



Submission to Ministry for the Environment

“Managing our wetlands: a discussion document on proposed changes to the wetland regulations”

Introduction

Te Waihangā NZ Infrastructure Commission welcomes the opportunity to submit on the Ministry for the Environment discussion document, [Managing our wetlands](#).

Te Waihangā was established under the New Zealand Infrastructure Commission/Te Waihangā Act 2019 with its main function “to co-ordinate, develop, and promote an approach to infrastructure that encourages infrastructure, and services that result from the infrastructure, that improve the well-being of New Zealanders”.

MfE states on page 4: “This discussion document responds to feedback received from various stakeholders and partners on the implementation of the wetland regulations across the country.” We record that we have previously provided feedback.

Executive summary

We agree that the 2020 freshwater package has the effect of prohibiting, or restricting (i.e. making a non-complying activity, in respect of earthworks that result in complete or partial drainage of a wetland) a number of activities in or near natural wetlands.

We support the proposals to provide a consenting pathway in respect of natural wetlands for cleanfills, managed fills, landfills, urban development, ecological restoration, and quarries/mines.

We note that this pathway is similar to the one already provided for in respect of “specified infrastructure”, and “lifeline utility” infrastructure.

Key outstanding issues are:

- Some important infrastructure is missed from the additional consenting pathway because it is either not specified, or not lifeline infrastructure.
- At issue is the definition of specified infrastructure is too narrow. This needs to be expanded to include, eg education, corrections, and economic/tourism infrastructure.
- The provision of criteria to assess infrastructure for the consenting pathway.
- There is scope for additional improvements to workability to be made, which should be applied also to the additional categories of activity identified above.
- The efficiency of a consenting pathway for infrastructure, in terms of time and cost, is a critical consideration, especially for delivering timely and urgent infrastructure

Submission

Section 2: Definition of a natural wetland

Question 1 asks: "Do you agree with the proposed changes to the definition of 'natural wetland'? Why/why not?"

We agree. Section 2 of the Resource Management Act 1991 defines a wetland as: "**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."

This is a reasonable definition, noting that "intermittently wet areas" include the flood plains of rivers where there is often a need for flood protection infrastructure. We suggest deleting the words "or intermittently" from the natural wetland definition, or providing a qualification to exclude the flood plains of rivers.

We agree with MfE that the existing definition of "natural wetland" in the National Policy Statement for Freshwater Management 2020 (NPS-FM) introduces unnecessary complexity, particularly at clause (c). The proposed changes to the definition of "natural wetland" are appropriate, for the reasons set out at bullet points 1-5 in Section 2 of the discussion document. They provide adequately for development in areas of pasture.

In response to **Question 2**, Te Waihangā is not aware of anything else that should be included or excluded from the definition of natural wetland.

Section 3: Restoration, maintenance and biodiversity activities

While the restoration or maintenance of wetlands is not a "core" infrastructure activity, it is reasonably common for wetland maintenance, improvement or restoration work to be proposed as mitigation or remediation in respect of an infrastructure project. To that end, Te Waihangā supports any changes to the NPS-FM and the accompanying Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) that would reduce the regulatory impediments to those activities being carried out. Therefore, we answer **Questions 3-7** in the affirmative.

Section 4: Additional consenting pathways

Page 4 of the discussion document states: "It also proposes that the regulatory framework for 'natural wetlands' should be amended to provide a consent pathway for certain activities so that development can occur where necessary, while ensuring no net loss of natural wetland extent or values occurs."

We agree, and also note this should capture a broader range of infrastructure than envisaged in the discussion document proposals. As well, there will be situations in which there will be some net loss in wetland extent or values from the delivery of critical infrastructure, which should not prevent this activity.

In response to **Questions 8 and 9**, we agree that quarrying should also be provided with a consenting pathway, for much the same reasons as stated in the discussion document. In short, quarrying is an ancillary or precursor activity that makes the construction of specified and other infrastructure possible. The justification for a workable consenting pathway is that, as stated in the discussion document, "the quarries can only occur in areas where the quarried resource is naturally found".

It is suggested that this rationale will need to be clearly expressed in the new or revised policies, as it may not fit squarely within the existing concept of "functional need" (as defined in the National Planning

Standards: “means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment”), also taking into consideration the economics of aggregate supply including transport to the site of use.

In addition, we consider that other changes to the current “gateway” test should be made in developing the new consenting pathways. In particular, the NPS-FM states that the tests for specified infrastructure are conjunctive, ie there must be national/regional benefit **and** functional need **and** adherence to the mitigation hierarchy. The discussion document indicates that this will apply to the new activities as well. While this approach may make sense for specified infrastructure (subject to our comments on “functional need” below), it is unlikely to apply, for example, to extractives or landfill activities. As well, smaller-scale activities may provide environmental benefits to natural wetlands, eg restoration and biodiversity conservation of degraded wetlands, but the requirement to be of regional or national significance suggests that only large proposals will be given a pathway. Accordingly, we recommend that the national/regional significance criterion be dropped from the new consenting pathways, or alternatively, that an “and/or” construct is used, as the discussion document implies on page 11 (spelled out below in the discussion on additional activities not listed in the discussion document). Similarly, as we suggest below, pathways should be provided for activities such as schools that are, collectively, of national significance, even if any particular site is not by itself nationally or regionally significant.

It is considered that discretionary activity status in the NES-F should be appropriate, noting that rules in local plans may trigger additional controls.

In response to **Questions 10 and 11**, we agree that discretionary activity status should apply to landfills, clean fills and managed fills, for the reasons set out in the discussion document. We agree with the observation in the discussion document that these activities do not “have to be situated where a natural resource occurs” (ie they do not have a “functional need” to locate in wetlands), but should nonetheless be provided for given the practical reasons for locating them close to development sites. In other words, they have an “operational need” to be located in such environments, and we consider this would be an appropriate test or gateway to include in the new policy. “Operational need” is defined in the National Planning Standards to mean “*the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.*”

In response to **Questions 12-14**, we consider that mining (minerals) and quarrying are indistinguishable as activities; all quarries are mines by definition. In short, mining for minerals can only occur in areas where those minerals are located, a context that is slightly different to the existing concept of “functional need”.

We also support a consenting pathway being provided for urban development directed by the National Policy Statement on Urban Development 2020, for the reasons outlined in the discussion document.

Additional activities not listed in the discussion document

Page 11 of the discussion document notes the NES-F regulations “include a ‘gateway test’ for specified infrastructure that councils must use when assessing any consent application. It includes the following requirements: (a) the activity must be of significant national or regional benefit (b) there must be a ‘functional need’ for that activity in that location (c) adverse effects must be managed through the ‘effects management hierarchy’, which requires initial consideration of how to avoid adverse effects where practicable, then how to minimise, remedy, offset, and compensate, in that order.”

The NPS-FM lists “specified infrastructure” as:

- a “lifeline utility” (as defined in the Civil Defence Emergency Management Act 2002)
- “regionally significant” infrastructure identified in a regional policy statement or plan
- public flood control, flood protection, or drainage works

Lifeline utilities under the CDEM Act are specifically:

- Radio New Zealand, and Television New Zealand
- Auckland international airport, Wellington international airport, Christchurch international airport
- The airports of: Bay of Islands, Blenheim, Dunedin, Gisborne, Hamilton, Hokitika, Invercargill, Napier, Nelson, New Plymouth, Palmerston North, Queenstown, Rotorua, Tauranga, Wanganui, Westport, Whakatane, and Whangarei
- The ports of: Auckland, Bluff, Port Chalmers, Gisborne, Greymouth, Lyttelton, Napier, Nelson, Picton, Port Taranaki, Tauranga, Timaru, Wellington, Westport, and Whangarei
- Distribution of gas, and other petroleum products
- Electricity generation and distribution through a network
- Supply and distribution of water to a city, district, or other place; waste water and sewerage network, and disposal of sewage and storm water.
- Telecommunications network
- Road network (including state highways)
- Rail network or service

All of the above is appropriate; however, a new rural school (or expansion of an existing one), for example, may on its own fail a test of significant national or regional benefit, despite its being part of a nodal network to achieve the Ministry of Education’s national objective of schooling for an additional 100,000 students by 2030.

If a rural school is not eligible to access the consenting pathway, students may need to travel several hours every day to and from school because of potential limitations on where schools can be sited. This is unlikely to be acceptable to communities.

As a further example: there are many small-scale water supplies around New Zealand likely to be too small-scale to qualify as regionally significant infrastructure, and which would not qualify as lifeline utilities because they may fail to meet the definition of a network. This facility will require maintenance or upgrading; however, this could be a prohibited activity if the area is near to natural wetlands. Further examples of infrastructure that we consider could fail to access the effects management hierarchy in respect of wetlands include: health services, corrections, and defence facilities. The last two examples are nationally significant infrastructure because they benefit all New Zealanders, regardless of location, however, may fail to be specified in a regional policy statement or regional plan. It is also possible that a hospital could fail to be specified as regionally significant in a plan.

More broadly, there is a degree of chance or luck in the NPS-FM linking the definition of specified infrastructure to what might be specified in regional plans, given there is no accompanying direction to actually create or maintain such a list (and we suggest that such lists are not generally developed with wetland regulations in mind). Accordingly, this detail is more appropriately set out in the NPS-FM itself.

We therefore ask MfE to consider widening the scope of infrastructure types that would have access to a consenting pathway in respect of natural wetlands. One way of achieving this broadening of scope would be to develop criteria to assess infrastructure for the consenting pathway, rather than rely on a list of specified infrastructure that will likely become incomplete.

Additional issues with the existing consenting pathway for “specified infrastructure”

We take this opportunity to raise additional concerns with the current consenting framework for specified infrastructure. These matters should also be borne in mind when designing a consenting pathway for the additional activities identified above. They are:

- The existing gateway in clause 3.22 of the NPS-FM is premised on specified infrastructure having a functional need to locate in or near a wetland. The National Planning Standard definition of “functional need” quoted above refers to activities which “*can only occur in that environment*”. A strict reading of this (which is open to a submitter or decision maker) would limit it to situations akin to windfarms locating on ridgelines, or marine farms locating in the coastal marine area because they have a true functional need to be there. This may not be the intention of clause 3.22 given that few activities have a comparable inherent need to be located in wetlands – although they may well have a technical or operational need to be there (eg linear infrastructure that needs to traverse through that environment, or other infrastructure that logically needs to be situated in a location that happens to be a wetland). To date decision makers have taken a practical approach to interpreting the term ‘functional need’. However, we consider it would avoid uncertainty, and better reflect the intended nature of the consenting pathway, if clause 3.22 were expanded to refer to “functional need or operational need” (as defined in the National Planning Standards).
- Regulation 45 of the NES-F clearly provides for activities associated with the construction of specified infrastructure as a discretionary activity, and we have proposed above this could be expanded to cover a wider scope of infrastructure. But the NES-F is less clear in the way it provides for the ongoing use or operation or maintenance or upgrading of existing infrastructure. In particular, the discharge of stormwater (from new non-permeable surfaces) is not clearly addressed in Regulations 46, 47 and 54; we understand some councils have suggested it could be a non-complying activity.
- A practical issue with many of the regulations that relate to activities within 100 metres of wetlands is that the applicant may not own all of the relevant land (or be granted access to it for the purpose of surveys), so cannot ascertain with accuracy whether or not the proposed activity is in fact within 100m of a wetland – it is suggested that a shorter threshold distance (e.g. 50m) may be more appropriate for some activities, and such a requirement would be more easily reviewed.
- Another uncertainty is whether the upgrade of specified infrastructure should be treated as being part of “construction” (Regulation 45) or “maintenance” (Regulation 46); clarity should be provided as to which regulation applies (or a new regulation for “upgrade” developed).
- Regulation 46(4)(b) refers to “increasing the size of the specified infrastructure”. It is unclear what this means in practice, for example whether this regulation would apply where a tower is lengthened, or has additional conductors installed, but the footprint in the wetland is the same. The intention should be clarified here.

Recommendations

1. Amend the definition of natural wetland in the NPS-FM to remove the words “or intermittently”, or, alternatively, to exclude the flood plains of rivers from the definition.
2. Provide access to the proposed consenting pathway for a broader range of infrastructure than currently provided for, including by creating a list of infrastructure that needs access to the consenting pathway
3. Enable Recommendation 2 by developing criteria to assess infrastructure for the consenting pathway
4. Include the concept of “operational need” into the gateway test for eligibility of access to the consenting pathway

5. The effects management hierarchy needs to be accessed and implemented efficiently, to deliver timely and urgent infrastructure to meet Government objectives
6. Reduce the distance of 100 metres from a wetland where regulations apply to 50 metres
7. Provide explicitly in the NES-F for the ongoing operation, maintenance and upgrading of infrastructure
8. Provide clarity on the meaning of "increasing the size of specified infrastructure", eg height of infrastructure, cf spatial footprint
9. Conduct a wider review of the workability and clarity of the existing freshwater policies and regulations

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