

# Regulatory Impact Statement: Changes to the wetland regulations

## Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing the release of a discussion document
Advising agencies:	Ministry for the Environment
Proposing Ministers:	Minister for the Environment
Date finalised:	29 July 2021
Problem Definition	
<p>The implementation of the wetlands provisions in the National Policy Statement for Freshwater Management 2020 (NPS-FM) and in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (the NES-F) is generating consenting and compliance issues for several significant industries and for urban development in general.</p> <p>These issues are unintended, and the wetlands provisions require modification to support their effective implementation and to improve environmental outcomes.</p> <p>The problem does not relate to the fundamental intent to protect remaining wetlands. Stakeholder feedback generally supports that intent. Rather, the problem relates to interpretation difficulties with the current definition of natural wetland and the lack of consent pathways to enable certain activities and developments to be considered on their merits thereby achieving important social and economic outcomes while also achieving better environmental and freshwater outcomes.</p>	
Executive Summary	
<p>The NPS-FM and the NES-F came into force on 3 September 2020. Almost immediately following this date a range of industry and stakeholders identified issues with the implementation of the wetland provisions, particularly those in the NES-F.</p> <p>These issues were principally regarding the interpretation of the definition of natural wetlands by council staff and technical specialists, and the absence of a consenting pathway for certain industries and activities proposed to locate in or near a natural wetland. The term ‘natural wetland’ that the regulations use is a subset of the RMA definition. As it is currently defined, a natural wetland is being interpreted to include areas that, although technically wetlands, were not intended to be captured by the definition of a ‘natural wetland’ and subject to the regulations – such as seeps in pasture. This has led to more areas than intended being subject to the regulations.</p>	

The overall policy directive set out in the NPS-FM is that natural wetlands are important and should be protected is not being challenged. The changes proposed in this paper will not undermine the strong protection afforded to New Zealand's remaining natural wetlands but will address a range of implementation issues that have arisen relating to wetlands that are already highly modified, where social, economic and environmental outcomes can be achieved by enabling consenting pathways that mandate consideration of the potential ecological effects of proposals and related mitigation and enhancement opportunities.

In several instances significant urban development or the use of identified sites by industries has been unable to progress due to areas of land now being defined as natural wetlands. This is despite these wetlands being highly modified and now utilised for pasture and the applicant proposing extensive offset mitigation or restorative works elsewhere to compensate for the wetland loss.

Feedback from environmental non-governmental organisations (ENGOs), the Department of Conservation (DOC), councils and community groups has also indicated that the regulations for restoration of natural wetlands are making it difficult for groups to carry out desirable restoration and maintenance work and that the regulations need to include provision for biosecurity activities.

In response, the Ministry proposes to consult on changes to the NPS-FM and NES-F including:

- Changes to the definition of a natural wetland in the NPS-FM to remove inconsistent interpretation and ensure it does not capture more areas than intended
- Providing a consenting pathway for quarries, landfill, cleanfills and managed fills
- Providing a consenting pathway for mining, with possible additional checks and balances for this sector
- Providing a consent pathway for urban development listed in a district plan
- Amending the restoration provisions to better enable wetland restoration and maintenance and provide for biosecurity activities

The changes outlined above are the preferred option to address the issues identified with the implementation of the NPS-FM and NES-F wetland provisions. Alternative options that are assessed in this RIS include a status quo option for all changes and consideration of removing the rule 53 prohibited activity classification from the NES-F (thereby enabling a general consenting pathway) as an alternative to amending the natural wetlands definition and providing specific consent pathways for certain sectors/activities.

### **Limitations and Constraints on Analysis**

This RIS reviews the proposed amendments in general terms as an environmental management technique – any specific wording changes to the NES-F regulations will be developed following the closure of the consultation period.

A tracked changes version of the natural wetland definition is reviewed in this RIS – final decisions on any wording changes will occur post-consultation.

**Responsible Director**

*Hayden Johnston*  
*Director – Water and Land Policy*  
*Ministry for the Environment*



*18 August 2021*

**Quality Assurance (completed by QA panel)**

	Ministry for the Environment
Panel Assessment & Comment:	The Ministry for the Environment’s Regulatory Impact Analysis Panel has reviewed the RIS “Regulatory Impact Statement: Changes to the Natural Wetland regulations”, which will accompany the discussion document upon release. The Panel confirms that the level of information provided meets the quality assessment criteria, for this stage of the process, and is likely to lead to effective consultation on the proposals. The consultation will provide information where there are currently limits or uncertainty and later support the delivery of a Regulatory Impact Assessment to inform subsequent decisions.

## Section 1: Diagnosing the policy problem

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

#### Current state

1. Since coming into effect on 3 September 2020 the wetland regulations in the NES-F have been identified by a range of stakeholders, including councils, ENGOs, land development and industry organisations as having a significant impact on their activities, including restricting access to a resource consenting pathway.
2. The current approach to wetland management is binary in nature, with activities such as earthworks *within* a natural wetland either provided for in limited circumstances or prohibited outright. Key issues with the prohibited activity rule relate to the limited provision for an alternative consenting pathway (eg it is only for certain sectors/activities listed in 3.22 of the NPS-FM). This is restricting development in or near a wetland to be able to be considered on its merits and its effects on the wetland appropriately assessed and avoided or mitigated. Prior to the NES-F coming into force this *could* occur through offset mitigation or wetland restoration being imposed by resource consent conditions (although this was variable).
3. Stakeholders in the quarrying, landfill, cleanfill and managed fills, mining and urban development industry sectors have identified two main issues. Their key concern relates to the prohibition on earthworks within a wetland (rule 53) and the lack of an available consent pathway. In some cases, this is likely to lead to the early closure or cessation of works. In other cases, this leads to restrictions on landform modifications which prevent or significantly constrain urban development. This is impacting the ability of district councils to give effect to the requirements of National Policy Statement on Urban Development 2020 (NPS-UD), and the Government's housing and Infrastructure Upgrade objectives. For example, enabling planned development to ensure there is sufficient housing to meet urban growth requirements in the short, medium, and long term.
4. A wide range of affected stakeholders, including those identified above but also councils, industry bodies and ENGOs have raised concerns that the definition of natural wetland used in the NPS-FM and NES-F is unworkable. The definition in clause 3.21 of the NPS-FM is:

*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.*

5. The definition serves as an 'entry point' for determining whether a land area contains a wetland and whether any development can occur on it. The key area of concern with the definition relates to part (c). Due to its complexity, with multiple qualifiers, councils and technical specialists have adopted varying interpretations of part (c). This is leading to its inefficient and ineffective implementation eg, more land than intended is being captured by the regulations.
6. Wetland restoration work is undertaken by community groups, councils and Government agencies. The regulations intent is to control restoration activities so that councils can have oversight and avoid any unintended consequences (such as sedimentation resulting from widespread weed clearance). Concerns have been raised from all the above groups that the regulations are unduly restrictive and disincentivise restoration. At the same time there is no provision for 'maintenance' or biosecurity activities.

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

7. Natural wetlands will continue to be comprehensively protected. However, this protection will be applied inefficiently, and the costs of the protection will result in a number of land use activities (including urban development, and location-specific activities necessary for development, such as quarries) being curtailed. There will also be lost opportunities for restoration of degraded wetlands - the prohibited activity status of any works within a natural wetland means resource consents with associated requirements for restoration cannot be applied for.
8. The NES-F provides the same high level of protection to all natural wetlands regardless of their ecological value. If the definition continues to be applied so that it captures more land than intended the result will be twofold. It will result in reduced land area being unable to be developed (either at all or to its full potential) for housing and business purposes while at the same time the cost of development will increase due to restrictions on the location and operation of quarries and landfills (that are necessary for development).
9. Councils and applicants require expert technical assessments to ascertain whether a site falls within the definition of a natural wetland or not. This results in high transaction costs (technical assessments, delays in processing, and legal opinions) on account of the lack of clarity or certainty resulting from the current NPS-FM definition of a natural wetland.
10. Restoration activities by community groups may be reduced and maintenance and/or weed clearance as part of biosecurity activities curtailed as this is not currently provided for through the regulations.

#### Key features and objectives of the Natural Wetland regulations

11. The relevant NPS wetland policy is Policy 6 which states "*There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted*". The policy directive of the NPS-FM remains the same, in that the regulations will continue to provide a strong level of protection for natural wetlands.

12. The NPS-FM and NES-F are designed to work together to provide the ability to obtain a resource consent for certain activities while managing the adverse environmental effects or the loss of natural wetlands.
  
13. The activities/sectors that are able to seek a resource consent are listed in the NPS-FM at clause 3.22(a) (see also paragraph 14) and include research, restoration, flood control works and the construction of specified infrastructure (including regionally significant infrastructure, flood control works and lifeline utilities). The impacts that arise from these activities are addressed through a 'gateway test' built into clause 3.22(b) that includes the following requirements:
  - the specified infrastructure must provide significant national or regional benefit;
  - there is a functional need for the specified infrastructure in that location; and
  - the impacts are managed through the consent pathway and applying the 'effects management hierarchy'. This requires consideration of avoiding the effect where practicable, then a requirement to minimise, remedy and offset, or compensate.
  
14. Clause 3.22 of the NPS-FM states that regional plans must include a policy that states *'that 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'.*

15. The effects management hierarchy is defined in the NPS-FM at clause 3.21 (Definitions relating to wetlands and rivers) to mean *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:*
- (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.*
16. The intention is that the regulations provide strong protection for natural wetlands while acknowledging that some activities are essential, eg through the exclusions in the definition and by providing a consent pathway for the construction and maintenance of specified infrastructure (with offsetting requirements).
17. The NES-F contains the rules for what activities can and cannot occur in and around wetlands. Currently, restoration of wetlands, scientific research of wetlands, construction of wetland utility structures and maintenance of wetland utility structures can be undertaken as a permitted activity provided they comply with the permitted activity conditions set out in Regulation 55. If these activities do not comply with the permitted activity conditions they default to consideration as a discretionary or restricted discretionary activity and must comply with matters of discretion listed in Regulation 56.

#### **Relevant prior government decisions, legislation, and Regulatory Impact Statements**

18. In June 2018, Cabinet approved the *Essential Freshwater* work programme in order to:
- stop further degradation of New Zealand's freshwater resources
  - to start making immediate improvements so that water quality is materially improving within five years; and
  - reverse past damage to bring New Zealand's freshwater resources, waterways, and ecosystems to a healthy state within a generation.

19. Wetlands are at risk. Some 90 percent<sup>1</sup> of natural wetland extent in New Zealand has been lost since human settlement began, and there has been ongoing degradation and loss since then<sup>2</sup>. The regulations need to provide strong protection for wetlands while acknowledging that some activities are essential.
20. In August 2020, the *Essential Freshwater* regulatory package was gazetted. This package included:
  - the NPS-FM, directed at embedding long-term change through regional plans and including policies to restore wetlands; and
  - the NES-F setting out a consenting pathway for certain activities in and around wetlands while removing any consenting pathway (through prohibited activity status) for other activities.
21. The package is now being implemented. The Ministry for the Environment (MfE) is engaging with stakeholders to identify issues as they arise, and to ensure councils and others have the support needed to effectively implement the package.
22. As part of the *Essential Freshwater* package, natural wetlands were addressed in an earlier regulatory impact statement ([RIS: Action for healthy waterways, Part II: Detailed analysis](#)).

#### Other government work programmes with interdependencies and linkages

23. The Government, as part of New Zealand's COVID-19 economic response, has committed \$12 billion through the New Zealand infrastructure upgrade programme. This includes further investment in roads, rail, and public transport, walking and cycling infrastructure across New Zealand. Access to materials and services to support infrastructure projects is required from the quarry (aggregates) and cleanfill etc sectors (for receiving overburden).
24. New Zealand is facing a housing supply shortage and in response the Government is encouraging development capacity to be released so that urban areas can grow both up and out. Some of the infrastructure funding mentioned above is supporting the development of new urban areas.

## What is the policy problem or opportunity?

### Nature, scale and scope of the problem

25. As the regulations are being implemented concerns have been raised by a wide variety of stakeholders, including councils, industry bodies and ENGOs, that the definition of a natural wetland used in the regulations is unworkable, and that the lack

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<sup>1</sup> [ROOT-CAUSES-OF-WETLAND-LOSS-IN-NZ\\_Jan-2021.pdf \(wetlandtrust.org.nz\)](#)

<sup>2</sup> [Our Land 2021 | Ministry for the Environment](#)



of a consent pathway for certain sectors will significantly affect the ability to realise planned infrastructure and urban development.

26. A resource consent pathway is available for certain activities listed in clause 3.22(1) of the NPS-FM, and associated rules are set out in Regulations 37 to 56 of the NES-F. However, the rule structure leaves no room to provide for other activities, particularly where those activities are necessary for, or associated with, the provision of 'specified infrastructure' (which is currently provided for in the regulations). Providing for these activities via a consent pathway could also provide improved outcomes through restoration and offsetting as part of granting a consent. It is particularly affecting the quarry, and landfill/cleanfill/managed fill sectors.
27. An estimated 40 million tonnes of aggregate and quarried materials are produced and consumed in New Zealand each year. Total annual production of aggregate affected by the current wetland definition is 15.540 million tonnes, or 38% of New Zealand's annual consumption of aggregates. The dominant uses of quarried material in New Zealand are roading (50%), building (20%), then limestone for agriculture and industry (10%).
28. It is estimated that every new house results in approximately 25 m<sup>3</sup> of spoil which is usually disposed of in a cleanfill or managed fill. To meet the housing demand in Auckland over the next 30 year an estimated 10,000,000m<sup>3</sup> of spoil may need to be disposed to cleanfill or managed fill.

## Stakeholders and effect on stakeholders

### Key issue: Wetland Definition

29. The definition of natural wetland in the NPS-FM has multiple qualifiers leading to variable interpretations. As a result, councils have taken a cautious approach and applied the definition more rigorously than intended. The result is that more land than anticipated is being captured by the regulations, particularly in peri-urban areas (urban outskirts).
30. A number of industry sectors (quarries, cleanfills, landfills and managed fills, mining, and urban development) have raised concerns because they are either need to occur or are occurring in areas where wetlands are located. The current definition of natural wetlands can be interpreted to include areas that the regulations intentionally seek to exclude, such as areas of wetted pasture, and this is impacting these sectors.
31. As noted earlier, the definition is as follows: *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.*

32. Part c) of the definition is particularly contentious. Extensive feedback has been received from councils, ENGOs, ecologists and a variety of industry groups on draft guidance released by MfE which clearly highlights the issues with this definition. For example, MfE has been asked for guidance on what is meant by improved pasture even though the term is separately defined in clause 3.21 of the NPS-FM.

**Key issue: Rule 53 and a consent pathway – Quarries and mining, clean/managed/landfill industries**

33. The quarry and mining sectors, and the cleanfill, landfill and managed fill industries have raised concerns about the prohibition on earthworks in a wetland in rule 53, and their inability to seek consent for operations that provide materials and services necessary for the construction and maintenance of 'specified infrastructure' (as already provided for in the regulations).<sup>3</sup> These materials and services are also fundamental to ensuring urban development can occur at pace and scale across the country.
34. The prohibition on earthworks that would result in the partial or complete draining of a natural wetland in rule 53, and lack of ability of these sectors to apply for consent has significantly impacted provision of existing and planned resources. This will negatively impact the achievement of the Government's infrastructure and housing objectives (eg, by constraining the supply of raw materials and services to support infrastructure provision and development).

**Key issues: Consent pathway - Urban development**

35. To implement the NPS-UD, councils (particularly district councils) must plan and provide for urban growth over the short, medium and long-term. The definition is constraining land area but associated with that is the lack of clear provision for consenting urban development. The regulations provide a consent pathway for roads and three waters (being defined as specified infrastructure) but housing development is provided for only if it is specified in a regional plan.
36. Without a clear consent regime for urban development, one that also requires appropriate associated offset or mitigation measures, there will be an inefficient use of land as sites planned for urban development must now avoid the removal of all or part of a natural wetland and there is no ability to restore or offset as part of development.

**Key issues: Restoration and provision for activities associated with biosecurity**

37. Councils, ENGOs and others including DOC have expressed concern that the provisions for restoring wetlands are too constraining. There has been criticism that community groups are no longer incentivised to undertake wetland restoration due to

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<sup>3</sup> Specified infrastructure includes regionally significant infrastructure listed in a council plan, flood control works, and 'lifeline utilities' (eg. roads, "three waters" pipes, ports (air and sea), electricity transmission infrastructure, rail etc).

the conditions that must be met, or the need for a consent to carry out such things as weed removal.

38. Environmental groups and government agencies engaged in the maintenance of natural wetlands have reported their activities are also being curtailed or require onerous resource consents. The current restoration definition distinguishes activities according to their intent, rather than their effects. It was designed to reduce barriers to activities that would benefit wetlands. But the drafting only covers restoration and not protection from new impacts. This has resulted in enabling restoration activities that aim to restore wetland values, but not activities for the protection of existing wetland values. The current framework also does not recognise or regulate activities that are undertaken for biosecurity purposes.

### What objectives are sought in relation to the policy problem?

39. Our objectives are to:
- a. Ensure the natural wetland provisions in the NPS-FM and NES-F support the effective implementation of the *Essential Freshwater* programme and improve environmental outcomes while reducing unnecessary cost and uncertainty to councils, industry sectors and ENGOS.
  - b. Directly address the issues known to be generating the policy problem by undertaking changes to the natural wetland provisions in the NPS-FM and the NES-F. The changes are:
    - Ensure the definition of a natural wetland only includes those areas that are intended to be captured by the NES-F regulations; and
    - Provide a consent pathway for specific activities that require the redevelopment of wetlands, have limited ability to relocate their activities, or urban development projects that have been planned for; and
    - Enable maintenance and biosecurity activities, and better provide for wetland restoration.
  - c. Ensure that protection for wetlands continues through offsetting requirements of no net loss and that activities only occur where certain tests are met eg, NPS-FM clause 3.22(1)(b) as appropriate.

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

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

40. Each policy option considered was assessed using the following general criteria:
- Effectiveness: provides a solution to the problem. The problem has been comprehensively addressed,
  - Timeliness: prevents further degradation of fresh water in New Zealand in a timely fashion,
  - Fairness: is cost-effective for government, councils, industry sectors and ENGOs,
  - Efficiency: Achieves maximum benefits with minimum wasted effort or expense,
  - Te Mana o te Wai: identifies the vital importance of water and ensures the health and well-being of the water is prioritised.

### What scope will options be considered within?

#### Existing policy decisions

41. The *Essential Freshwater* wetland regulations came into force on 3 September 2020. The *Essential Freshwater* package includes the National Policy Statement for Freshwater Management 2020 (NPS-FM), and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F). These regulations are intended to:
- stop further degradation of New Zealand's freshwater,
  - start making immediate improvements so water quality improves within five years, and
  - reverse past damage and bring New Zealand's freshwater resources, waterways, and ecosystems to a healthy state within a generation.
42. A focus of the Freshwater Package was the regulatory framework for 'natural wetlands', which are naturally occurring or have been constructed to replace or restore a naturally occurring wetland. The NPS-FM and NES-F are designed to work together to provide the ability to obtain a resource consent for certain activities and sectors where necessary, while managing the effects on natural wetlands.
43. The NPS-FM provides strong protection for natural inland wetlands through Policy 6 whereby the extent of natural inland wetlands regardless of their ecological state is maintained and further fragmentation of remaining natural wetland habitats and loss of natural wetland values is prevented. The NES-F provides the consenting pathway for certain activities in and around natural wetlands.

44. The changes proposed here are in keeping with the original intent of the policies. Natural wetlands will still be protected, and if consenting pathways are implemented for the identified sectors, the Government's intention is for them to be subject to a high threshold, including the current gateway test and subject to the effects management hierarchy set out in the clause 3.21 of the NPS-FM to avoid, minimise, remedy, offset and compensate for adverse effects.
45. The offset and compensate requirements are to ensure there is no net loss of wetland extent. As part of consultation the question of whether any additional checks and balances for the additional sector's is being explored.

#### Stakeholder engagement

46. MfE is engaging with stakeholders to identify issues with the regulations as they arise, and to ensure councils and others have the support needed to effectively implement the NPS-FM and NES-F provisions (eg, provision of the wetland delineation tool to assist where there is uncertainty about wetland extent).
47. Ministry officials have visited several sites with stakeholders to see and hear first-hand the concerns and view wetland areas that are at issue (eg, proposed urban developments and quarries).
48. Following public consultation, MfE will report back to the Minister on submissions received and develop final policy advice that considers these submissions and the concerns expressed by the sectors.

#### *Quarries, cleanfills, landfills and managed fills*

49. The scope of options is to ensure these industries have a consent application pathway where they are:
  - necessary for construction and maintenance of specified infrastructure or urban development,
  - providing services or materials required to meet national and regional infrastructure goals; and
  - constrained in where they can be located.

#### *Mining (minerals)*

50. Mining (minerals) can only occur where the resource is located. The scope of options is similar to the response proposed for the quarry sector, cleanfill, landfill and managed fill operators. Through the consultation process MfE will seek to obtain feedback as whether any additional checks and balances, over and above what is already provided in the NES-F regulations, should be in place for mining activities in and around wetlands.

### *Urban development supply*

51. Councils, construction companies and the major aggregate companies who often have a vertical integration business structure (ie, they are suppliers of aggregates and undertake construction projects, including urban development, that rely on aggregates) are concerned about the impact of hectares lost to wetland protection. They have conveyed the view that this will result in a reduction of planned housing yield, and effect both supply and cost.
52. Under the NPS-UD local authorities are required to ensure that New Zealand has well-functioning urban environments that are responsive to change. Planning decisions must improve housing affordability by supporting competitive land and development markets and intensification in specified areas. Local authority decisions on urban development are required to be strategic, responsive, and integrated with infrastructure planning and decisions. Local authorities have conveyed to MfE and other relevant ministry's the difficulty faced by them in balancing the requirements of the NPS-UD with those of the wetland regulations. The sector seeks clarity from central government on how to rationalise the various pieces of national direction.
53. The option utilises definitions in the NPS-UD to explicitly provide a consent pathway for urban development. The question of appropriate offsets for aspects of urban development eg schools will be explored through consultation.

### *Better provision for restoration activities in wetlands, maintenance and biosecurity*

54. Councils, ENGOs, DOC and others have given feedback to MfE that the natural wetlands provisions are too constraining for maintenance works and restoration activities. The scope of this option is to remedy this issue through amended provisions. The amended provisions will be drafted following the closure of the consultation period and will address the following matters:
  - The way in which disturbance of vegetation is controlled, including addressing the current constraint on the area of disturbance that is possible,
  - The need to include weed and pest control activities that are for biosecurity reasons rather than to restore the site in which the control is occurring, and
  - Work to ensure that the settings match the types of activities that are low impact in the short term but beneficial in the long term (eg, permitting the use of weed clearance using handheld tools).

### *Feedback interpretation of the wetland definition*

55. Early in 2021 MfE drafted guidance on the wetland definitions in the NPS-FM to address interpretation queries raised by councils. MfE followed this with an

implementation workshop supported by technical expertise from councils,<sup>4</sup> DOC staff and Manaaki Whenua Landcare Research ecology expertise. The workshop attendees brought a spread of expertise across wetland ecology, planning, consenting, and compliance.

56. Following the workshop an exposure draft of the wetland definitions guidance was released to a technical working group, council SIG networks, and a mailing list of practitioners who had provided contact details through the MfE Webinar '*Wetlands and Rivers*' for feedback. Feedback was open for a month and 60 submissions on the guidance were received from the following submitters:

- **Councils/council groups:** BOPRC, WCRC, Environment Southland, ECAN, GWRC, NRC, Taranaki Regional Council, Auckland Council, Auckland Transport, Gisborne District Council, Tauranga City Council, Waikato Regional Council, Otago Regional Council, NRC
- **Kahui Wai Maori**
- **ENGOS:** National Wetlands Trust, Forest and Bird
- **Industry groups:** Straterra, Rangitata Race Diversion Management Ltd, DairyNZ, Oceana Gold, Winstone Aggregates /Fulton Hogan/ Kaipara LTD/ J swap Contractors LTD, Federated Farmers, Aggregates and Quarries Association (AQA), HortNZ, Beef & Lamb NZ, Fulton Hogan Land Development Ltd, Mercury NZ, Boffa Miskell, Powerco Ltd, Tonkin and Taylor, Fonterra, Fletcher Building Ltd, Enviser Ltd on behalf of the Ski Association of New Zealand
- **Environmental practitioners:** RMLA, LandPro, Environmental Institute of Australia and New Zealand (EIANZ), EnviroNZ Corporate, Cardno NZ, Bioresearches, Civil Plan Consultants, Pattle Delamore Partners Ltd, Momentum Planning and Design Ltd (Tauranga), Eel Enhancement Company (EECo)
- **Research organisations:** NIWA, Lincoln University, Manaaki Whenua Landcare Research
- **Public/Landowners:** 4
- **Agencies:** MPI, DOC, Freshwater Implementation Directors' Group chair
- **Other:** Grafton Downs Limited and Wesley College Trust Board, Simpson Grierson / Beachlands South LP.

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<sup>4</sup> Councils represented were: NRC, ORC, BOPRC, TDC, AC, GWRC and ECAN.

57. These submissions informed the proposed changes to the definition of a natural wetland set out below. Release of the guidance is scheduled to coincide with consultation on draft changes to the definition to provide the counterfactual to the proposed amendments.

### What options are being considered?

58. The policy directive of the NPS-FM remains the same; the regulations will provide a strong level of protection for natural wetlands and result in improvements to water quality. The options below seek to address the implementation issues raised by a range of stakeholders on the regulations as set out above.

#### Status Quo

59. Under the status quo option, no changes are made to the NPS-FM or NES-F provisions, instead reliance is placed on educative tools including the use of guidance documents (as above) to reduce the degree of uncertainty and promote the protection of all wetlands.

#### Option One - Amended natural wetland definition

60. Under option one amendments to clause (c) in the definition of natural wetland in the NPS-FM will be made and subsequent changes to the NES-F regulations to better enable the restoration of wetlands. The proposed amendments are:

(c) *Any area of ~~improved~~ pasture that, ~~at the commencement date~~ is dominated by (that is more than 50% of) exotic or pasture species ~~and is subject to temporary rain derived water pooling.~~*

61. The reason for each change is as follows:
- deleting 'improved' pasture is to remove room for interpretation as to what 'improved' means (eg, a certain level of nitrogen application has been suggested) when the intent is just to capture pasture (that also happens to be a wetland),
  - deleting 'at the commencement date', removes the need for back-casting by councils as this is likely to be contentious and may unnecessarily exclude areas of pasture,
  - inserting 'or' between 'exotic pasture' seeks to address the issue that some exotic species (eg, buttercup) are not considered 'pasture' species but are common in areas of wetted pasture,
  - 'temporary rain derived water pooling' was originally included as a place holder to address the lack of a hydrology module in the 'wetland delineation tool'. The wetland delineation tool is incorporated by reference in the NPS-FM and contains three modules, hydrology, soil and vegetation. Now that the hydrology module is in place the rain derived pooling qualifier has limited utility.



62. The changes outlined above seek to achieve the original intent, which is to acknowledge that wetlands occurring in damp paddocks and gullies are already highly modified environments and should be able to continue their current purpose (grazing) or be allowed to shift in land use (urban development).
63. Changes to the natural wetland definition would better provide for development of areas unintentionally caught by the existing definition (eg, wetted pasture).
64. All other wetlands would remain subject to very strong protection under the regulations eg, effects management hierarchy and offsetting/compensation requirements for those activities that have a consent pathway and regulations 52 (Non-complying) and 53 (Prohibited) for all other activities.

#### **Option Two – Fully or partially remove Prohibited Activity (Regulation 53)**

65. Under option two the prohibited activity rule in Regulation 53 of the NES-F (complete or partial drainage of all or part of a natural wetland) is removed. This would have the effect of providing a consenting pathway for any proposal to be considered on its merits and either approved or declined, having regard to all relevant considerations.
66. Option two has several potential sub-variants:
  - Outright deletion of Regulation 53,
  - Partial deletion of Regulation 53 by limiting application to rural zone areas only. Removal of natural wetlands in urban areas could have a discretionary activity classification;
  - Apply a minimum size criterion to Regulation 53 (eg, this could be the same as that set out in Clause 3.23 of the NPS-FM relating to the mapping requirement for wetlands, being wetlands 0.05ha or greater in extent). Activities within smaller wetlands would shift to a non-complying or discretionary activity; and
  - Apply a size criterion to the proposal in terms of the area of wetlands affected as a portion of the total area proposed for development.

#### **Option Three - New consent pathways, better provision for restoration and an amended natural wetland definition**

67. Option three entails the introduction of consent pathways for quarries, cleanfills, landfills, managed fills and mining (with additional checks and balances for mining), as well as for urban development listed in a regional or district plan document. It includes the Option 1 amendments to the definition of natural wetland in the NPS-FM and changes to the NES-F regulations to better enable the restoration of wetlands.
68. The scope of options considered for urban development is to extend the consent pathway available in the NES-F for *specified infrastructure listed in a regional plan* to expressly provide for urban development. To avoid the current need for a plan change before any resource consent can be sought, it is proposed that the consent

pathway would be tied to urban development that is *plan-enabled*. This is a defined term in clause 3.4(1) of the NPS-UD and means housing and/or business land that is:

- already zoned for housing or for business use in an operative district plan, or
- zoned for housing or for business use in a proposed district plan, or
- land identified by the local authority for future urban use or urban intensification in a Future Development Strategy (or any other relevant plan or strategy).

69. The consent pathway for plan-enabled development is proposed to apply to development for housing and business purposes that is identified in regional or district plan or strategy document. Consultation will explore whether offsetting is appropriate for all aspects of urban development eg, schools and medical centres.

#### **Assessment of options**

70. The table below provides a summary of the assessment of the options based on criteria set out at the start of Section 2 (para 44).

71. It should be noted that the efficiency and effectiveness criteria are considered the two key criteria for analysis and accordingly are afforded greater weight in the analysis. In terms of the environment criteria, the option is considered viable if it has the same impact as the status quo (as opposed to improved).

72. The outcome sought is for a more workable policy that provides a similar degree of protection.

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

### key for qualitative judgements:

- ++** much better than doing nothing/the status quo/counterfactual
- +** better than doing nothing/the status quo/counterfactual
- 0** about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

	Status Quo	Option One – Amend natural wetland definition	Option Two – Fully or partially remove prohibited activity classification (Regulation 53)	Option Three – New consent pathways, and amend natural wetlands definition
<b>Environment</b>	0	0 This option is considered to protect the environment as effectively as the status quo as it seeks to clarify what is already intended to be captured by the regulations.	- This option is considered to be worse than the status quo for the environment. Any activity within a natural wetland could proceed as either discretionary and/or non-complying activity. Activities would require robust assessment and enhancement of wetlands would be achieved through good design and offset mitigation. But evidence shows not all required offsetting is undertaken	0 This option is considered to protect the environment as effectively as the status quo. Opportunities are provided for select sectors and activities that align with Government priorities. Strong protection remains in place for wetlands from all other activities. The option provides opportunities for offsetting and restoration that may not otherwise be progressed but constrains this to select sectors. This reduces the overall

			and eventually sites available for offsetting (if open for any and all activities) will become limited.	risk of mitigation failure and reduced biodiversity outcomes. .
<b>Effectiveness</b>	0	<p style="text-align: center;">+</p> <p>Provides an improved definition for councils and resource users of a natural wetland. Reduces current uncertainty from definition</p>	<p style="text-align: center;">+</p> <p>Provides a consenting pathway for land use activities and associated mitigation and enhancement opportunities to be considered.</p> <p>Outcomes would still be consistent with the <i>Essential Freshwater</i> package as activities with discretionary and non-complying activity status require robust assessments and protection outcomes for wetlands would still be achieved.</p>	<p style="text-align: center;">++</p> <p>Retains the strong level of protection for natural wetlands sought in the NPS-FM and NES-F, while providing a resource consenting pathway for selected activities to continue where an assessment is provided against the effects management hierarchy. Associated mitigation and enhancement opportunities can then be considered.</p> <p>Outcomes would still be consistent with the <i>Essential Freshwater</i> package as activities with discretionary and non-complying activity status require robust assessments and protection outcomes for wetlands would still be achieved.</p>
<b>Timeliness</b>	0	<p style="text-align: center;">+</p> <p>An amended definition of natural wetland will mean that the current impediment to proposals that are inadvertently caught by the current definition will be removed. Proposals affecting low value features such as damp pasture that were not intended to be captured by the regulations will be able to be considered in a timely manner.</p>	<p style="text-align: center;">+</p> <p>This option improves timeliness as there will be an RMA process whereby activities can be considered on their merits whereas under the status quo, prohibited activity status provides no ability for site-specific, nor proposal-specific assessments.</p>	<p style="text-align: center;">++</p> <p>This option improves timeliness as there will be a clear process whereby selected activities (plan-enabled urban development, quarrying, clean fills, managed fills, mining) can be considered on their merits whereas under the status quo, prohibited activity status provides no ability for site-specific, nor proposal-specific assessments. The assessed improvement in terms of timeliness relative to Option 2 is because</p>

				Option 3 is a hybrid option which also includes amendments to the natural wetland definition. This will significantly assist timely outcomes for activities inadvertently caught by the current definition.
<b>Fairness</b>	0	<p style="text-align: center;">+</p> <p>This option is considered fairer than the status quo because it resolves uncertainty around the definition and ensures the regulations capture only those areas intended.</p>	<p style="text-align: center;">+</p> <p>This option is considered fairer than the status quo as the full or partial removal of prohibited activity status enables applicants to undertake site-specific assessments and provide mitigation and/or enhancement opportunities that can then be independently assessed.</p>	<p style="text-align: center;">+</p> <p>This option is considered fairer than the status quo as it provides a resource consent pathway for specific industry sectors and urban development projects. Acknowledges the requirements for certain activities to be situated in specific locations. The revised definition of a wetland reduces the uncertainty of the current definition and captures only those areas intended.</p>
<b>Efficiency</b>	0	<p style="text-align: center;">+</p> <p>This option will be more efficient than the status quo as it will remove many of the interpretation difficulties and uncertainty associated with the current definition of natural wetlands.</p>	<p style="text-align: center;">-</p> <p>This option will be less efficient than the status quo as although it will provide a resource consent pathway for activities to be considered on their merits, uncertainty around the definition of a wetland will remain resulting in increased costs to councils and applicants, including legal challenge, on consenting decisions.</p>	<p style="text-align: center;">++</p> <p>This option will be much more efficient than the status quo as it combines the efficiency advantages of amending the definition in Option 1, with clear consenting pathways for select industry and urban development. This option retains a strong level of protection for natural wetlands by retaining the prohibited activity status for all other activities that would result in the complete or partial drainage of a wetland.</p>

<b>Te Mana o te Wai</b>	0	<p style="text-align: center;">0</p> <p>This option is considered to give effect to Te Mana o te Wai as effectively as the status quo because it clarifies how, and to what, the regulations were intended to apply.</p> <p>Natural wetlands will still be protected and restored, and the health of New Zealand's fresh water, ecosystems, and their ability to sustain life maintained in line with Te Mana o te Wai.</p>	<p style="text-align: center;">+</p> <p>This option is considered to protect Te Mana o te Wai as activities with discretionary and non-complying activity status require robust assessments and protection outcomes for wetlands would still be achieved.</p> <p>This option is considered to be a better option than the status quo in terms of Te Mana o Te Wai in that it enables water sensitive design to be implemented with meaningful protection and consideration of enhancement of water courses and wetlands through good design and offset mitigation.</p>	<p style="text-align: center;">+</p> <p>This option is considered to protect Te Mana o te Wai as it provides a resource consent pathway for specific industry and urban development projects while retaining the prohibited activity status for all other activities that would result in the complete or partial drainage of a wetland.</p> <p>The option ensures there is no net loss of wetlands (via consent requirements to offset) and increases the opportunities for restoration while balancing the demand for growth.</p>
<b>Overall assessment</b>	0	+	+	++

### What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

73. Option 3 is the preferred option because it reduces the uncertainties associated with identifying natural wetlands and enables key industries and activities to occur in or around a wetland while providing for no net loss of wetland extent via offsetting requirements associated with the consent process.
74. The removal of the strong protection provided by the non-complying and prohibited activity regulations under Option 2 may negate one of the key purposes of the *Essential Freshwater* programme; to arrest the decline and loss of natural wetlands. The risk associated with this option is a significantly increased consent burden on councils and applicants. The associated required offsetting would result in available and suitable sites for offsetting becoming limited over time. The risk is that compensation instead becomes the norm, resulting in an overall continued decline of wetland extent and biodiversity values.

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

Affected groups (identify)	Comment <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence <b>Certainty</b> <i>High, medium, or low, and explain reasoning in comment column.</i>
<b>Additional costs of the preferred option compared to taking no action</b>			
Environment	Restoration and offsetting are more likely to occur (through consent requirements) though some risk remains that offsetting may either not be undertaken or will not be maintained resulting in reduced biodiversity values overtime. Risks associated with offsetting set out in the Wetland Trust report. <a href="#">ROOT-CAUSES-OF-WETLAND-LOSS-IN-NZ_Jan-2021.pdf</a> ( <a href="#">wetlandtrust.org.nz</a> )	<b>Low-medium</b>	<b>High</b>
Regulated groups	Compliance costs remain, including cost of obtaining ecological assessments and resource consents. A degree of uncertainty remains regarding the	<b>Medium</b>	<b>High</b>

	revised wetland definition. Pathway created for industry sector and land development projects with existing resource consents.		
Regulators	Change of NES wetland regulations will increase compliance and monitoring requirements. Additional resource and time to educate staff and ratepayers	<b>High</b>	<b>Medium</b>
Others (eg wider govt, consumers, etc.)	Further production of guidance documents. Ongoing monitoring to assess policy effectiveness of the new/amended regulations.	<b>Medium</b>	<b>Medium</b>
<b>Total monetised costs</b>			
<b>Non-monetised costs</b>		<b>Medium</b>	
<b>Additional benefits of the preferred option compared to taking no action</b>			
Environment	Provision for on-going maintenance and biosecurity activities	<b>Medium</b>	<b>High</b>
Regulated groups	Consenting and consent compliance costs will reduce while certainty regarding the consentability of major projects or ongoing use of land for development will increase.	<b>Medium</b>	<b>High</b>
Regulators	Reduced uncertainty greater implementation costs through increased consents.	<b>High</b>	<b>High</b>
Others (eg, wider govt, consumers, etc.)	Reduced compliance costs for ENGOs and others undertaking maintenance and restoration works.	<b>Medium</b>	<b>Medium</b>



	<p>Reduced requirements for resource consenting but increased opportunity costs</p> <p>Greater certainty regarding compliance with regulations.</p>		
<b>Total monetised benefits</b>			
<b>Non-monetised benefits</b>		<b>Medium</b>	

## Section 3: Delivering an option

### How will the new regulations be implemented?

75. Under section 43 of the RMA the Governor-General may by Order in Council introduce new, or amend, existing national environmental standards and national policy statements.

#### Ongoing operation and enforcement

76. Local authorities with resource management responsibilities under section 30 of the RMA (eg, regional councils and unitary authorities) will have the principal role for managing and enforcing the amended natural wetland regulations. When introduced, MfE will support regional councils (including any unitary authority) and the industry sectors to implement the new regulations through the publication of updated guidance documents and advisory notes.
77. Under section 35 of the RMA regional councils are responsible for monitoring and reporting on the state of the environment in their region.

#### Available non-regulatory options

78. The loss of natural wetlands is a significant resource management issue and opportunities to address this solely through non-regulatory options are limited. To prevent the further loss of wetlands the most effective use of non-regulatory options is as an adjunct to support the implementation of regulatory responses. This includes the preparation of guidance documents, providing advisory services to landowners, and other educative initiatives to raise awareness of the importance of wetlands as a significant part of New Zealand's landscape.
79. The use of the wetland delineation tool has been provided for in clause 3.23 of the NPS-FM to assist in determining whether an area has wetland characteristics based on the vegetation, soil type and hydrology of the area. The vegetation and hydric soils tools have been adapted for New Zealand conditions, and a hydrological tool has just been released. The use of the delineation tool is intended to be used where there is uncertainty or dispute about the existence or extent of a natural wetland.
80. The delineation tool has been adopted from an American example and has been adapted to fit the New Zealand context. While it provides a non-regulatory method for resolving disputes regarding what is, or what is not a wetland, it does not resolve the fundamental underlying issue of the definition of a wetland or providing consenting pathway for certain activities.
81. As set out above with regard to guidance, the intention is to release finalised guidance on the current definition of a natural wetland to function as the counterfactual to the proposed amendments. This will be linked on the Ministry's website and in the discussion document.

#### Timing for when regulations come into effect

82. The implementation date is yet to be advised and is dependent on the preferred option.

#### **Stakeholder and council involvement in implementation**

83. To date industry and sector group stakeholders and local government across the country have contributed to identifying issues with implementation of the natural wetlands provisions. The introduction and implementation of new consenting pathways will be of strong interest to stakeholders and regulators

#### **Public notification process of the regulatory changes**

84. MfE and regional councils will need to continue with the timely production of guidance and advice while ensuring guidance and advice reflects any changes made to the NPSFM and/or NES-FW since 2020.
85. Notification of changes to the wetland regulations will occur as part of a package of changes to the NES freshwater regulations.

#### **Implementation risks**

86. All three options carry implementation risks.
87. The definition of a natural wetland under option one still contains a high degree of uncertainty of what does or does not constitute a natural wetland. The definition could remain open to ongoing interpretation and disagreement between parties.
88. The changes to the natural wetland definition may not fully resolve the interpretation issues identified by stakeholders. Ultimately a regulatory definition will be determined through its application in subsequent consent applications and decisions by councils and the Environment Court.
89. The key risk with Option 1 is ensuring a no-net loss regime is established. There is limited research on the long-term success of constructed wetlands achieving good biodiversity outcomes. It is anticipated that in many areas there will be increasingly limited areas available for offsetting that are not required for other purposes such as urban development.
90. If Option 2 is adopted the consent burden on council and applicants would be significant due to the assumption that a wide range of activities are now possible, subject to consent. Councils would have an increased monitoring burden to manage.

#### **Existing management arrangements for Natural Wetlands**

91. Both MfE and regional councils have a significant role in ensuring that changes to the NPS-FM and NES-FW are implemented when they come in effect. Thereafter the majority of responsibility for implementation, enforcement and monitoring rest with the regional council as one of their section 30 RMA responsibilities.

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

92. The monitoring, evaluation and review of NES regulations and regional plan provisions is a requirement under the RMA.

### **Opportunities for feedback**

93. Following any amendments made to the natural wetland regulations coming into effect the Minister for the Environment, Ministry for the Environment and other may continue to receive feedback from stakeholders and regulators.

### **Monitoring and evaluation of the new regulations**

94. Monitoring and evaluation of any new natural wetland regulations will rest with MfE and the regional councils as part of their ongoing responsibilities under section 35 of the RMA to monitor the state of the environment.

### **Future regulatory reviews**

95. The NES-F may be reviewed again at any stage. A further consideration is the transition to a new planning and resource management regime under the future Natural and Built Environments Act and the effect of this on the existing NES-F regulations.