

Practice Note:

Wetlands and Essential Freshwater 2020

Disclaimer: This memo does not constitute legal advice and should not be relied on as such.

Executive Summary

The Government's Essential Freshwater package aims to halt the ongoing loss of wetlands and values by ensuring that:

- Activities that may result in losses of natural inland wetlands are avoided where at all possible, although there are some limited exemptions; and
- Where those exemptions are met, activities are subject to the Effects Management Hierarchy specified in the National Policy Statement for Freshwater Management 2020 (NPSFM).

There are also controls on activities within, and up to 100m away from, natural wetlands. It is important to check both the National Environmental Standards for Freshwater 2020 (NES-F) and any relevant regional plans before undertaking any activities within 100m of wetlands to determine which controls apply and whether a resource consent is required.

Where consent is required, whether under the NES-F or a regional plan, the matters outlined in the NPSFM should be addressed as part of any application for resource consent.

Introduction

The Government's Essential Freshwater (Action for Healthy Waterways) package came into effect on 3 September 2020. As part of that package, the Government has recognised that the cumulative loss of natural inland wetland¹ habitats is an ongoing issue and has introduced provisions in the National Policy Statement for Freshwater Management 2020 (NPSFM) and National Environmental Standards for Freshwater 2020 (NES-F) to address this issue.

National Policy Statement for Freshwater Management 2020

Policy 6 of the NPSFM states:

***“Policy 6:** There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.”*

This policy is further refined by Section 3.22 (Natural Inland Wetlands) of the NPS-FM, which requires regional councils to include the following policy (or words to the same effect) into its regional plans:

¹ What constitutes a **natural inland wetland** is defined in section 3.21 of the NPSFM as follows:
“natural inland wetland means a natural wetland that is not in the coastal marine area”

Natural wetland is also defined:

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

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

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“The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:

- a) *the loss of extent or values arises from any of the following:*
 - i. *the customary harvest of food or resources undertaken in accordance with tikanga Māori*
 - ii. *restoration activities*
 - iii. *scientific research*
 - iv. *the sustainable harvest of sphagnum moss*
 - v. *the construction or maintenance of wetland utility structures (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
 - vi. *the maintenance or operation of specified infrastructure, or other infrastructure (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
 - vii. *natural hazard works (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020); or*
- b) *the regional council is satisfied that:*
 - i. *the activity is necessary for the construction or upgrade of specified infrastructure; and*
 - ii. *the specified infrastructure will provide significant national or regional benefits; and*
 - iii. *there is a functional need for the specified infrastructure in that location; and*
 - iv. *the effects of the activity are managed through applying the effects management hierarchy.”*

This policy specifies that loss of **natural inland wetlands** is to be avoided², but also covers situations where it may be acceptable to have a loss of wetland extent or values - when it is for one of the listed activities, or where there is a functional need and the activity is subject to the application of the Effects Management Hierarchy (see below).

Section 3.22 also has additional requirements in relation to implementation of Policy 6 through resource consents³, specifically:

- 2) *Subclause (3) applies to an application for a consent for an activity:*
 - a. *that falls within any exception referred to in paragraph (a)(ii) to (vii) or (b) of the policy in subclause (1); and*
 - b. *would result (directly or indirectly) in the loss of extent or values of a natural inland wetland.*
- 3) *Every regional council must make or change its regional plan(s) to ensure that an application referred to in subclause (2) is not granted unless:*
 - a. *the council is satisfied that the applicant has demonstrated how each step of the effects management hierarchy will be applied to any loss of extent or values of the wetland*

² The use of the term avoid in a planning context has been explored in the King Salmon line of caselaw and should be interpreted as “prevent the occurrence of; not allow”. See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

³ Guidance issued by the Ministry for the Environment for the NSPFM 2014 (amended in 2017) clarified that policies requiring plans to be amended should be treated as if they were included in plans, as it is a matter of **when** those amendments will be included, not **if**.

(including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity; and

- b. *any consent granted is subject to*
 - i. *conditions that apply the effects management hierarchy; and*
 - ii. *a condition requiring monitoring of the wetland at a scale commensurate with the risk of the loss of extent or values of the wetland.*

Application of the NPSFM provisions

These provisions apply to all activities that may affect wetlands whether they are earthworks, discharges, or water takes, diversions and uses. They therefore have wide-ranging implications for resource consenting in and around wetlands.

Consent decisionmakers are required to “*have regard*”⁴ to the relevant provisions of the NPSFM and regional plans when considering applications under s104 of the Resource Management Act 1991 (RMA). This means it is important that applicants and s42A officers undertake an assessment of these policies and whether a proposal is consistent with these provisions.

In having regard to these provisions, it is therefore necessary to consider whether the proposal will avoid any loss of extent or values⁵. Where a loss of extent or values cannot be avoided, it is necessary to determine whether the activity is one of those specified in clause (a) or is specified infrastructure meeting the requirements in clause (b)(i)-(iv). If not, significant weight should be given to the direction to “avoid” the activity and strong consideration should be given to refusing consent. Only when an application meets one of either (a) or (b) in the policy should application of the Effects Management Hierarchy be considered.

What is the Effects Management Hierarchy?

The Effects Management Hierarchy as it applies to natural inland wetlands and rivers is defined in the NPSFM:

“effects management hierarchy, in relation to natural inland wetlands and rivers, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) that requires that

⁴ Section 104(1), Resource Management Act 1991

⁵ **Loss of value** is defined in the NPSFM 2020:

“**loss of value**, in relation to a natural inland wetland or river, means the wetland or river is less able to provide for the following existing or potential values:

- a) any value identified for it under the NOF process; or
- b) any of the following, whether or not they are identified under the NOF process:
 - i. ecosystem health
 - ii. indigenous biodiversity
 - iii. hydrological functioning
 - iv. Māori freshwater values
 - v. amenity”

“Potential values” means that the activity must not preclude the potential for improvement in a value in the future.

Loss of extent is not defined but is likely to be as a result of reclamation, structures, earthworks, planting etc. which will reduce the area of natural inland wetland.

For clarity, the acronym “NOF” in this policy refers to the National Objectives Framework as defined in the NPSFM.

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- a) adverse effects are avoided where practicable; and
- b) where adverse effects cannot be avoided, they are minimised where practicable; and
- c) where adverse effects cannot be minimised, they are remedied where practicable; and
- d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; and
- e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; and
- f) if aquatic compensation is not appropriate, the activity itself is avoided”

Where a functional need is demonstrated (this is a high bar given the definition in the NPSFM), section 3.24(3) of the NPSFM requires that applicants demonstrate how the Effects Management Hierarchy has been applied to any loss of extent or values of the wetland. This includes demonstrating how the Effects Management Hierarchy has been applied to cumulative effects and loss of potential value for ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, natural character and amenity.

When should this information be provided?

The information above (whether an activity meets the criteria in the policy, Effects Management Hierarchy assessments) should be provided for all activities within or near wetlands.

Where that information is not provided, the application is incomplete in terms of Schedule 4 of the RMA⁶ and the application should be returned under s88 with reference to assessments required under section 3.22 of the NPSFM.

National Environmental Standards for Freshwater 2020

Given the direction to avoid further loss of values and extent of wetlands, the National Environmental Standards for Freshwater 2020 (NES-F) also include several regulations related to activities in and around **natural wetlands**⁷. These include controls on:

- Restoration of natural wetlands (clauses 38-39)
- Scientific research (clauses 40-41)
- Construction and maintenance of wetland utility structures⁸ (clauses 42-44)

⁶ Schedule 4(2)(2)(a)-(c) of the RMA requires an assessment of an activity against any relevant objectives, policies, rules (and requirements, conditions or permissions in those rules), and any other relevant requirements in a document referred to in Schedule 104(1)(b) of the RMA.

⁷ **Natural wetland** under the NES-F has the same definition as under the NPSFM:

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

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

⁸ The NES-F defines a **wetland utility structure** as:

- a) a structure placed in or adjacent to a wetland whose purpose, in relation to the wetland, is recreation, education, conservation, restoration, or monitoring; and

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- Construction of specified infrastructure (clause 45)
- Maintenance and operation of specified infrastructure and other infrastructure (clauses 46-47)
- Sphagnum moss harvesting (clauses 48-49)
- Arable and horticultural land use (clause 50)
- Natural hazard works (clause 51)
- Drainage of natural wetlands (clauses 52-53)
- Other activities including (clause 54)
- Vegetation clearance
- Earthworks
- Taking, use, damming, diversion or discharge of water

In addition to those matters, the NES-F also includes a suite of conditions for any activities permitted under the NES-F (clause 55) and matters of discretion for any activities subject to a restricted discretionary status (clause 56).

When undertaking activities within 100m of wetlands, it is important to check these provisions (together with the provisions of any ORC plan) to determine whether consent is required. Where consent is required, whether under a regional plan or the NES-F, it is necessary to consider the relevant policies in the NPSFM as these will have a direct impact on whether the proposed activity is likely to obtain consent.

Conclusion

This advisory note provides Otago Regional Council's current thinking on how the Government's Essential Freshwater package will affect consenting related to wetlands, and the need to avoid further loss of extent or value of these habitats. It is likely that there will be specific questions on these provisions in regard to particular proposals, so we offer 30 minutes free pre-application advice to help applicants. This can be arranged through a phone call to our Consents Public Enquiries team (0800 474 082) or by emailing public.enquiries@orc.govt.nz. This guidance **does not** constitute legal advice and should not be relied on as such.

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- b) for example, includes the following structures that are placed in or adjacent to a wetland for a purpose described in paragraph (a):
- i. jetties:
 - ii. boardwalks and bridges connecting them:
 - iii. walking tracks and bridges connecting them:
 - iv. signs:
 - v. bird-watching hides:
 - vi. monitoring devices:
 - vii. maimai"