

Council Meeting Agenda - 15 September 2022

Meeting will be held in the Council Chamber at Level 2, Philip Laing House
144 Rattray Street, Dunedin - Councillors
[ORC YouTube Livestream - Members of the Public](#)



Members:

Cr Andrew Noone, Chairperson	Cr Gary Kelliher
Cr Kevin Malcolm, Deputy Chairperson	Cr Michael Laws
Cr Hilary Calvert	Cr Gretchen Robertson
Cr Michael Deaker	Cr Bryan Scott
Cr Alexa Forbes	Cr Kate Wilson
Cr Carmen Hope	

Senior Officer: Pim Borren, Interim Chief Executive

Meeting Support: Dianne Railton, Governance Support Officer

15 September 2022 01:00 PM

Agenda Topic	Page
1. APOLOGIES	
Cr Michael Deaker has submitted his apology for this meeting.	
2. PUBLIC FORUM	
3. CONFIRMATION OF AGENDA	
Note: Any additions must be approved by resolution with an explanation as to why they cannot be delayed until a future meeting.	
4. CONFLICT OF INTEREST	
Members are reminded of the need to stand aside from decision-making when a conflict arises between their role as an elected representative and any private or other external interest they might have.	
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The Council will consider minutes of previous Council Meetings as a true and accurate record, with or without changes.	
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6.1 DRAFT SUBMISSION ON MINISTRY FOR THE ENVIRONMENT'S CONSULTATION DOCUMENT "MANAGING OUR WETLANDS IN THE COASTAL MARINE AREA"	14

The paper is provided to report on the Ministry for the Environment's (the Ministry) consultation document "Managing our wetlands in the coastal marine area" (the current consultation) and recommend a draft submission for Council approval.

6.1.1	Attachment 1: Discussion Document Managing our Wetlands in the Coastal Marine Area - Final	19
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7.	RESOLUTION TO EXCLUDE THE PUBLIC	88
That the Council excludes the public from the following part of the proceedings of this meeting (pursuant to the provisions of the Local Government Official Information and Meetings Act 1987), namely:		
<ul style="list-style-type: none">- Minutes of the 24 August 2022 public-excluded Council Meeting- Minutes of the 29 August 2022 Extraordinary public-excluded Council Meeting- RPS Notification- Process for appointing a permanent Chief Executive		
7.1	Public Exclusion Table	88
8.	CLOSURE	



Minutes of an ordinary meeting of Council
held in the Council Chamber on
Wednesday 24 August 2022 at 1:00pm

Membership

Cr Andrew Noone *(Chairperson)*
Cr Kevin Malcolm *(Deputy Chairperson)*
Cr Hilary Calvert
Cr Alexa Forbes
Cr Michael Deaker
Cr Carmen Hope
Cr Gary Kelliher
Cr Michael Laws
Cr Gretchen Robertson
Cr Bryan Scott
Cr Kate Wilson

Welcome

Chairperson Noone welcomed Councillors, members of the public and staff to the meeting at 1:00pm. Staff present in the Chamber included Pim Borren, (interim Chief Executive), Anita Dawe (GM Policy and Science), Richard Saunders (GM Regulatory and Communications), Amanda Vercoe (GM Governance, Culture and Customer), Dianne Railton (Governance Support), Tom De Pelsemaeker (Acting Manager Policy), Dolina Lee (Senior Analyst Freshwater and Land), Warren Hanley (Senior Resource Planner Liaison), Anne Duncan (Manager Strategy) and Francisco Hernandez (Principal Advisor Climate Change), Garry Maloney, Julian Phillips, Doug Rodgers (Manager Transport), and present electronically were Gavin Palmer (GM Operations), and Nick Donnelly (GM Corporate Services). Shannon Wallace (MfE) also attended the meeting electronically.

1. APOLOGIES

There were no apologies.

Cr Deaker, Cr Forbes, Cr Hope, Cr Kelliher and Cr Laws attended the meeting electronically.

2. PUBLIC FORUM

Mr Allan Savell, Branch President of the Dunedin Tramways Union, spoke at public forum about Funding of Wages for Bus Drivers.

3. CONFIRMATION OF AGENDA

The agenda was confirmed as published.

4. CONFLICT OF INTEREST

No conflicts of interest were advised.

5. CONFIRMATION OF MINUTES

Resolution: Cr Noone Moved, Cr Calvert Seconded

That the minutes of the (public portion of the) Council meeting held on 29 June 2022 be received and confirmed as a true and accurate record.

MOTION CARRIED

6. ACTIONS (STATUS OF COUNCIL RESOLUTIONS)

The report on open actions from resolutions of the Council Meetings were reviewed.

7. MATTERS FOR CONSIDERATION

7.1. Six Monthly Report to the Minister

The report presented for adoption by Council, the sixth progress report to the Minister for the Environment, in accordance with section 27 of the Resource Management Act 1991 in relation to the recommendations made under section 24A of the Resource Management Act 1991. This report is the final report of the current triennium. Anita Dawe (GM Policy and Science) was present to speak to the report and respond to questions.

Ms Dawe advised that further information regarding Environmental Monitoring will be included in the Six Monthly Report to the Minister, detailing work and projects being undertaken in the field and the non-regulatory area.

Resolution CM22-216: Cr Malcolm Moved, Cr Hope Seconded

That the Council:

- 1) **Notes** this report.
- 2) **Approves** the sixth report to the Minister for the Environment, that reports on progress against the recommendations made in his letter of 19 November 2019.
- 3) **Notes** that the next report will be brought to Council around March 2023, dependent on a new Council meeting schedule.

MOTION CARRIED

7.2. Plan Change 8 Urban Discharges

The paper was provided for Council to approve Plan Change 8 (PC8) Discharge Management to the Regional Plan: Water for Otago (Water Plan) as amended by the Environment Court Decision No. [2022] NZEnvC 101 ,and to set a date for making the plan change fully operative by incorporating the amended provisions into the operative Water Plan. Anita Dawe (GM Policy and Science), Tom De Pelsemaeker (Acting Manager Policy) and Dolina Lee (Senior Analyst Freshwater and Land) were present to speak to the report and respond to questions.

Ms Dawe acknowledged the team effort from Team ORC for the work undertaken. On behalf of Council, Chair Noone thanked the team for their efforts.

Resolution CM22-217: Cr Wilson Moved, Cr Calvert Seconded

That the Council:

- 1) **Notes** this report.
- 2) **Approves** the minor changes made to partially operative Plan Change 8 in accordance with clause 16(2) of Schedule 1 of the RMA.
- 3) **Approves** Plan Change 8 as amended by Environment Court Decisions [2022] NZEnvC 101 in accordance with clause 17(3) of Schedule 1 of the RMA.
- 4) **Affixes** Council's seal to Plan Change 8 to the Water Plan in accordance with clause 17(3) of Schedule 1 of the RMA.
- 5) **Resolves** to make Plan Change 8 operative from 3 September 2022, and publicly notify this date on 27 August 2022, in accordance with clause 20 of Schedule 1 of the RMA.

MOTION CARRIED

7.3. ORC Submissions lodged on NPS-FM/NES-F amendments for wetland regulations, NPS Indigenous Biodiversity exposure draft, and Water Services Entities Bill

The report was provided for Council to note staff submissions lodged on the following central government consultations:

- The exposure drafts of proposed changes to the National Policy Statement for Freshwater Management 2020 (NPS-FM) and National Environmental Standard for Freshwater (NES-F), including amendments to the provisions for identifying wetlands and regulations for managing activities in or near wetlands; and
- The Water Services Entities Bill; and
- The exposure draft on the National Policy Statement for Indigenous Biodiversity (NPS-IB).

Anita Dawe (GM Policy and Science), Tom De Pelsemaeker (Acting Manager Policy) and Warren Hanley (Senior Resource Planner Liaison) were present to speak to the report and respond to questions.

Cr Scott asked if Council would receive a paper providing feedback on submissions. Ms Dawe confirmed a summary report could be brought back to Council in the new triennium, that highlights where there have been policy changes.

Resolution CM22-218: Cr Noone Moved, Cr Robertson Seconded

That the Council:

- 1) **Notes** this report and the staff submissions on:
 - a. *The exposure drafts of proposed changes to the National Policy Statement for Freshwater Management 2020 and National Environmental Standard for Freshwater, including amendments to the provisions for identifying wetlands and regulations for managing activities in or near wetlands; and*
 - b. *The Water Services Entities Bill; and*
 - c. *The exposure draft on the National Policy Statement for Indigenous Biodiversity.*

MOTION CARRIED

7.4. Zero Carbon Alliance

This report provides the Otago Regional Council (ORC) with an update on the Dunedin City Council led Zero Carbon Alliance (ZCA) and presents the updated formal documentation for the Council to note. Anne Duncan (Strategy Manager) and Francisco Hernandez (Principal Advisor Climate Change) were present to speak to the report and respond to questions.

Chair Noone advised that while he was delegated to sign the agreement at the 23 June 2021 Council Meeting, he asked for the report to come back to Council for noting due to the significant amount of time that has elapsed between the agreed delegation, and to note the revised Memorandum of Understanding incorporating updated terms of reference.

Cr Calvert and Cr Laws expressed their concerns with wording in the agreement having directive targets rather than aspirational targets. Mr Hernandez and Dr Borren will forward Council's concerns to DCC regarding the wording in Clause 1.1f in the Terms of Reference, and Clause 5.3i in the Memorandum of Understanding, requesting the wording be changed to aspirational target of Zero Carbon 2030.

Resolution CM22-219: Cr Malcolm Moved, Cr Wilson Seconded

That the Council:

- 1) **Notes** the report.
- 2) **Notes** the Chair will sign the revised Memorandum of Understanding incorporating updated terms of reference, as amended by this meeting, for the Zero Carbon Alliance Collaboration and Key Representative Group.
- 3) **Appoints** the Chief Executive as ORC's representative on the Collaboration Group
- 4) **Notes** that the CE will appoint Principal Advisor Climate Change Francisco Hernandez as ORC's representative on the Key Representatives group.
- 5) **Notes** that six monthly reporting on progress with the Zero Carbon Alliance can be provided.

MOTION CARRIED

7.5. Living Wage for Bus Drivers

The purpose of this report is to seek Council direction to increase the wage rate to equivalent to the September 2022 Living Wage for bus drivers driving Council contracted bus services. Gavin Palmer (GM Operations) and Doug Rodgers (Manager Transport) were present to speak to the report and respond to questions.

Mr Rodgers said staff are committed to preparing a more comprehensive report to Council which would provide a number of options to increase recruitment and retention, fare structure, driver wages and conditions.

Cr Calvert left at 2.56pm for the remainder of the meeting.

Resolution CM22-220: Cr Forbes Moved, Cr Malcolm Seconded

That the Council:

- 1) **Receives** this report.
- 2) **Agrees** to fund from 1 September 2022, an increase in the wage rate for bus drivers delivering Council's contracted bus services to match the difference between either the 2021 Living Wage rate or the wage rate currently being paid by operators (whichever is the higher) and the 2022 Living Wage rate.
- 3) **Notes** the estimated cost to do so is estimated at \$0.471 million per annum.
- 4) **Notes** that the funding required to support this additional payment to bus operators is not budgeted in the 2022-23 Annual Plan or 2021-31 Long Term Plan.
- 5) **Notes** that while central government announced extra funding in the May 2022 budget for bus driver pay and conditions, the Minister is yet to release that and the pathway to access a share of it is yet to be specified. That may mean Waka Kotahi may not co-invest in raising bus driver wages in Otago at this time.

MOTION CARRIED

7.6. Kuriwao Land

The report sought Council's approval of the sale of surplus land subject to the Otago Regional Council (Kuriwao Endowment Lands) Act 1994. Nick Donnelly (GM Corporate Services) was present to speak to the report and respond to questions.

Mr Donnelly advised the report relates to land discussed at Council last year, where Council asked for an ecological report. He said the land is not leased and is surplus to ORC requirements. Following questions, Chair Noone suggested the paper should lie on the table to enable specific contractual details to be discussed with the public excluded. He stated further consideration of this paper would continue following the close of the confidential portion of the meeting.

Resolution CM22-221: Cr Wilson Moved, Cr Noone Seconded

That the Council:

- 1) **Lay** the report on the table and take back up following consideration in public-excluded.

MOTION CARRIED

Resolution: Chair Noone Moved, Cr Wilson Seconded

That the public meeting adjourns for a break at 3.35pm. The meeting resumed at 3.45pm

8. RECOMMENDATIONS ADOPTED AT COMMITTEE MEETINGS

8.1. Recommendations of the Regulatory Committee

Resolution CM22-223: Cr Noone Moved, Cr Kelliher Seconded

That the Council adopts the resolutions of the 29 June 2022 Regulatory Committee.

MOTION CARRIED

8.2. Recommendations of the Otago Southland Regional Transport Committee

Resolution CM22-224: Cr Forbes Moved, Cr Wilson Seconded

That the Council adopts the resolutions of the 15 July 2022 Otago Southland Regional Transport Committee.

MOTION CARRIED

8.3. Recommendations of the Strategy and Planning Committee

Resolution CM22-225: Cr Wilson Moved, Cr Robertson Seconded

That the Council adopts the resolutions of the 13 July 2022, 27 July 2022 and 10 August 2022 Strategy and Planning Committee.

MOTION CARRIED

9. CHAIRPERSON'S AND CHIEF EXECUTIVE'S REPORTS

9.1. Chairperson's Report

Chair Noone noted that DCC were yet to sign the CDEM Agreement, whereas in the report it said all parties had signed the agreement.

Resolution: Cr Malcolm Moved, Cr Wilson Seconded

That the Chairperson's report be received.

MOTION CARRIED

9.2. Chief Executive's Report

Resolution: Cr Wilson Moved, Cr Malcolm Seconded

That the Chief Executive's report be received.

MOTION CARRIED

10. RESOLUTION TO EXCLUDE THE PUBLIC

At 3:50pm a motion was made to move into public excluded.

Resolution: Cr Noone Moved, Cr Malcolm Seconded:

That the public be excluded from the following parts of the proceedings of this meeting, (pursuant to the provisions of the Local Government Official Information and Meetings Act 1987) namely:

- *Minutes of the 29 June 2022 public excluded Council Meeting*
- *Kuriwao Land – Options*
- *National Ticketing System Participation Agreement*
- *Hearings Panel Appointment – pORPS Sch 1 Process*
- *Process for appointing a permanent Chief Executive*

The general subject of each matter to be considered while the public is excluded, the reason for passing this resolution in relation to each matter, and the specific grounds under section 48(1) of the Local Government Official Information and Meetings Act 1987 for the passing of this resolution are as follows:

General subject of each matter to be considered	Reason for passing this resolution in relation to each matter	Ground(s) under section 48(1) for the passing of this resolution
<i>Minutes of the 29 June 2022 public excluded Council Meeting</i>	Section 7(2)(a) To protect the privacy of natural persons, including that of deceased natural persons; Section 7(2)(i) To enable any local	

	authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).	
<i>Kuriwao Land – Options</i>	<p>Section 7(2)(h) To enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities;</p> <p>Section 7(2)(i) To enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).</p>	Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds: (a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.
<i>National Ticketing System Participation Agreement</i>	<p>Section 7(2)(h) To enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities;</p> <p>Section 7(2)(i) To enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).</p>	Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds: (a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.
<i>Hearings Panel Appointment – pORPS Sch 1 Process</i>	<p>Section 7(2)(a) To protect the privacy of natural persons, including that of deceased natural persons;</p> <p>Section 7(2)(b)(ii) To protect information where the making available of the information—would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.</p>	Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds: (a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.

<p><i>Process for appointing a permanent Chief Executive</i></p>	<p>Section 7(2)(i) To enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).</p>	<p>Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds: (a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.</p>
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This resolution was made in reliance on section 48(1)(a) of the Local Government Official Information and Meetings Act 1987 and the particular interest or interests protected by section 6 or section 7 of that Act or section 6 or section 7 or section 9 of the Official Information Act 1982, as the case may require, which would be prejudiced by the holding of the whole or the relevant part of the proceedings of the meeting in public are shown above.

The meeting resumed in public at 4.53pm following closure of the Council public-excluded part of the meeting, to continue consideration of the report 7.6 Kuriwao Land.

Resolution CM22-222: Cr Noone Moved, Cr Scott Seconded

That the Council:

- 1) **Receives** this report.
- 2) **Approves** the sale of the land contained in record of title 7963 subject to Council agreement of satisfactory terms and conditions (considered at a public excluded session of Council), that there is a covenanting requirement by the successful purchaser.

MOTION CARRIED

11. CLOSURE

There was no further business and Chairperson Noone declared the meeting closed at 4:58pm.

Chairperson

Date



Minutes of an extraordinary meeting of Council
held in the Council Chamber at Level 2 Philip Laing House
144 Rattray Street, Dunedin
on Monday 29 August 2022 at 1:00pm

Membership

Cr Andrew Noone *(Chairperson)*
Cr Kevin Malcolm *(Deputy Chairperson)*
Cr Hilary Calvert
Cr Michael Deaker
Cr Alexa Forbes
Cr Carmen Hope
Cr Gary Kelliher
Cr Michael Laws
Cr Gretchen Robertson
Cr Bryan Scott
Cr Kate Wilson

Welcome

Chairperson Noone welcomed Councillors, members of the public and staff to the meeting at 1:01pm. Staff present included Pim Borren, (interim Chief Executive), Anita Dawe (GM Policy and Science), Amanda Vercoe (GM Governance, Culture and Customer), Dianne Railton (Governance Support Officer), and Peter Constantine (Acting Principal Planner), and present electronically were Nick Donnelly (GM Corporate Services), Gavin Palmer (GM Operations), Richard Saunders (GM Regulatory and Communications). Also present in the Chamber were Simon Anderson (Ross Dowling) and electronically, Felicity Boyd (Incite).

1. APOLOGIES

Resolution: Cr Hope Moved, Cr Noone Seconded:

That the apology for Cr Forbes be accepted.

MOTION CARRIED

Cr Deaker, Cr Kelliher, Cr Laws, Cr Malcolm and Cr Robertson attended the meeting electronically.

2. CONFIRMATION OF AGENDA

The agenda was confirmed as published.

3. CONFLICT OF INTEREST

No conflicts of interest were advised.

4. RESOLUTION TO EXCLUDE THE PUBLIC

Resolution: Cr Noone Moved, Cr Calvert Seconded:

That the public be excluded from the following parts of the proceedings of this meeting, (pursuant to the provisions of the Local Government Official Information and Meetings Act 1987), and that Simon Anderson (Ross Dowling) and Felicity Boyd (Incite) be permitted to remain at this meeting, after the public has been excluded, because of their legal and professional knowledge.

MOTION CARRIED

The general subject of each matter to be considered while the public is excluded, the reason for passing this resolution in relation to each matter, and the specific grounds under [section 48\(1\)](#) of the Local Government Official Information and Meetings Act 1987 for the passing of this resolution are as follows:

General subject of each matter to be considered	Reason for passing this resolution in relation to each matter	Ground(s) under section 48(1) for the passing of this resolution
1.1 Consideration of the pORPS into Freshwater and Non Freshwater Parts	Section 7(2)(g) To maintain legal professional privilege.	Section 48(1)(a) Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds: (a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.

This resolution is made in reliance on [section 48\(1\)\(a\)](#) of the Local Government Official Information and Meetings Act 1987 and the particular interest or interests protected by [section 6](#) or [section 7](#) of that Act or [section 6](#) or [section 7](#) or [section 9](#) of the Official Information Act 1982, as the case may require, which would be prejudiced by the holding of the whole or the relevant part of the proceedings of the meeting in public are shown above.

5. CLOSURE

There was no further business and Chairperson Noone declared the meeting closed at 1:03pm.

Chairperson

Date

DRAFT MINUTES

6.1. Draft submission on Ministry for the Environment’s consultation document “Managing our wetlands in the coastal marine area”

Prepared for: Council
Report No. SPS2247
Activity: Governance Report
Author: Warren Hanley, Senior Resource Planner Liaison
Endorsed by: Anita Dawe, General Manager Policy and Science
Date: 15 September 2022

PURPOSE

- [1] To report on the Ministry for the Environment’s (the Ministry) consultation document “*Managing our wetlands in the coastal marine area*” (the current consultation) and recommend a draft submission for Council approval.

EXECUTIVE SUMMARY

- [2] The 2020 National Environmental Standards for Freshwater (NES-F) implemented provisions to manage effects on wetlands.
- [3] In 2021, the New Zealand High Court issued a judgement¹ that the wetland rules in the NES-F apply to wetlands in the Coastal Marine Area (CMA).
- [4] Earlier this year the Ministry consulted on further changes to the NES-F’s wetland regulations. Within that consultation, it recognised growing concern in applying the NES-F wetland provisions within the CMA. The Ministry signalled it would undertake further work to respond to the concerns that the NES-F was not the appropriate instrument to manage wetlands within the CMA.
- [5] The current consultation is the result of that further work and proposes various pathways for the NES-F role in the management of wetlands within the CMA.
- [6] Of the pathways proposed, the Ministry’s preferred option is to amend the NES-F so that it does not apply to wetlands within the CMA.
- [7] ORC staff recommend to Council that ORC support the Ministry’s preferred option, which is also endorsed by the regional sector.

RECOMMENDATION

That the Council:

- 1) **Approves** the submission on *Managing our wetlands in the coastal marine area* (as appended) to be lodged on behalf of Otago Regional Council submission with the Ministry for the Environment, no later than 21 September 2022.

¹ *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated*, November 2021

BACKGROUND

- [8] The NES-F 2020 sought to manage natural wetlands – the original policy intent was that the provisions to manage the loss or degradation of all natural wetlands would apply to all natural wetlands, including those within the CMA. Till then, management of wetlands in the CMA was implemented via the existing policy framework including:
- National Policy Statement for Freshwater Management (NPS-FM); and
 - New Zealand Coastal Policy Statement 2010 (NZCPS); and
 - Regional coastal plans.
- [9] While the NPS-FM is a freshwater instrument, it requires the impact on receiving environments, such as the CMA, to be managed (and thus restricted) within freshwater environments. This is different to the NZCPS, coastal plans, and the current NES-F which all contain provisions to regulate activities within the CMA.
- [10] The High Court’s 2021 decision has created some uncertainty for managing wetlands in the CMA and both stakeholders and councils across New Zealand expressed concern about this to the Ministry.
- [11] As a result of stakeholder and council feedback, the Ministry’s current consultation has defined two key policy problems:
- 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
 - 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.
- [12] In a practical sense, having the NES-F apply within the CMA overreaches its intent and risks. The impacts are potentially widespread and include unintentionally frustrating or in some case prohibiting activities that were permitted. The impacts are potentially widespread and include unintentionally frustrating, or in some cases, prohibiting activities that were permitted. To illustrate this risk, on page 4 of the consultation document (appended to this report), the Ministry highlights a case study of how the NES-F halted the Rangitane Maritime Development.
- [13] The Ministry signalled in its May 2022 consultation on its exposure draft of wetland regulation amendments to the NES-F that it would develop a further consultation to respond to these issues. ORC’s submission on the May 2022 consultation supported this approach.
- [14] The Te Uru Kahika Regional and Unitary Councils² regional sector (the Sector) also lodged a submission on 6 July 2022, giving detailed reasoning as to why the NES-F should not apply within the CMA. ORC Science staff provided technical expert input to the Sector’s submission. That submission is appended to this report.

DISCUSSION

² Te Uru Kahika Regional and Unitary Councils Aotearoa represents the sixteen regional councils and unitary authorities of New Zealand.

- [15] The regional sector submission supported the improvement in the management of New Zealand's coastal wetlands but clearly articulated reasons why the NES-F is not the right regulatory tool to do this, for the following reasons:
1. No regulatory rationale, nor clear benefit, has been identified for including coastal wetland management under a freshwater instrument.
 2. Inland and coastal wetlands are not the same and require different management regimes. An appropriate framework for managing coastal wetlands (and their different characteristics) already exists.
 3. The NES-F is demonstrably 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 and has inconsistent approaches to activities within its own provisions.
- [16] The Sector has drafted a further submission on this current consultation that builds on from the 6 July 2022 submission and supports the Ministry's preferred solution to exclude wetlands in the CMA from being managed under the NES-F.
- [17] ORC staff consider the regional sector submissions provides a robust critique of the NES-F in respect to managing coastal wetlands, and that it represents concerns that are current and relevant to Otago, and ORC's regulatory role.
- [18] As ORC had input into, and is represented by, the regional sector submissions, staff consider ORC should support these submissions.

OPTIONS

- [19] Staff acknowledge the Ministry's positive approach to addressing an issue that has arisen in the application of the NES-F. The consultation proposes three pathways to address the key policy problems:
- Status Quo - The NES-F continues to apply to the CMA (remains unchanged).
 - Option 1 - Amend the NES-F to clarify where and how it applies to the CMA.
 - Option 2 - Amend the NES-F so its wetland provisions do not apply to the CMA.
- [20] The Ministry has selected its preferred option (Option 2) by assessing which pathway best achieves the following objectives to solve the policy problem:
- Effectiveness.
 - Practicality.
 - Gives effect to Te Mana o Te Wai.
 - Takes into account Te Tiriti o Waitangi.
- [21] ORC staff recommend that the first two pathways - 'status quo' and Option 1 will not resolve the issues of concern in having the NES-F apply within the CMA. Staff's preference is to support Option 2 as this provides an immediate and effective reversal of the adverse impacts that are created applying the NES-F to the CMA.
- [22] Of relevance to Otago's situation, staff note one example where additional clarification under Option 1 would not be ideal due to the way in which the national '*Coastal hydrosystem*' classification system constitutes what is a coastal wetland. Excepting for its deep channel, large areas of Otago's harbour (mud/sandflats) would likely be classified as coastal wetland and therefore the NES-F would restrict activities in the

harbour that are currently permitted, or otherwise regulated under the Regional Plan: Coast. This would result in concerns as to how existing, and future activities within these areas might be impacted, as well as complicating the development of future Otago coastal policy.

- [23] The Ministry's evaluation of Option 2 finds that it appropriately achieves the requirements under *Te Mana o te Wai* and *Te Tiriti o Waitangi*.
- [24] In conclusion, staff recommend ORC to submit a brief submission to the Ministry, that recognises and supports the Sector's submissions, which is in support of the adoption of Option 2, amending the NES-F so it does not apply with the CMA.

CONSIDERATIONS

Strategic Framework and Policy Considerations

- [25] ORC's strategic directions commit Council to taking leadership on issues of significance and importance to Otago communities and national direction. Staff at ORC have had significant involvement in the development of the regional sector submission.
- [26] Staff consider the NPS-FM appropriately provides for integrated management by requiring consideration of the coastal environment as a receiving environment when managing activities in freshwater areas. Regulating activities within the CMA is most effectively, and efficiently achieved via the existing and coastal-focused framework of the NZCPS 2010 and regional coastal plans.
- [27] Opportunities to improve Otago's policy framework for coastal management include the development of the proposed Otago Regional Policy Statement 2021 as well as the future review of the Regional Plan: Coast.

Financial Considerations

- [28] Submitting on national consultations is a funded activity under ORC's Annual Plan.

Significance and Engagement

- [29] The consideration of the NES-F consultation, and any subsequent submission is consistent with He mahi rau rika: ORC Significance, Engagement and Māori Participation Policy.

Legislative and Risk Considerations

- [30] As has already been the experience in other regions, the NES-F wetland provisions may frustrate otherwise beneficial activities with Otago's CMA, as well as add additional, and potentially unbudgeted costs to ORC's regulatory functions (such as the need for legal opinions, appeals to consent processes) as the interpretation and implementation of the NES-F in the CMA is tested.
- [31] The regional sector has clearly articulated the likely ongoing risks to Regional Council operations, and ORC should reinforce this via a submission to this consultation supporting the Ministry's preferred option.

Climate Change Considerations

- [32] While the consultation is not directly related to implementing climate change mitigation or adaptation, the concern that the NES-F may add complexity, costs, and restraints to otherwise appropriate activities is relevant. Future activities which may be desirable or

even necessary to manage the impacts of climate change could be delayed or prohibited under the status quo.

Communications Considerations

[33] Council staff have been collaborating with regional sector colleagues, and the Ministry, to better understand the issues with the status quo of the NES-F. An ORC submission to the Ministry will further support that process.

NEXT STEPS

[34] If approved by Council, a submission will be lodged. The outcome of this current consultation will be reported back to Council following the decision of the Ministry.

ATTACHMENTS

1. Discussion Document Managing our Wetlands in the Coastal Marine Area - Final [6.1.1 - 23 pages]
2. ORC Submission on Managing our Wetlands in the Coastal Marine Area [6.1.2 - 2 pages]
3. Te Uru Kahika submission on NESF Exposure Draft and Coastal Wetlands [6.1.3 - 17 pages]
4. Te Uru Kahika submission on Managing Wetlands in the Coastal Marine Area - September 2022 - Draft [6.1.4 - 27 pages]



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



Ministry for the
Environment
Manatū Mō Te Taiao



Te Kāwanatanga o Aotearoa
New Zealand Government

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1 Managing our wetlands in the coastal marine area

Section 1: Managing our wetlands in the coastal marine area – consultation on a preferred option

Overview

In the coastal marine area (CMA),¹ wetlands and estuaries are the meeting place of terrestrial and marine environments. They act as a buffer zone, protecting coastlines from erosion and filtering contaminants from upstream land use. They also provide ecosystem services, such as water filtration, carbon sequestration and flood protection. They are sources of mahinga kai and resources such as raupō, and are part of New Zealand’s network of waterways over which kaitiakitanga is exercised. They are often sites of cultural and spiritual significance.

The National Policy Statement for Freshwater Management (NPS-FM) and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) set requirements for freshwater and its ecosystems, including the protection of wetlands found in the CMA.

Context: Why are we talking about this now?

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.

However, many councils and stakeholders initially interpreted the NES-F as applying only to natural *inland* wetlands (which are natural wetlands not in the CMA). They therefore continued to rely on coastal plans to regulate activities that affect wetlands within the CMA.

In November 2021, the High Court held in *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated*² (the High Court decision) that the NES-F wetland provisions do apply to natural wetlands in the CMA.

The High Court decision has prompted stakeholders and councils to raise the implications of applying the NES-F wetland provisions over top of the New Zealand Coastal Policy Statement (NZCPS) and coastal plan rules (see [The regulatory framework](#) for further background).

Key issues

Two key issues have been identified.

- 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.

¹ CMA means the foreshore, seabed and coastal water, and the air space above the water, of which the seaward boundary 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 ([section 2, RMA](#)).

² *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113.

² Managing our wetlands in the coastal marine area

- 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.

The physical extent to which the NES-F wetland provisions should apply within the CMA is unclear

The original policy intent was that the NES-F apply to all natural wetlands, including 'coastal wetlands', preliminarily defined in the [Action for Healthy Waterways discussion document 2019](#) as 'natural wetlands found around the margins of estuaries and intertidal areas, and include salt marsh and mangrove areas'.³

The NES-F relies on the definition of [natural wetland](#), as opposed to '[natural inland wetland](#)', to indicate that the NES-F wetland provisions apply in the CMA. 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.

The High Court noted it was unlikely that the NES-F wetland provisions were intended to apply to the entire CMA (ie, from mean highwater springs to the outer limit of the territorial sea). But the physical extent of what constitutes a natural wetland within the CMA was not specified by the Court.⁴

The physical extent to which the NES-F wetland provisions apply in the CMA needs to be clarified. The application of the NES-F provisions beyond the areas originally intended is difficult and impractical for councils.

Applying the NES-F wetland provisions in the CMA could prevent or constrain activities unlikely to cause the loss or degradation of natural wetlands

The NES-F provisions (eg, earthworks, vegetation clearance and water takes/discharges), apply to a wide range of coastal activities. Some coastal activities that have previously been managed by regional councils through coastal plans are unlikely to fall within existing or proposed consent pathways in the NES-F. As the more stringent NES-F provisions apply, these activities are captured as prohibited or non-complying.

Councils and stakeholders have pointed to examples of activities where this is the case, in particular relating to: mangrove clearance; the construction of structures in the CMA; dredging associated with harbour maintenance; vessel use; and aquaculture operations. Further impacted coastal activities are likely to arise as the NES-F continues to be implemented.

Additionally, the take, use and discharge of water has less of an impact on wetlands in the CMA as compared to inland wetlands due to the influence of tides. The relevant NES-F regulations may unnecessarily constrain operations that require such activities in the CMA.

³ Ministry for the Environment. 2019. [Action for healthy waterways – A discussion document on national direction for our essential freshwater](#). Wellington: Ministry for the Environment. p 44.

⁴ *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113 at [117].

3 Managing our wetlands in the coastal marine area

While the initial policy intent was for the NES-F to protect wetlands in the CMA, the application of the NES-F goes beyond this intent by preventing appropriate coastal activities from occurring, especially those with minor effects.

More could be done to identify and address the specific risks faced by wetlands in the CMA. Issues such as sedimentation, harmful marine activities, emerging contaminants, and climate change are known to impact the CMA. The NES-F may not be the best means to address these issues.

Case study

This case study shows the impact of the NES-F on a recent coastal consent application.

Case study: Rangitane Maritime Development

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 (FTA).

The FTA sets out criteria for projects that may be referred to an expert consenting panel or lodged with the Environmental Protection Authority (EPA). A project is not eligible to be referred or lodged if it includes an activity that is described as a prohibited activity in the Resource Management Act 1991 (RMA) or regulations made under the RMA, including a national environmental standard.

The Rangitane Maritime Development project was referred to a panel and lodged with the EPA prior to the High Court decision in *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated*. However, following the decision, the activity status of the proposed reclamation earthworks within the project were reassessed and the panel determined that those aspects of the proposal are now prohibited activities under the NES-F. Therefore, the panel cannot progress the consent application.

This means the public boat ramp facility, which may have had minor effects on the environment, is unable to be built under the current NES-F settings.

The regulatory framework

National regulation of wetlands in the CMA

There are three pieces of national direction under the Resource Management Act 1991 (RMA) that contain provision for the management of wetlands in the CMA.

The National Policy Statement for Freshwater Management (NPS-FM)

The NPS-FM sets national direction for freshwater and its ecosystems. While the policies in the NPS-FM relate only to natural inland wetlands, there are requirements to manage impacts of up-catchment freshwater and land use on **receiving environments** – which include wetlands and estuaries in the CMA.

The requirements for receiving environments under the NPS-FM relate to managing the impacts on receiving environments from upstream. For this reason, they are distinct from the regulations in the NZCPS and NES-F, both of which currently regulate activities within the CMA.

The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F)

The NES-F regulates activities that are likely to cause adverse effects on natural wetlands, including those within the CMA.

The NES-F regulates three things – vegetation clearance, earthworks and water takes/discharges – for select purposes (eg, construction of specified infrastructure, maintenance of wetland utility structures). These select purposes are provided for through consent pathways (eg, construction of specified infrastructure is discretionary). There are general non-complying or prohibited rules for any purpose not specifically provided for and for the activities likely to impact a natural wetland (eg, activities that would result in the complete or partial drainage of a natural wetland).

The New Zealand Coastal Policy Statement (NZCPS) and coastal plans

Activities in the CMA (including those in and around wetlands) are regulated by the NZCPS and addressed under coastal plans, driven by the matters set out in [section 12](#) of the RMA (which requires resource consent for activities not specifically permitted in coastal plans).

Activities that are undertaken in the CMA (eg, 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.

How the NES-F and NZCPS work together

Regulations in coastal plans must be read alongside the regulations in the NES-F. Where both the NES-F and a coastal plan regulate an activity, the more stringent regulation prevails and must be adhered to by resource users.

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.

How wetlands are defined

[The Resource Management Act 1991 \(RMA\)](#) defines ‘wetland’ as including permanently or intermittently wet areas, shallow water and land water margins.⁵

[The National Policy Statement for Freshwater Management 2020 \(NPS-FM\)](#) uses the terms ‘natural wetland’ (which is the RMA definition, subject to three exclusions⁶) and ‘natural inland wetland’ (which is a natural wetland not in the CMA).

[The Resource Management \(National Environmental Standards for Freshwater\) Regulations 2020 \(NES-F\)](#) exclusively uses the term ‘natural wetland’, as its provisions apply to all natural wetlands, including those in the CMA.

[The New Zealand Coastal Policy Statement 2010 \(NZCPS\)](#) does not define wetland, or coastal wetland, but its policies require that councils manage coastal wetlands through provisions in regional coastal plans (coastal plans).

⁵ See the full definition of ‘wetland’ in [section 2, RMA](#).

⁶ See the full definition of ‘natural wetland’ at Subpart 3, clause 3.2(1) of the [NPS-FM](#).

5 Managing our wetlands in the coastal marine area

Preferred option to amend the NES-F

The Ministry is seeking to address the above issues associated with the application of the NES- F wetland provisions to the CMA, and to ensure that the protection of natural wetlands in the CMA from loss and degradation is achieved effectively. Three approaches were considered in the development of this discussion document, which are discussed in detail under [Section 3: Interim Regulatory Impact Analysis – Options considered](#).

This discussion document seeks your feedback on the Ministry’s preferred option, which is to amend the NES-F so that the wetland provisions do not apply to wetlands in the CMA ([Option 2](#)). This could be achieved through a simple amendment to definitions used in the NES-F.

AMEND THE NES-F SO THE WETLAND PROVISIONS DO NOT APPLY TO THE CMA

Replace all references to natural wetland in the NES-F with natural [inland](#) wetland and define ‘natural inland wetland’ by reference to the existing definition in the NPS-FM⁷. This would clarify that the NES-F wetland provisions no longer apply to natural wetlands in the CMA.

How wetlands in the CMA would continue to be managed

Wetlands in the CMA would continue to be managed through the NZCPS, coastal plans and section 12 of the RMA.

Councils would still be required to pursue integrated catchment management through requirements in the NPS-FM to manage freshwater and land-use in a way that mitigates adverse effects on receiving environments (which may include estuaries and the wider coastal marine area).

The Ministry has a work programme focussed on providing better outcomes for estuaries, which is currently in the planning stage. Within this work programme there will be scope to further consider protections for wetlands in the CMA. This is a separate work programme and will therefore have its own public consultation process.

This development of estuaries policy will also clarify the relationship between the NPS-FM and the NZCPS, and provide for better integration across freshwater and coastal management.

⁷ The NPS-FM defines ‘natural inland wetland’ as ‘a natural wetland that is not in the coastal marine area’ (3.21, [NPS-FM](#)).

⁶ Managing our wetlands in the coastal marine area

Section 2: How to have your say

The Government welcomes your feedback on this consultation document, at <https://consult.environment.govt.nz/freshwater/managing-our-wetlands-in-the-coastal-marine-area>. The questions posed in this document are a guide only and all comments are welcome. You do not have to answer all the questions.

To ensure your point of view is clearly understood, you should explain your rationale and provide supporting evidence where appropriate.

Consultation questions

1. Do you agree that the current application of the NES-F to the CMA requires amendment? Why/why not?
2. Do you agree with the proposal to amend the NES-F wetland provisions to no longer apply to the CMA? Why/why not?
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?
4. Are there any reasons to prefer other options? If so, what are they?
5. Is there any additional relevant information that you think the Ministry should consider?

Timeframes

This consultation starts on 10 August 2022 and ends at midnight on 21 September 2022.

When the consultation period has ended, we will report back to the Minister for the Environment on submissions received and develop final policy advice that considers these submissions.

How to provide feedback

There are two ways you can make a submission:

1. via Citizen Space, our consultation hub, available at <https://consult.environment.govt.nz/freshwater/managing-our-wetlands-in-the-coastal-marine-area>
2. write your own submission.

If you want to provide your own written submission you can provide this as an uploaded file in Citizen Space.

We request that you don't email or post submissions as this makes analysis more difficult. However, if you need to, please send written submissions to Managing our wetlands in our coastal marine area, Ministry for the Environment, PO Box 10362, Wellington 6143 and include:

- your name or organisation
- your postal address
- your telephone number
- your email address.

If you are emailing your feedback, send it to WetlandsTeam@mfe.govt.nz as a:

- PDF, or
- Microsoft Word document (2003 or later version).

Submissions close at midnight on 21 September 2022.

More information

Please direct any queries to:

Email: WetlandsTeam@mfe.govt.nz

Postal: Managing our wetlands in the coastal marine area, Ministry for the Environment,
PO Box 10362, Wellington 6143

Publishing and releasing submissions

All or part of any written comments (including names of submitters), may be published on the Ministry for the Environment's website, environment.govt.nz. Unless you clearly specify otherwise in your submission, the Ministry will consider that you have consented to website posting of both your submission and your name.

Contents of submissions may be released to the public under the Official Information Act 1982 following requests to the Ministry for the Environment (including via email). Please advise if you have any objection to the release of any information contained in a submission and, in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information. We will take into account all such objections when responding to requests for copies of, and information on, submissions to this document under the Official Information Act.

The Privacy Act 2020 applies certain principles about the collection, use and disclosure of information about individuals by various agencies, including the Ministry for the Environment. It governs access by individuals to information about themselves held by agencies. Any personal information you supply to the Ministry in the course of making a submission will be used by the Ministry only in relation to the matters covered by this document. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that the Ministry may publish.

Section 3: Interim regulatory impact analysis

Context and related work programmes

The Ministry is currently proposing changes to the wetland provisions in the NES-F and NPS-FM as part of the work programme *Managing our wetlands*. This includes proposed amendments to the exclusions within the definition of a natural wetland, along with other proposals, including consent pathways for additional operations. Consultation on those changes closed on 10 July 2022, but information on them is still available in the [consultation section of the Ministry's website](#).

The proposal in this discussion document relates to, but is distinct from, that work as it relates specifically to whether the NES-F wetland provisions should apply to the CMA.

For additional background see [the regulatory framework](#) and other amendments being progressed (above in [Section 1](#)).

Future policy development for the protection of estuaries could result in options that also provide further protection for wetlands in the CMA. However, this policy development would occur through a separate process.

Policy problem

The policy problem is twofold.

- 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.

For a detailed description of these issues and how they have come about see [Section 1 – Key issues](#).

Objectives

The purpose of this analysis is to assess which option best addresses the policy problem set out above. The preferred option will best achieve the following objectives:

- Effectiveness
- Practicality
- Gives effect to Te Mana o Te Wai
- Takes into account Te Tiriti o Waitangi (the Treaty of Waitangi).

The criteria by which these objectives will be assessed, as compared to the status quo, are set out in [Section 3.4](#) below.

Criteria used to compare options to the status quo

The following criteria have been considered in assessment of whether the options meet the above objectives.

- a) **Effectiveness** – Does the option:
 - address activities most likely to cause loss and degradation of wetlands in the CMA
 - manage wetlands in an integrated way on a whole-of-catchment basis and considers the effects on receiving environments
 - support the objectives of the RMA, the NES-F, the NPS-FM and the NZCPS
 - treat regulated parties equally and fairly?
- b) **Practicality** – Is the option:
 - implementable and able to be understood by users
 - flexible – takes a risk-based approach and is tailored to the threats faced by a wetland in the CMA
 - accessible – interacts well with other relevant systems
 - trusted by all stakeholders
 - likely to achieve maximum benefits with minimum wasted effort or expense?
- c) **Gives effect to Te Mana o te Wai** – Does the option:
 - place the wellbeing of the water first, and promote values-based, holistic management to sustain the wellbeing of the people
 - acknowledge mātauranga Māori
 - give practical expression to the principles of Te Mana o te Wai?
- d) **Takes into account Te Tiriti** – Does the option:
 - take into account the principles of Te Tiriti
 - promote partnership and protect Māori rights/interests, and relationships with their taonga?

Limitations of analysis

The total area of the CMA that would be classified as natural wetland, or impacted by the 10-metre and 100-metre setbacks in the NES-F wetland provisions (under the [status quo](#) or [Option 1](#)), has not been determined. However, we are aware that under the status quo, the NES-F could be interpreted to apply to over 15,000 kilometres of the New Zealand coastline, out to a depth of several metres.

Costs associated with administering the regulations, consent applications and compliance have yet to be quantified. It is likely the costs will vary by region but they are expected to be substantial, particularly for those regions with large coastal areas, eg, Auckland and Northland.

The scope of this impact assessment is focussed on the question of whether the wetland provisions in the NES-F should continue to apply to the CMA. It does not make any wider

assessment of the NES-F or NPS-FM. These instruments were the subject of public consultation, and a significant body of analysis and advice, before being agreed by Cabinet in 2020 – they are not examined further in this document. Nor does this document consider the impact of any future work to come, as part of better protecting estuaries.

Te Tiriti

The options outlined in this interim regulatory impact analysis are of a limited scope, focussed on how the existing NES-F wetland provisions should apply (or not) to the CMA. The assessment of iwi/Māori interests is considered within the context of this limited scope of options.

The broader NES-F and its structure were subject to extensive engagement and consultation before being agreed by Cabinet in 2020.

Options considered

In working through viable options to address the [policy problem](#) set out above (and described in more detail in [Section 1](#)), we considered three possible approaches. These are discussed in full below and are as follows:

- [Retain the status quo](#): The NES-F continues to apply to the CMA (unchanged)
- [Option 1](#): Amend the NES-F to clarify where and how it applies to the CMA
- [Option 2](#): Amend the NES-F so its wetland provisions do not apply to the CMA

Retain the status quo: The NES-F continues to apply to the CMA (unchanged)

If the status quo is retained, uncertainty will remain about where in the CMA the NES-F wetland provisions apply due to the broad RMA definition of wetland and associated definition of natural wetland in the NES-F.

The current overlap between the NZCPS, coastal plan rules and the NES-F wetland provisions will also remain under the status quo.

For more detail about how the regulatory framework currently works see [Section 1](#).

Under the status quo, any person conducting an activity in the CMA must:

- determine if their activity falls within an area defined as a natural wetland; and, if so,
- comply with the most stringent activity status. If the NES-F is more stringent, that will apply. If the regional coastal plan is more stringent, it will apply; and
- ascertain which conditions apply. A plan rule can have conditions that deal with different effects of the activity regulated by a National Environmental Standard (NES) but if the plan's conditions deal with the same effects, then the NES prevails.

A wide range of coastal activities in or around natural wetlands would continue to be managed under the NES-F, and some coastal activities managed by coastal plans such as reclamation, dredging or mangrove management, are unlikely to meet the conditions under existing or proposed consent pathways in the NES-F.

Many activities would therefore be captured as prohibited or non-complying under the NES-F, where they would otherwise have been adequately and appropriately managed by coastal plans.

Councils would continue to be required to amend coastal plans where there is duplication with an NES-F provision as soon as reasonably practicable, even where activities would be more appropriately managed by coastal plans.

Retaining the status quo is likely to involve a substantive analysis for councils, require amendments to coastal plans and generate costs for councils and resource users. Many councils have told us they were unaware that the NES-F would apply to the CMA and therefore have not planned or budgeted for this work, which in some cases will be extensive.

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

Option 1 is to amend the NES-F to clarify the physical extent to which the natural wetland definition (and therefore the NES-F wetland provisions) applies in the CMA and to amend the wetland provisions to reflect which rules are applicable to the CMA. This option would not alter the underlying position that the NES-F wetland provisions apply to the CMA.

The two changes would be to:

- clearly define what is a 'natural coastal wetland' for the purpose of the NES-F
- amend the NES-F to clarify which rules apply to 'natural coastal wetlands'.

This would retain the NES-F wetland provisions in the CMA, but would clarify where and how they apply. The proposed amendments would alleviate some of the conflict/duplication between rules in coastal plans and the rules in the NES-F, but councils would still need to amend existing or proposed coastal plans.

Define a 'natural coastal wetland' in the NES-F

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

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

- is within the coastal marine area (CMA);
- is part of a tidal estuarine hydrosystem⁸; 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 contour⁹ within the coastal hydrosystem.

⁸ 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.

⁹ 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.

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.

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.

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](#).

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.'¹⁰ 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.

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. 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).

Amend the NES-F to clarify which rules apply to natural coastal wetlands in the CMA

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)
- 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)
- 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).

Take, use, damming, diversion or discharge of water

Amend the NES-F so that the rules regarding the take, use, damming, diversion or discharge of water in the NES-F apply only to natural inland wetlands, and not 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.

¹⁰ Ministry for the Environment. 2019. [Action for healthy waterways – A discussion document on national direction for our essential freshwater](#). Wellington: Ministry for the Environment. p 44.

Vegetation clearance

Provide an exemption for mangroves from vegetation clearance rules in the NES-F.

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.

Earthworks

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.

Other consent pathways

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.

Note that the new consent pathways being proposed through the *Managing our wetlands* work programme (ie, for quarrying, fills, mineral mining, urban development) are proposed to only apply to natural inland wetlands.

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 overlap with other regulations and legislation

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.

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](#).¹¹

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

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'.

This option would resolve ambiguity about where the NES-F wetland provisions apply in the CMA and would not require further policy work to define natural wetlands within the CMA.

This option also addresses the issue that the NES-F does not appropriately manage some activities in the CMA. It alleviates workability issues associated with some appropriate coastal activities being constrained by the more stringent prohibited or non-complying activity status in the NES-F, when they were effectively and appropriately managed through coastal plans.

It would also remove the regulation of activities (under the NES-F), such as the take, use and discharge of water, which do not require regulation in the CMA, due to tidal influence.

Wetlands in the CMA would continue to be managed through the NZCPS, existing coastal plans, and section 12 of the RMA.

Councils would also have ongoing requirements under the NPS-FM to provide for an integrated management approach, including recognition of, and objectives to address, the impacts of freshwater and up-catchment land use, on receiving environments – which include estuaries and the wider coastal marine area.

Non-regulatory options

We do not consider that non-regulatory options (such as technical guidance and support for councils) sufficiently address the implementation challenges outlined in this document.

¹¹ 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.

15 Managing our wetlands in the coastal marine area

Comparative analysis of options against the status quo

Table 1: Comparative analysis of Option 1 and Option 2 against the status quo

Criteria	Status quo	Option 1: Amend the NES-F to clarify where and how it applies to the CMA	Option 2: Amend the NES-F so its wetland provisions do not apply to the CMA
Effectiveness	0	<p>+</p> <p>Addresses some activities likely to cause loss or degradation of wetlands in the CMA by retaining some stringent regulatory provisions under the NES-F for the protection of natural coastal wetlands.</p> <p>Provides for integrated catchment management by enabling councils to develop plan rules that appropriately manage the impacts of freshwater and land use on their receiving environments (requirements to do so remain under the NPS-FM).</p> <p>Supports the requirements of the RMA, NPS-FM and NES-F, but requirements in the latter will continue to overlap with the NZCPS, in some instances inappropriately.</p> <p>Despite the amendments, the NES-F rules will still overlap with regional coastal plan rules, leading to duplication or conflict. That could threaten regional council objectives and may result in some activities being subject to overly stringent rules in the NES-F, instead of more appropriate coastal plan rules.</p>	<p>+</p> <p>Addresses some activities (through identification and associated rules in coastal plans) that are likely to cause loss and degradation of wetlands in the CMA.</p> <p>Would remove rules that are ineffective at regulating impacts in the CMA, eg, water takes and discharges.</p> <p>Provides for integrated catchment management by enabling councils to develop plan rules that appropriately manage the impacts of freshwater and land use on their receiving environments (requirements to do so remain under the NPS-FM).</p> <p>Supports the requirements of the RMA and NPS-FM but recognises that the requirements in the NES-F may be less appropriate for managing adverse effects on wetlands in the CMA than other national direction (coastal plans under the NZCPS).</p> <p>Removes overlap with coastal plan rules and supports regional councils to achieve their objectives through retaining coastal plans as the primary tool for wetlands in the CMA.</p>
Practicality	0	<p>+</p> <p>Reduces some of the duplications or conflicts between the NES-F and coastal plan rules, but the remaining regulatory regime is complex and may be difficult for users to understand.</p> <p>The NES-F is tailored to natural inland wetlands and does not take a risk-based approach for wetlands in the CMA.</p> <p>Amending the NES-F wetland provisions to address some of the known workability issues when applied to the CMA should minimise the need for</p>	<p>++</p> <p>Resolves workability issues associated with applying the natural wetland definition in the CMA, and provides clarity for regulated parties and regulators.</p> <p>Section 12(1) of the RMA restricts resource use activities in the CMA unless expressly allowed by a national environmental standard, a rule in a regional coastal plan or a resource consent.</p>

Criteria	Status quo	Option 1: Amend the NES-F to clarify where and how it applies to the CMA	Option 2: Amend the NES-F so its wetland provisions do not apply to the CMA
		<p>councils to amend existing or proposed coastal plans, as the amendments should address duplication or conflict between the NES-F and coastal plans.</p> <p>The natural coastal wetland definition will provide some clarity as to where the NES-F wetland provisions apply in the CMA but is likely to still require substantive guidance and may continue to result in broader areas being captured than was the initial policy intent.</p> <p>Issues remain with defining a wetland in the CMA so that the regulations would appropriately apply, eg, some regulations may apply appropriately to a saltmarsh but not to a shallow harbour.</p> <p>Retains the existing framework which is causing conflict and confusion due to the application of two separate management systems and associated rules in the CMA, under the NES-F and coastal plans under the NZCPS.</p> <p>Does not provide for maximum benefit, as the NES-F does not regulate the full range of threats to wetlands in the CMA but is likely to require substantial effort from councils to amend plan rules.</p>	<p>The NZCPS and coastal plan rules take a risk-based approach for most activities in the CMA, including those likely to impact natural wetlands. Existing coastal plan rules that are developed for the circumstances within regions continue to apply.</p> <p>Avoids the necessity for councils to amend their plans to avoid duplication between NES-F and coastal plan rules under s44(A)(5) of the RMA.</p> <p>Interacts well with the existing framework where the NZCPS manages activities in the CMA while the NPS-FM manages up-catchment land use and freshwater to achieve best outcomes for receiving environments.</p> <p>Limits the application of regulations that already underwent a full consultation process. However, there was not a common understanding of the application of the NES-F in that previous consultation, so this present consultation seeks feedback on this, with clarity about the proposed application.</p> <p>Minimises effort and expense to councils, and allows for a more nuanced approach to managing threats to wetlands in the CMA through the NZCPS and coastal plan rules.</p>

Criteria	Status quo	Option 1: Amend the NES-F to clarify where and how it applies to the CMA	Option 2: Amend the NES-F so its wetland provisions do not apply to the CMA
Gives effect to Te Mana o te Wai	0	<p>0</p> <p>Removes some of the NES-F wetland provisions in the CMA, providing more stringent protection of freshwater in these environments.</p> <p>Promotes a holistic approach by overlapping freshwater and coastal management tools.</p> <p>NES-F provisions may over-ride coastal plan rules developed in consultation with communities and tangata whenua to recognise mātauranga Māori and region-specific tikanga.</p> <p>Gives practical expression to some principles of Te Mana o te Wai in line with the status quo.</p>	<p>0</p> <p>Removes all NES-F wetland provisions in the CMA, but retains the protections for wetlands in the CMA as freshwater receiving environments under the NPS-FM.</p> <p>Recognises that the NES-F may not address the key threats or values associated with wetlands in the CMA .</p> <p>Removes provisions in the NES-F that could over-ride coastal plan rules developed in consultation with communities and tangata whenua, and ensures that mātauranga Māori and region specific tikanga can continue to be recognised through coastal plans.</p> <p>Gives practical expression to some principles of Te Mana o te Wai in line with the status quo.</p>
Takes into account Te Tiriti o Waitangi (the Treaty of Waitangi)	0	<p>0</p> <p>The remaining NES-F wetland provisions will continue to cut across regional coastal plan rules that have had input from Te Tiriti partners.</p> <p>At this stage, no further engagement has been undertaken with our Te Tiriti partners to understand the possible impact on their rights and interests in the CMA.</p> <p>Retains regulation 37 of the NES-F, that nothing in the regulations applies to the customary harvest of food or resources undertaken in accordance with tikanga Māori. Does not provide scope for the recognition of other activities that may be undertaken in accordance with tikanga Māori in the CMA.</p>	<p>+</p> <p>Removal of the NES-F from the CMA will allow for the unobstructed management of wetlands in the CMA through coastal plans. Under the RMA and NZCPS, development of coastal plan rules require councils to effectively consult with Te Tiriti partners. An example of where a regional council has adopted a partnership approach to environmental management in the CMA is the Ōhiwa Harbour Strategy with the Bay of Plenty Regional Council.</p> <p>Maintains regulation of wetlands in the CMA at a regional and local level, where mana whenua can input local knowledge to best protect local values and environmental objectives for coastal wetlands.</p> <p>Enables regional councils (through coastal plans) to 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.</p>
Overall assessment	0	<p>+</p> <p>Option 1 could not be progressed under timeframes for the <i>Managing our wetlands</i> work programme as it would require further development, collaboration and consultation. The amendments would not be in place in until</p>	<p>++</p> <p>Option 2 could be progressed alongside the proposed changes to the wetland provisions in the NES-F and NPS-FM as part of the <i>Managing our wetlands</i> work programme. The amendments could be in place by late 2022.</p>

Criteria	Status quo	Option 1: Amend the NES-F to clarify where and how it applies to the CMA	Option 2: Amend the NES-F so its wetland provisions do not apply to the CMA
		<p>later in 2023. Ongoing workability issues for regulated parties and regulators would remain in the interim.</p> <p>The NES-F wetland provisions may not be the most effective tool to achieve the Government’s objectives for wetlands in the CMA as the NES-F is broad in its application to the CMA and limited in its capability to effectively regulate the range of activities that occur in or near wetlands in the CMA.</p> <p>Applying the NES-F wetland provisions in the CMA is not practical and even under this option, which leads to a complex and ambiguous regulatory regime that is unlikely to enhance the benefits of coastal plan rules.</p> <p>It gives effect to some principles of Te Mana o te Wai, but is not a holistic way to manage a wetland in the CMA, and further engagement with Te Tiriti partners would be needed to better incorporate mātauranga Māori and understand potential impacts on rights and interests in the CMA.</p>	<p>This would provide a more immediate and effective resolution, and greater clarity for regulated parties and regulators.</p> <p>Addresses concerns raised by regional councils regarding planning, consenting and compliance in the CMA, and reduces costs to councils and applicants. Protection continues through the NZCPS and existing plan rules.</p> <p>This option recognises that the regulation of vegetation clearance, earthworks and land disturbance, and water takes and discharges through the NES-F wetland provisions may not be appropriate for wetlands in the CMA. It acknowledges that threats and community objectives and outcomes for wetlands in the CMA may be best managed through tailored rules in coastal plans.</p> <p>It upholds a regional risk-based approach to managing wetlands within the CMA, which provides scope for regional councils (through coastal plans) to determine (and consult with their communities and Te Tiriti partners on) what activities should be regulated to best protect wetlands in the CMA.</p>

Example key for qualitative judgements:	
++ much better than doing nothing/the status quo	- worse than doing nothing/the status quo
+ better than doing nothing/the status quo	-- much worse than doing nothing/the status quo
0 about the same as doing nothing/the status quo	

Which option is most likely to address the problem?

Analysis of options

Retaining the status quo would mean the ambiguity around the physical extent to which the NES-F wetland provisions apply to the CMA would remain. Councils would also face the cost of amending existing or proposed coastal plans to remove duplication or conflict with the NES-F, even where activities were more appropriately managed by coastal plan provisions.

Option 1 would go some way to addressing this, but would not resolve all potential conflict. As additional conflicts emerge over time, subsequent amendment would be required to address the ongoing implications of applying the NES-F to the CMA.

There are likely to be further instances, beyond those addressed in Option 1, where coastal plan rules and NES-F rules conflict, leading to the requirement for councils to amend their coastal plans under section 44(A)(5) of the RMA and more stringent provisions applying, even if this is not appropriate.

Even with a new definition of natural coastal wetland introduced under Option 1, it is likely that uncertainty over natural coastal wetland identification would remain an issue. Substantive guidance would be needed for councils and resource users to help determine if a habitat is a natural coastal wetland.

We further note that the NES-F regulations, even if amended under Option 1, may be insufficient to fully address the wide range of threats that impact wetlands in the CMA. The risks to wetlands in the CMA are different from the risks to inland wetlands. The NES-F is well structured to address risks to inland wetlands, but does not effectively address coastal risks specific to wetlands in the CMA (eg, sedimentation, marine activities, climate change).

We consider that coastal plans under the NZCPS and section 12 of the RMA remain the best mechanisms for managing the range of impacts on natural wetlands in the CMA at the present time. While more could be done to improve the management and protection of CMA wetlands in the future, it is apparent from the uncertainty and workability issues under the current application of the NES-F wetland provisions to CMA wetlands, that the NES-F is not the appropriate tool for achieving this.

Option 2, to amend the NES-F so its wetland provisions do not apply to the CMA, is the preferred option.

Estimated costs and benefits of the preferred option (Option 2)

An initial assessment of the estimated costs and benefits of Option 2 to amend the NES-F so that it no longer applies to the CMA, is set out below.

Regional councils: Option 2 will minimise costs to regional councils associated with administering the wetland provisions within the CMA, and avoid the need for councils to update existing or draft coastal plans to address duplication or conflict with the NES-F.

Resource users: Option 2 will reduce costs to resource users associated with consent application fees under the NES-F. It will also mitigate the legal risk of resource users

inadvertently undertaking activities that are captured as non-complying under the NES-F, but set out as permitted, controlled, restricted discretionary or discretionary in coastal plans.

Central government: Option 2 provides certainty about where the NES-F applies and simplifies regulatory processes. It will reduce costs in the system associated with a dual layer of regulatory policy by relying on coastal plan rules and section 12 of the RMA, which regulate activities and impacts on wetlands in the CMA.

Delivering the preferred option

Final Cabinet decisions on the full package of wetland amendments will be supported by a final regulatory impact statement and section-32 evaluation for all amendments. Cabinet consideration and gazettal could occur in late 2022, and could be progressed alongside the policy proposals within the *Managing our wetlands* process that is amending specific wetland provisions in the NES-F and NPS-FM.

Updated guidance will support the implementation of the full package of amendments to the wetland provisions in the NES-F and NPS-FM.



Our reference: A1686674

6 September 2022

Ministry for the Environment
Wellington
WetlandsTeam@mfe.govt.nz

Otago Regional Council submission on *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

Otago Regional Council (ORC) appreciates the opportunity to provide a submission to the Ministry for the Environment (Ministry) on this consultation *Managing our wetlands in the coastal marine area*.

Otago values its 480-kilometre coastline, which is diverse in natural and human values, including the two main harbours at Dunedin and Oamaru, many inlets and bays, and coastal wetlands. Therefore, the development of any national directions which would influence the management of the coastal marine area is of significant interest to ORC.

Due to how the coastal hydrosystem classification system is used to define what is a coastal wetland, large areas of the Otago harbour (mud/sand flats) would likely become subject to the NES-F's wetland provisions. ORC is concerned that may impact existing lawful activities, create uncertainty for future activities, and add additional costs in developing future ORC coastal policy as well as carrying out our regulatory functions.

ORC contributed to the Local Government Regional Sector's (the Sector) 6 July 2022 submission on the Ministry's exposure draft of proposed changes to the National Policy Statement for Freshwater Management (NPS-FM) and National Environmental Standards for Freshwater (NES-F) (including wetland regulations).

In that submission, the Sector advanced detailed reasons for why the NES-F should be further amended so that it did not apply within the coastal marine area (CMA). Rather than repeat those reasons in our submission, it is appended for reference, and the reasons are summarised as follows:

- No rationale has been provided for the inclusion of coastal wetlands in the NES-F
- Inland and coastal wetlands are not the same and require different management regimes, and a more appropriate route is already available for coastal wetlands
- The NES-F is imposing unnecessary costs on councils and coastal activities
- There is considerable uncertainty regarding how to delineate coastal wetlands
- The NES-F conflicts with other national direction.



ORC has also reviewed the Sector's draft submission on 'managing wetlands in the CMA' (appended), which builds on the Sector's 6 July 2022 submission. ORC supports this draft submission as it represents ORC's position, and we understand the other 15 regional councils also endorse it.

In conclusion, ORC confirms it supports the Ministry's preferred option which is to amend the NES-F so its wetlands provisions do not apply to the CMA.

If there is the opportunity, ORC would like to speak to its submission. ORC understands its submission may be publicly available via the Ministry's website.

Yours sincerely

Andrew Noone

Chair of Otago Regional Council

Encl.

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:

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021 592 285





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.tiakitamakimakaurau.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>





10 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
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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 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. This could potentially lead to inconsistent decisions around New Zealand which is contrary to the purpose of having national regulation. The 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.
10. 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.





11. 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 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'.
12. 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).
13. 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.
14. 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.
15. 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 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.
16. 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.

17. 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).
18. 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.
19. 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?

20. 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.
21. This is the simplest means of addressing the issues caused by the poorly conceived provisions of the NES-F. 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?

22. 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?

23. 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'.

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

25. 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.

26. 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.

27. The inclusion of 'coastal wetland' in brackets in the proposed definition is likely to generate confusion about natural vs non-natural 'coastal wetlands'.

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 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'.
29. 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'.
30. 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.'
31. 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.
32. 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.
33. 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 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.

34. 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).
35. 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?

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

Conclusion

37. 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 inadequate central government policy development for provisions included in the NES-F, where little benefit has been added.
38. 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.
39. 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.

40. 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.
41. More broadly, the regional sector reiterates the clear value to central government if policy development is co-designed with those that inherit these outputs, particularly regional and unitary councils. This will avoid two years of implementation problems with consequent delays and effects that do not advance a common interest to ensure that wetland management provisions are well considered.

Contact details

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

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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:

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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.tiakitamakimakaurau.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>



The general subject of each matter to be considered while the public is excluded, the reason for passing this resolution in relation to each matter, and the specific grounds under [section 48\(1\)](#) of the Local Government Official Information and Meetings Act 1987 for the passing of this resolution are as follows:

General subject of each matter to be considered	Reason for passing this resolution in relation to each matter	Ground(s) under section 48(1) for the passing of this resolution
<i>Minutes of the 24 August 2022 public excluded Council Meeting</i>	<p>Section 7(2)(a) To protect the privacy of natural persons, including that of deceased natural persons;</p> <p>Section 7(2)(b)(ii) To protect information where the making available of the information—would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.</p> <p>Section 7(2)(h) To enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities;</p> <p>Section 7(2)(i) To enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).</p>	
<i>Minutes of the 29 August 2022 Extraordinary public excluded Council Meeting</i>	<p>Section 7(2)(g) To maintain legal professional privilege.</p>	
<i>2.1 RPS Notification</i>	<p>Section 7(2)(g) To maintain legal professional privilege.</p>	<p>Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds:</p> <p>(a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.</p>

<p><i>2.2 Process for appointing a permanent Chief Executive</i></p>	<p>Section 7(2)(i) To enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).</p>	<p>Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds: (a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.</p>
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This resolution is made in reliance on [section 48\(1\)\(a\)](#) of the Local Government Official Information and Meetings Act 1987 and the particular interest or interests protected by [section 6](#) or [section 7](#) of that Act or [section 6](#) or [section 7](#) or [section 9](#) of the Official Information Act 1982, as the case may require, which would be prejudiced by the holding of the whole or the relevant part of the proceedings of the meeting in public are shown above.