from the CMA
(this was identified as the preferred option in the discussion document).

Other government work programmes with interdependencies and linkages

22. An earlier consultation covered issues relating to issues in inland natural wetlands. Although the policy issues for the two types of wetlands are independent, Ministerial decisions on natural inland wetlands will be sought at the same time as part of a package relating to wetlands.
23. Changes are proposed to the Resource Management (Stock Exclusion) Regulations 2020 (Stock Exclusion Regulations) to amend the map of low slope land which identifies areas in which beef cattle and deer must be excluded from access to water

⁷ *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] (NZHC 3113)

⁸ [ME1669-Discussion-Document-Managing-our-wetlands-in-the-Crn MA-9-v2.8-FINAL.pdf](https://www.mfe.govt.nz/publications/discussion-documents/managing-our-wetlands-in-the-crn-MA-9-v2.8-FINAL.pdf)
([environment.govt.nz](https://www.environment.govt.nz))

bodies (including wetlands), from 1 July 2025. These changes are also included in the policy package relating to wetlands.

24. The Government, as part of New Zealand's COVID-19 economic response, has committed \$12 billion through the New Zealand infrastructure upgrade programme. This includes further investment in roads, rail, and public transport, walking and cycling infrastructure across New Zealand, some of which may be located in or otherwise affect wetlands in the CMA.
25. To support this the COVID-19 Recovery (Fast-track Consenting) Act 2020 was enacted, enabling accelerated consenting for qualifying projects through referral to an expert consenting panel or lodgement with the Environmental Protection Authority (EPA).
26. The NPS-FM and NES-F are national direction made under the RMA. The Government's reform of the resource management system includes replacing the RMA with a Natural and Built Environments Act (NBA), under which all existing regulations (including the proposed amendments set out here) will be transitioned into the proposed National Planning Framework and NBA Plans.

How is the status quo expected to develop if no action is taken?

27. If the NPS-FM and NES-F continue to operate in their current form, wetlands in the CMA will continue to be comprehensively protected. However, this protection will be applied inefficiently, with continuing uncertainty about the coverage of the NES-F and variations in its application among local authorities.
28. A major concern of local authorities is that activities in the CMA that can currently be undertaken without adverse environmental effects could or would be precluded by the stricter provisions of the NES-F. This includes activities permitted under coastal plans as a result of engagement with stakeholders, including existing Memoranda of Understanding and other formal agreements between tangata whenua and councils.

What is the policy problem or opportunity?

29. These problems are a result of regulatory failure – unintended consequences resulting from the design of the existing regulation; specifically, outcomes misaligned with the original policy intent. There are three related areas of concern with the current application of the NES-F to wetlands in the CMA.

There is considerable uncertainty about the physical extent to which wetlands within the CMA are covered by the NES-F wetland provisions

30. The original policy intent was that the NES-F apply to all natural wetlands, both inland and coastal. For this reason, the NES-F definition of natural wetland does not distinguish between different types.
31. However, many councils and stakeholders initially interpreted the NES-F as applying only to natural inland wetlands (ie natural wetlands not in the CMA). They continued to rely on coastal plans to regulate activities that affect wetlands within the CMA.
32. Since the High Court decision, stakeholders and councils have raised concerns about the implications of applying the NES-F wetland provisions on top of the NZCPS and coastal plan rules. They have indicated that establishing which parts of the CMA would be covered by NES-F provisions appears highly difficult if not impractical.
33. Due to the broad definition of natural wetland, the regulations can be interpreted as applying to a much larger proportion of the CMA than originally intended. Under the

status quo, the NES-F could be interpreted to over 15,000 kilometres of the New Zealand coastline, out to a depth of several metres. In the High Court decision, it was noted it was unlikely that the NES-F wetland provisions were intended to apply to the entire CMA (ie from mean high water springs to the outer limit of the territorial sea). But the Court did not provide a specific definition of the physical extent of a natural wetland within the CMA.

34. Ongoing uncertainty and divergent interpretation will, at minimum, generate significant direct costs to councils and other stakeholders. These costs arise from technical and legal advice on interpretation, and regulatory processes (plans, consenting, Courts) in which they are considered.
35. It is possible that there will be further court cases – which would be costly very expensive for the parties involved - that will at best clarify interpretation, and in some cases may overturn well-accepted interpretations of and practices under coastal plan rules (especially those which relate to specific locations, developed through consultation processes mandated by the NZCPS).
36. Indirect effects include diverting resources that could be used to improve management of wetlands, and disproportionate costs in regulating activities with low environmental impacts.

Some NES-F wetland provisions in the CMA may lead to regulatory requirements that are excessive relative to potential environmental impacts

37. Some activities in wetlands in the CMA are likely to fall outside existing or proposed pathways in the NES-F for obtaining resource consents; and as a result may be prohibited or non-complying (requiring extended consenting time and costs).
38. Councils and stakeholders have pointed to examples of activities where this could be the case; in particular:
 - mangrove clearance
 - construction of structures
 - dredging associated with harbour maintenance
 - vessel use
 - aquaculture
39. Other affected activities are likely to be identified as the NES-F continues to be implemented.
40. In addition, the influence of tides means that the take, use and discharge of water (regulated under the NES-F) has less impact on wetlands in the CMA than on inland wetlands.
41. Many of these activities are presently managed through existing coastal plan rules with a relatively light regulatory touch, which is considered appropriate in light of their environmental impacts. Some have minor effects and others may actually contribute to better management of wetlands.
42. Applying the NES-F wetlands provisions, resulting in prohibition of some activities and extended consenting processes for others, may be disproportionate to potential adverse impacts. In the latter instance, even if activities could be consented, they may not proceed because applicants consider consenting requirements are too uncertain and/or expensive.

43. An indication of potential costs was provided by Te Uru Kahika Regional and Unitary Councils Aotearoa in its submission:

"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 \$1,000 to \$7,000 (depending on the deposit required for infringement of a regional rule at the relevant council)."

44. An example of the impacts of applying the NES-F definition arose when, in September 2021, the Far North District Council and Far North Holdings Limited applied to construct a public boat ramp facility at Rangitane, Kerikeri, through the COVID-19 Recovery (Fast-track Consenting) Act 2020. However, following the High Court decision, proposed reclamation earthworks within the project were reassessed; a panel determined that those aspects of the proposal would now be prohibited activities under the NES-F, and thus it could not proceed with the consent application. Therefore, the public boat ramp facility, which is likely to have had minor effects on the environment, cannot be consented and built under current NES-F settings.

45. Te Uru Kahika Regional and Unitary Councils Aotearoa also provided examples of the impact of the NES-F over-regulating activities, such as:

- the breadth of coverage of the NES-F is illustrated by the observation that *"... 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."*
- extraction of sand from the Kaipara Harbour for use in infrastructure and residential development; as the entire harbour is a wetland, and subject to the NES-F under current provisions, there is considerable uncertainty about the status (discretionary, restricted discretionary or non-complying) under which current consents for extracting sand would be renewed
- works associated with seawalls (with *"potentially significant implications, especially in times of climate change and an increasing awareness of the need for coastal protection structures"*)
- extensions to jetties on islands – use as 'recreation' determines whether an extension is classified as restricted discretionary or non-complying
- *"activities adjacent to the CMA [including] earthworks, erosion and sediment control at earthworks sites, on-site wastewater and stormwater discharges within 100m of natural wetlands"*.

It is not clear what the best regulatory mechanism is for meeting future challenges

46. The social, economic and environmental context in which regulation of wetlands in the CMA operates is not static. Like any other regulatory system, it is almost inevitable that changes to regulations will be needed in the future in response to known and unforeseen challenges.
47. There are specific, ongoing challenges to wetlands in the CMA, such as sedimentation, harmful marine activities, emerging contaminants, and climate change impacts, such as new pollutants, plant species and diseases etc. More could be done to identify and address these issues.

48. This raises the question: what is the best regulatory instrument or instruments to address future regulatory challenges to wetlands in the CMA? How flexible is each option, especially given one option has one set of instruments (NZCPS , coastal plans) and the other has two (these plus the NES-F)?

Who is affected by these problems, how and how much?

49. Key stakeholders are:
- councils, in their roles as regulators and providers of infrastructure and amenities in the CMA
 - businesses operating in the CMA, and industry bodies representing them
 - environmental consultancies, lawyers and similar businesses providing advisory services
 - environmental non-government organisations (ENGOS)
 - iwi, in both the exercise of tikanga and mātauranga Māori, and economic interests in land and fisheries.
50. There are no reliable estimates of the magnitude of the problems identified above and how they will manifest over time. We do not have reliable information about the total costs generated among councils and regulated parties by uncertainty about the definition. Nor is it feasible to estimate the number or value of activities in the CMA that do not proceed because of prohibitions or uncertainty about/ excess costs of consenting. And assessing impacts of any future Court decisions is totally speculative.
51. The views of stakeholders are discussed in *What feedback has been received from stakeholders?*

What objectives are sought in relation to the policy problem?

52. To address the problems identified above, our objectives are to:
- ensure the natural wetland provisions in the NPS-FM and NES-F support the effective implementation of the Essential Freshwater programme and the obligations of Te mana o te Wai
 - provide clarity on the extent to which the NES-F applies (and does not apply) to natural wetlands in the CMA, and the interaction between the NES-F and coastal plan rules
 - ensure regulation (consenting) of activities in the CMA is proportionate to potential environmental impacts
 - avoid unnecessary or unfair costs to stakeholders from uncertain and/or inappropriate legal requirements in the NES-F
 - ensure regulatory arrangements are appropriate to address future challenges to wetlands in the CMA.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

53. The options will be assessed against the following criteria; that they should

- *consistency with the obligations of Te Mana o te Wai and the NPS-FM*

The intention of this criterion is primarily to test how effective each option is in giving effect to the 'protective' objectives of these policies; and if (and only if) this is the case, whether the subsidiary objectives of Te Mana o te Wai (meeting health needs and providing for social, economic and cultural well-being) would be met.

- *stakeholders can readily identify which provisions (in NES-F and/or coastal plans) apply to any given activity in natural wetlands in the CMA*

This criterion is intended to test how effective each option is in providing clarity to stakeholders about the consent status of any given activity, and avoiding the ambiguities (and consequential costs) arising from the current definition of wetlands in the CMA.

- *activities in natural wetlands in the CMA are regulated proportionately to potential environmental impacts*

This criterion is intended to test how effective each option is in dealing with consenting requirements that appear unduly onerous under the status quo, and the extent to which it would enable activities to proceed (subject to normal consent requirements to manage the impacts).

- *no unnecessary or unfair costs to stakeholders from uncertain, onerous and/or inappropriate legal requirements in the NES-F*

This criterion is intended to identify the costs each option would impose on affected parties – including highlighting who would bear these costs and whether they fall excessively on any party – in order to compare these costs with the positive impacts expected from the option.

- *'future proofing' - ensuring regulatory arrangements are sufficiently flexible to address future challenges to wetlands in the CMA.*

This criterion is intended to test the flexibility of the regulatory structure(s) under each option to address future events that necessitate a regulatory response.

What scope will options be considered within?

54. We have limited the options to the two upon which we consulted. We would consider alternatives to the status quo had they been raised during the consultation, but no other options were offered (although a number of submitters did suggest refinements to option 1).

55. The only non-regulatory option we have identified is providing councils and other stakeholders with guidelines about coverage of the NES-F and other technical support. This would partially address one problem – ambiguity about the coverage of the NES-F – but there would be some delay while guidelines are developed, as this would need to be done jointly with councils to enable the widest possible access to expertise and ensure common understanding of any guidelines.

56. Afterwards there would still be some uncertainty as any guidelines could be challenged and overturned in Court. In a recent Environment Court decision, the legal weight of guidance on inland wetlands issued in September 2021 was considered. Smith J stated that the guidance had no regulatory force, and therefore could not be relied on to instruct the Court.⁹
57. Guidelines would not address the problem of excessive regulatory requirements resulting from NES-F provisions that are disproportionate to environmental impacts (which under s44(A)(5) must prevail over less stringent coastal plan rules).
58. For these reasons we have not developed non-regulatory options further.

What options are being considered?

59. The following alternatives to the status quo, as presented in the discussion document, are set out below.

Option 1 – Amend the NES-F to clarify where and how it applies to the CMA

60. This option is to amend the NES-F to:
- clearly define what is a 'natural coastal wetland', in order to clarify the physical extent to which the definition (and therefore the NES-F wetland provisions) applies in the CMA
 - clarify which NES-F wetland provisions apply, or do not apply, to 'natural coastal wetlands' within the CMA, in terms of consent status and pathways.
61. See *Annex 1: Definition of a 'natural coastal wetland' under Option 1* for a comprehensive description of this option.
62. This option would not alter the underlying position that the NES-F wetland provisions apply to the CMA. It would retain the NES-F wetland provisions in the CMA, but would clarify where and how they apply.
63. The proposed amendments would alleviate some of the conflicts and duplication between rules in coastal plans and the NES-F; when made, councils would need to amend existing or proposed coastal plans to align these with the new NES-F provisions.

Option 2 - Amend the NES-F so its wetland provisions do not apply to the CMA

64. This option would mean that the NES-F wetland provisions do not apply to wetlands in the CMA. It could be achieved through a simple amendment to the NES-F to replace references to 'natural wetlands' with references to 'natural inland wetlands'.
65. Wetlands in the CMA would continue to be managed through the NZCPS, existing coastal plans, and s12 of the RMA.
66. The NPS-FM would still apply with respect to natural wetlands in the CMA, with its requirements for councils to develop plans that give effect to Te Mana o te Wai, and to take an integrated catchment approach.

⁹ *Federated Farmers of New Zealand, Minister of Conservation, Royal Forest and Bird Society of New Zealand v Northland Regional Council* [2022] NZEnvC 016 at [20]-[25].

How do the options compare to the status quo/counterfactual?

	Status quo	Option One – Clarify provisions in the NES-F	Option Two – Exclude CMA wetlands from the NES-F
The obligations of Te Mana o te Wai and the NPS-FM are met	0	+	0
		The health and wellbeing of wetlands in the CMA will be maintained, and the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future will be enhanced	The health and wellbeing of wetlands in the CMA will be maintained at no less than the level prior to the NPS-FM/NES-F, and the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future will be enhanced
Councils and other stakeholders can readily identify which provisions apply to any given activity	0	+	++
		Parties should be able to readily identify which NES-F and coastal plan provisions apply to any given activity (although the possibility of ambiguity at the boundary of the two instruments remains, and unforeseen 'boundary issues' could occur at any time) Councils will need to amend coastal plans for alignment with revised NES-F provisions	Relevant provisions will be entirely within the NZCPS and coastal plans
Activities are regulated proportionately to potential environmental impacts	0	+	+
		Revised NES-F provisions should largely avoid outright prohibitions and ensure consenting pathways for other activities are as rigorous as necessary in light of potential environmental impacts (but no more so); subject to some uncertainty about activities that result in unforeseen 'boundary issues'	Regulation is entirely as required by coastal plans; 'proportionality' should largely apply, to the extent that activities are appropriately classified in those plans as permitted, discretionary etc.
No unnecessary or unfair costs to stakeholders from uncertain, onerous and/or inappropriate requirements in the NES-F	0	+	++
		Should substantially reduce costs to councils and applicants from arguments about coverage vis-a-vis NES-F definitions, although will not entirely eliminate them (as there are likely to be residual issues about definition of coverage)	Will eliminate these costs
'Future proofing' regulatory arrangements	0	-	++
		Processes for future regulatory change could be cumbersome because of having to work through (and align) two regulatory systems. Regulatory change may be reactive as the occurrence of unforeseen 'boundary issues' could trigger requirements for adjusting settings at any time.	Processes for future regulatory change should be moderately straightforward through changes to the NZCRS and coastal plans A policy process to consider appropriate regulation of estuaries, including some CMA wetlands, is scheduled to begin in the near future.
OVERALL ASSESSMENT	0	+	++

Key for assessments	++ much better than doing nothing/the status quo	+ better than doing nothing/the status quo	0 about the same as doing nothing/the status quo	- worse than doing nothing/the status quo	-- much worse than doing nothing/the status quo
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What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

- 67. We conclude from the above that Option 2 – excluding coverage of wetlands in the CMA from the NES-F – is the preferred option.**
68. Option 1 is expected to better meet the obligations of Te Mana o te Wai than the status quo:
- as the NES-F will still apply, any natural wetland loss will be discouraged, and where it occurs, will be mitigated and rectified through the gateway tests in the NPS-FM and application of the effects management hierarchy; therefore this option is not expected to result in any material degradation of wetlands in the CMA
 - however, some activities beneficial to the community that do not happen under the status quo will be enabled.
69. Option 2 would result in a robust level of protection (below), and would similarly enable activities beneficial to the community that are precluded under the status quo.
- the level of protection of wetlands in the CMA would be no less than prior to the introduction of the NES-F
 - wetlands in the CMA would still be covered by NPS-FM requirements for councils to develop plans that give effect to Te Mana o te Wai, actively involve tangata whenua, and to take an integrated catchment approach¹⁰
 - section 12 of the RMA requires resource consents for activities not specifically permitted in coastal plans.
70. We note that regional councils and unitary authorities have been developing coastal plans since 2010, and would be expected to have considerable experience in drafting and applying provisions that deliver against both national requirements (per the NZCPS) and local conditions. While coastal plans may have limitations in the level of protection they provide, it is not clear that an intermediate level of direction through NES-F will improve this, potentially the time and resources needed to implement regulations through the NES-F would be diverted from other work on coastal plans that would offer better protection for wetlands.
71. Both options should result in significantly improved clarity about which provisions apply to any given type of activity that affects natural wetlands in the CMA. However, Option 2 is unambiguously better on this point; the only provisions are to be found in coastal plans.
72. Under Option 1 there would be two sets of provisions to consider and possibly reconcile. Notwithstanding the care that would be exercised in drafting definitions for the NES-F (and supporting guidance material), there is always a possibility of inconsistencies emerging at the boundaries of its definitions through unforeseen activities or circumstances, or Court decisions that are inconsistent with the policy intent.
73. Both options would offer similar 'proportionality' by eliminating current NES-F prohibitions and consenting requirements that appear excessive relative to potential

¹⁰ For example, councils would still be required to recognise receiving environments and the cumulative effects of land-use on these, when developing freshwater plan content.

environmental impacts – under option 1, by redrafting the relevant provisions, under option 2, by ensuring NES-F provisions no longer apply.

74. 'Excess' costs arise under the status quo from councils and applicants having to (a) clarify coverage of particular activities vis-a-vis NES-F definitions, and (b) process applications through stricter consent pathways under the NES-F than coastal plans.
75. Option 1 would reduce these costs substantially, although may not entirely eliminate them, as there may be residual issues about coverage and some NES-F pathways that are stricter than under coastal plans.
76. Option 2 would eliminate excess costs entirely, as costs would be purely as a result of processes under coastal plans, as they were prior to the implementation of the NES-F.
77. Option 2 appears better for making changes to CMA wetland regulation in the future, as changes would be needed in only one regulatory system (the NZCPS and coastal plan rules). Under option 1 changes might be needed in two – that and the essential freshwater system – with additional potential problems in aligning two sets of changes.
78. Moreover, using coastal plans as the primary regulatory instrument provides flexibility to tailor regulation of wetlands in the CMA to local circumstances, which is more limited with national regulations.
79. The NES-F inherently limits scope for local decision-making. Under option 1, remaining NES-F wetland provisions would cut across regional coastal plan rules that have had input from Te Tiriti partners, such as existing Memoranda of Understanding and other formal agreements between tangata whenua and councils. This option does not provide scope for the recognition of activities that may be undertaken in accordance with tikanga Māori in the CMA.
80. Under Option 2, the NPS-FM requirements for councils to develop plans that give effect to Te Mana o te Wai, and actively involve tangata whenua, still apply. Under the RMA and NZCPS, development of coastal plan rules requires councils to effectively consult with Te Tiriti partners. Maintaining regulation of wetlands in the CMA at a regional and local level, through coastal plans, means that mana whenua can use local knowledge, and councils can recognise full expression of, and provision for, mātauranga Māori, tikanga Māori and te ao Māori in the CMA, without being constrained by the NES-F.

What feedback has been received from stakeholders?

81. Councils, businesses, and industry bodies almost universally supported option 2, indicating that they considered this to be a straightforward and effective way to resolve issues with the status quo.
82. Local authorities highlighted a number of inconsistencies between the NZCPS and the NPS-FM/NES-F wider than the definition – for example, requirements in the sections in the RMA governing each – and suggested that NES-F provisions that are appropriate for inland wetlands may be unsuitable or unworkable in wetlands in the CMA.
83. They also considered that coastal plan rules are generally operating satisfactorily, are well understood and accepted by stakeholders, and are reasonably effective in balancing protection of the marine environment with enabling suitable activities.
84. Support for option 1 was received from environmental NGOs, the Parliamentary Commissioner for the Environment and the Māori Trustee. The general rationale for this preference in most of these submissions was that removing coverage of the NES-F from the CMA and relying on coastal plans would result in insufficient protection for natural wetlands.

85. They perceived changes to NES-F as unjustified and high-risk, supported managing wetlands through bespoke provisions within national environmental standards, and suggested changes to the New Zealand Coastal Policy Statement (NZCPS) and the NES-F.
86. Iwi submitters (s 9(2)(ba)(i) Te Ao Marama, Te Mana o Ngati Rangitahi Trust and Te Rūnanga o Ngāi Tahu) were of the view that Option 2 would not give effect to Te Mana o te Wai. They generally supported maintaining the status quo or progressing Option 1 in some form.
87. There was little support for retaining the status quo. Those submitters that did, acknowledged that change is needed, but suggested further work is required to develop suitable policy.
88. The Ministry acknowledges the view of submitters supporting Option 1, that the NZCPS and coastal plans may not provide sufficient levels of protection of wetlands in the CMA. Its concern was identifying a suitable mechanism to enhance those protections.
89. Since consultation closed, the Minister has directed the Ministry to consider issues raised during public consultation and develop appropriate policies for the protection of coastal wetlands, as part of policy work on estuaries that will proceed in the near future¹¹. This will include natural wetlands found around the margins of estuaries and intertidal areas, including those in the CMA, which was the intended focus of the original application of the NES-F to the CMA.
90. For other natural wetlands in the CMA, the Ministry remains of the opinion that the differences between these and inland natural wetlands – for example, different hydrology, different impacts of comparable developments – are such that wetlands in the CMA are better regulated through the NZCPS and coastal plans than through the NES-F.

¹¹ That policy work is noted in the Minister's paper to Cabinet.

What are the marginal costs and benefits of the preferred option?

Affected groups	Comment	Impact	Evidence Certainty.
<i>Additional costs of the preferred option compared to taking no action</i>			
Regulated groups	Increased costs for consenting (including ecological assessments) of activities which are no longer prohibited or discouraged by non-complying consent requirements (However, applicants will only incur those costs if they consider them justified by positive outcomes of the projects.)	Medium	High
Regulators (councils)	Increased costs for consenting and monitoring of projects which are no longer prohibited or discouraged by non-complying consent requirements (some or all of which may be recovered from applicants)	Medium	High
Central government	Costs of ongoing monitoring to assess effectiveness of reliance on coastal plan rules	Low	High
The wider community	Risks that in the absence of NES-F requirements, existing provisions in the NZCPS and coast plans are not fully effective, resulting in continuing loss of wetlands extent and/or value	Low	Low
Total monetised costs		-	-
Non-monetised costs		Medium	High

Affected groups	Comment	Impact	Evidence Certainty.
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Some activities can proceed to consent hearings and are no longer prohibited or discouraged by non-complying consent requirements ¹²	High	Medium
	Reduced uncertainty about coverage and substantially lower consenting and associated costs to determine coverage	Medium	High
	Reduced consenting costs for activities that have lower consenting requirements under coastal plan rules than the NES-F	Medium	High
Regulators (councils)	Reduced uncertainty about coverage and substantially lower consenting costs to determine coverage	Medium	High
	Lower monitoring and enforcement costs, through having to apply only one set of requirements (in coastal plans) rather than two	Medium	High
The wider community	Ability to enhance regulation of wetlands in the CMA to address known and future challenges such as impacts of climate change	High	Medium
Total monetised benefits		-	-
Non-monetised benefits		High	Medium

¹² For example, the proposal for a boat ramp at Rangitane, Kerikeri, could proceed to a consent hearing. Whether it is eventually built would in part depend on the merits of its application and whether a consent is granted.

Section 3: Delivering an option

How will the new arrangements be implemented?

Public notification process of the regulatory changes

91. Notification of amendment to the NES-F, that its wetland provisions no longer apply to wetlands in the CMA, will occur as part of a package of changes to the *Essential Freshwater* regulations.
92. There is no implementation plan required for the proposed change to the NES-F other than informing councils and other stakeholders of the change.

Ongoing operation and enforcement

93. Where consents have already been granted in respect of NES-F, they would remain in force. We assume that any consent applications in respect of NES-F provisions underway at the effective date of the change be withdrawn (with fees refunded at the discretion of the responsible council).
94. Under section 35 of the RMA regional councils and unitary authorities are responsible for monitoring and reporting on the state of the environment in their region. They have the principal role in ongoing management and enforcement of the provisions of regional coastal plans

Stakeholder and council involvement in implementation

95. As noted previously, if the Cabinet agrees to proceed with Option 2, the Ministry will begin policy work on estuaries in the near future, including some natural wetlands in the CMA.
96. This policy process will require stakeholder engagement during and after the policy development process, gathering information about trends and conditions of these wetlands, and preparation of guidance material and the like during implementation.
97. Moreover, industry stakeholders and local government have contributed to identifying issues with implementation of the natural wetlands provisions. This has been part of a deliberate effort by the Ministry to secure feedback from stakeholders on the implementation of the Essential Freshwater package, and will be maintained (in respect of wetlands in the CMA) after the proposed changes come into effect.
98. Funding is also available from the Ministry for initiatives that could improve the management and enhance the condition of natural wetlands.¹³

¹³ See [Get funding | Ministry for the Environment](#)

Implementation risks

99. Councils are currently in the process of preparing revised plans required under the NES-F (by 2024). They have indicated that they are experiencing pressures on capacity and difficulty in recruiting policy/planning and scientific staff.¹⁴ The changes proposed for wetlands in the CMA could have two opposing effects on these pressures:
- reducing them, by replacing the extensive processes associated with consenting non-complying activities under the NES-F with simpler processes under coastal plans
 - exacerbating them, by enabling consenting (under coastal plans) of some activities currently prohibited or discouraged by the NES-F.
100. The net impact is unknown, but if council capacity constraints persist, they represent a risk to achieving the objectives of these changes.

How will the new arrangements be monitored, evaluated, and reviewed?

101. It will be difficult to assess the direct impacts on wetlands as these effects are long-term and may be subject to influences outside the consented activities (eg changes in contiguous waterways or landscapes). Some of this may be done through councils' state of the environment reporting (below).
102. Monitoring and evaluation of natural wetlands in the CMA is a requirement for both the Ministry and regional councils, as part of their ongoing responsibilities under section 35 of the RMA to monitor the state of the environment.
103. The effectiveness of the NZCPS and coastal plans will be assessed in 2023 and again in 2026, using reports on the state of New Zealand's freshwater prepared under the Environmental Reporting Act 2015.
104. As part of the engagement with councils and other stakeholders, generally and as part of the policy work on estuaries, the Ministry will be seeking information from them about regulatory processes and the current state and recent trends in CMA wetlands.

¹⁴ Te Uru Kahika Regional and Unitary Councils Aotearoa (2022) *Progress Report: Regional planning implementation of the NPS-FM* June 2022
[220705 NPS-FM progress report as a 1 May 2022 - proofed.docx \(environment.govt.nz\)](#)

Annex 1: Definition of a 'natural coastal wetland' under Option 1

105. The Department of Conservation and the Ministry collaborated with technical experts to develop a definition and to test the practicability of its application with a preliminary regional council working group.

106. The definition developed s:

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

- is within the coastal marine area (CMA)
- is part of a tidal estuarine hydrosystem¹⁵; 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 contour¹⁶ within the coastal hydrosystem.”

107. 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.

108. This definition would identify which areas of the coastal environment fall within the definition of natural coastal wetland and are therefore subject to the NES-F. The definition is implementable, as all proposed boundaries have already been mapped through various national projects.

109. Further context for what constitutes a coastal wetland, and the coastal hydrosystems classification system used to develop this definition, can be found in *A classification of New Zealand's coastal hydrosystems*.¹⁷

110. The preliminary regional council working group expressed concern that the proposed definition would capture the majority of an estuarine system (up to a depth of six metres) rather than just ‘the margins of estuaries and intertidal areas and include saltmarsh and mangrove areas.’¹⁸ While the working group indicated some agreement with the definition from a scientific perspective, it did not agree with the application of the NES-F wetland provisions to such a broad area, due to the significant impacts that this would have on a range of coastal activities.

111. The proposed definition captures a range of coastal hydrosystems and wetland types. CMA wetlands are subject to different threats and activities dependent on wetland type.

¹⁵ Hume T, P Gerbeaux, DE Hart, H Kettles and D Neale (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

¹⁶ This is consistent with the RAMSAR definition of a wetland which includes areas of saline water the depth of which at low tide does not exceed six metres.

¹⁷ <https://environment.govt.nz/publications/a-classification-of-new-zealands-coastal-hydrosystems/>

¹⁸ Ministry for the Environment (2019:44) *Action for healthy waterways – A discussion document on national direction for our essential freshwater* Wellington

Therefore, some NES-F wetland provisions may apply appropriately to one type of CMA wetland captured by the definition, but not to others (eg a saltmarsh, but not to a shallow harbour).

112. Option 1 would also make the following changes to the NES-F rules so that they apply more appropriately to natural coastal wetlands:

- *amend the take, use, damming, diversion or discharge of water rules so they only apply to natural inland wetlands (and not to natural coastal wetlands)*

Under the proposed definition above, natural coastal wetlands would all be geographically within areas of tidal influence, therefore water takes and discharges have minimal impacts on CMA wetlands. All other natural wetlands (eg brackish dune wetlands) are covered as natural inland wetlands by the NES-F, as they exist above the inland CMA boundary

- *provide an exemption for mangroves from vegetation clearance rules in the NES-F (as these are managed to a more nuanced degree via coastal plan rules)*

Mangroves are an indigenous species found only in the four northern regions and expansion is a known consequence of land-based human activity (eg, sedimentation and nutrification). Mangroves and mangrove seedlings are removed for a variety of purposes, including to maintain roading sight lines or prevent mangrove establishment in key wildlife habitats. In some instances, rules around managing mangroves in coastal plans have been co-designed with communities and have community group investment.

Currently under the NES-F, permitted and restricted discretionary activities that involve vegetation clearance apply to all species under the NES-F both exotic and indigenous vegetation. However, many situations where mangroves can be cleared under coastal plans would become non-complying under NES-F regulation 54(a).

Councils are concerned about the non-complying rule overriding detailed coastal plans that have a rule structure nuanced to uses and outcomes in the CMA.

This option would leave the coastal plan rules developed under NZCPS, and negotiated by regional councils with their communities, as the regulatory tool for managing mangroves.

- *clarify that rules managing sphagnum moss harvesting, and arable and horticultural land use, only apply to natural inland wetlands (and not to natural coastal wetlands)*

Amend the NES-F to clarify that sphagnum moss harvesting (r48–49) and arable and horticultural land use (r50) apply only to 'natural inland wetlands' and not to natural coastal wetlands.

- *provide other consent pathways*

Earthworks for the construction or maintenance of structures within the CMA range from permitted to prohibited activity status in coastal plans. Councils' interpretation of NES-F regulation 54(b) of the NES-F is that all coastal activities leading to land disturbance would become non-complying.

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.

113. Note that the new consent pathways being proposed through the *Managing our wetlands*¹⁹ work programme (ie for quarrying, fills, mineral mining, urban development) are proposed to only apply to natural inland wetlands.
114. No further amendment has been identified for the following consent pathways, and the relevant rules would apply to all natural wetlands (both inland and coastal):
- restoration of natural wetlands (r38–39)
 - scientific research (r40–41)
 - natural hazard works (r51)
 - other activities (r54).

Address the overlap with other regulations and legislation

115. Other coastal activities captured by equivalent RMA regulations that create 'land disturbance' may be inadvertently captured as non-complying in coastal wetlands by the NES-F - for example, vessel use and discharges, or aquaculture activity and structures.
116. To ensure these activities remain without conflict, a new regulation in the NES-F would state that the NES-F is subject to:
- National Environmental Standards – Marine Pollution 1998; and
 - National Environmental Standards – Marine Aquaculture 2020.²⁰

¹⁹ <https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/>

²⁰ This would be similar to the existing regulation 7 in the NES-F, which states that the NES-F is subject to the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017.