NEW ZEALAND
INFRASTRUCTURE
COMMISSION
Te Waihanga

Submission to Ministry for the Environment

"Managing our wetlands: Exposure draft of proposed changes to the NPS-FM and NES-F (including wetland regulations)"

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Introduction

Te Waihanga NZ Infrastructure Commission ('**Te Waihanga**') welcomes the opportunity to submit on the Ministry for the Environment exposure drafts[1] of NPS-Freshwater Management, and NES-Freshwater amendments as part of the 'Managing our wetlands' workstream.

Te Waihanga was established under the New Zealand Infrastructure Commission/Te Waihanga Act 2019, with its main function being "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".

Te Waihanga made a submission on the Discussion Document Managing our wetlands: A discussion document on proposed changes to the wetland regulations.

[1] Please refer exposure drafts for changes to the NES-F (available here: https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/user_uploads/exposure-draft-changes-to-rm-nesf-regulations-2020.pdf) and the NPS-FM (available here: https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/user_uploads/exposure-draft-changes-to-npsfm-2020.pdf).

Executive summary

As set out in our response to the Discussion Document, we are concerned that the 2020 freshwater package currently 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. Among other things, this has the potential to be inappropriately disenabling where it affects infrastructure that needs to be located in such environments for practical or operational reasons.

Accordingly, we generally support the proposals in the exposure drafts to provide new consenting pathways in respect of natural wetlands for cleanfills, managed fills, landfills, urban development, ecological restoration, and quarries/mines.

Key outstanding issues are:

- While the changes to the 'natural wetland' definition are improvements, we remain concerned that the NPS-FM casts the net too wide in identifying wetlands that then become subject to protection, without regard to scale or value.
- Similarly, the effects management hierarchy appears to require the same degree of protection regardless of scale or value, or of overall ecological outcomes.
- Against that backdrop, it is considered that the consenting pathways in the NPS-FM are still too narrow:
  - The category of 'specified infrastructure' misses out important facilities that do not fall into the definition of lifeline infrastructure, if they do not happen to be identified in regional plans or policy statements (e.g. educational facilities, small-scale and non-networked water infrastructure, corrections facilities and healthcare facilities). We consider such facilities should be brought within the definition of 'specified infrastructure' if they are not covered by other pathways ('urban development', for example).
  - The 'functional need' test remains inappropriate for specified infrastructure; the reasons for this have been recognised in the efforts to design alternative tests for other activities as part of the new consenting pathways (and the Policy Rationale document acknowledges that the functional need test is not fit for purpose in those contexts), but in our view many of the same factors apply equally to specified infrastructure as well.
- The addition of consenting pathways for quarrying, mining, cleanfills/landfills, and urban development is an appropriate step, and these changes are (in principle) supported. However, we raise a number of concerns with the framing of these pathways, particularly in relation to the 'national/regional benefits' test and the 'best practicable location' test.

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Submission

Amendment 1: Definition of 'natural wetland'

We consider that the proposed amendments are a step in the right direction. However, we have remaining concerns with this definition as well as the overall approach to the identification and assessment of wetlands in the NPS-FM and NES-F.

Overall approach

A universal theme in the feedback we received from the infrastructure stakeholders consulted was a concern that the NPS-FM casts the net much too wide in its identification of wetlands. As a starting point it captures all wetlands, regardless of scale, whether or not they are permanent or ephemeral, or identified. There is also no quality or size assessment associated with their identification, such that the approach in these documents:

- Captures low value 'wetlands' that might accidentally arise in managed grass areas (other than pasture) such as sports fields, air fields, development sites etc. A minimum size (in the realm of 0.5 ha^2) and value assessment would assist in that regard; and
- Restricts even routine and relatively low impact activities associated with infrastructure maintenance, access, or minor upgrade – which then require resource consent and are subject to considerations in the 'effects management hierarchy' that are more appropriate for 'new' infrastructure impacting on higher value areas.

A related issue (which we return to below in the context of the offsetting and compensation principles) is that there is a lack of regard in the associated policy directions to the quality or values of wetlands in assessing the level of avoidance, mitigation, offsetting required, or overall ecological outcomes.

In particular, the definitions of 'natural wetland' and 'effects management hierarchy' do not have any direct reference to the actual quality or ecological value of wetlands. On their face, the NPS-FM and NES-F afford the same degree of protection to the least valuable wetland in the country as they do the most pristine. We consider this leads to a lack of proportionality in terms of the value of wetlands and the lengths that must be taken to avoid them. We return to this point in the context of Amendment 8 below.

Deliberately constructed and induced wetlands

We agree that it is appropriate to exclude deliberately constructed and induced wetlands.

However, we consider the 'induced wetland' exception in the current drafting, which is focused on deliberately constructed water bodies, does not go far enough. For example, the 'induced wetland' exception would not include:

- 'Wetlands' caused by poorly installed culverts, or other 'blockages' (not associated with a constructed water body) which result in wet ground occurring.
- A 'wetland' that has developed around other infrastructure and which could now (due to the NES-F and NPS-FM) impede the operation, maintenance or upgrade of that infrastructure.

Accordingly, our view is that induced wetlands should be excluded from the definition entirely, or that paragraph (b) of the definition of natural wetland should be extended to all wetlands that have developed in or around specified infrastructure, since the construction of the infrastructure.

[2] We are aware of a suggested minimum size of as little as $2m^2$ but do not consider that (on its own, i.e. if not part of a wider wetland area) would realistically constitute an ecologically viable wetland.

The 'pasture' exception – why not other 'managed grass' areas?

We agree it is appropriate to exclude 'pasture wetlands' or 'wet farmland' from the definition of 'natural wetland'.

However, we consider that the same principles apply equally to other areas of 'managed grass' in more urban settings; which are clearly modified environments and where any 'wetland' that might arise (e.g. due to difficulties with maintenance) will be of very low value. But because of the way this part of the definition is drafted, the 'exotic pasture' species test in clause (d)(ii) does not even become relevant unless the land in question is "an area of pasture" under clause (d).

This fails to cover a range of other areas where grass has been deliberately sown and actively maintained (i.e. 'managed grass'), such as active airfields, sports fields, development sites and so on. It is inappropriate for such areas to be caught by the 'inland wetland' definition and subject to effective prohibition if wetted areas supporting certain wetland species have developed.

> *Example 1: Wetlands arising near airfield runways*
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> *Base Ohakea frequently experiences the pooling of water around airfield runways. As these areas are seasonally wet, they cannot be mown and some have started growing sedges. The areas are unlikely to meet the 'pasture exclusion' and would therefore be caught under the definition of a 'natural wetland'. This would result in NZDF having to comply with extensive conditions or obtain consents to undertake works in or around a "natural wetland" for the purposes of maintaining or upgrading important Defence infrastructure.*

Pasture species test

With regard to the 'pasture' exclusion, the removal of reference to temporary rain derived pooling simplifies the definition somewhat. However, the 50% exotic pasture species test still poses a number of problems:

- If this approach were to be used then ensuring a complete list of species becomes critical. We have received feedback that the list is too limited, and for example does not include wet pasture species which while rarely sown today have been sowed extensively in the past.
- One of the concerns from our stakeholders was that the national list of exotic pasture species does not account for the fact that native species are often used in managed pasture or that pasture weeds form a significant component of managed pasture areas (i.e. Ranunculus, rumex (docks and sorrels) and ragwort).
- More broadly, we consider that the exception is framed the wrong way around. Rather than needing 51% coverage of pasture species in order to not qualify as a natural wetland, we suggest that the test should be 51% wetland species in order to qualify as a natural wetland in the first place (otherwise, for example, wet areas that are covered with species that are not listed and native dry ground grasses would also qualify as natural wetlands).
- Overall, even if such improvements are made, the time and effort required to accurately identify areas of natural wetland will be extensive, and in many cases unduly onerous (particularly where, for example, there is a need to identify natural wetlands within 100m of linear infrastructure spanning hundreds of kilometres. We return to this point below).

Lack of clarity around coastal wetlands remains

Noting the High Court's recent decision in *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113 recognising that the NES-F regulations apply in the coastal environment,

we consider that this definition would benefit from further guidance in the coastal space. For example, we are aware of submitters in resource consent processes arguing that all of the coastal marine area qualifies as a "wetland", because in terms of the RMA definition of 'wetland' it is wet and it is land. It would be appropriate to clarify this position for the benefit of submitters and applicants alike, via amendments to the NPS-FM or NES-F or other material incorporated by reference (in order to ensure it has the appropriate legal status, given that additional 'guidance material' may not).

We understand that the Ministry is turning its mind to this matter in developing a delineation protocol for wetlands within the CMA, and a working definition of 'natural coastal wetland', and welcome further guidance in this space.

Alternatively, given the new consenting pathways in the NES-F (for quarries, mining, landfills/cleanfills, and urban development) all refer to "natural inland wetlands", we suggest that for consistency the existing regulations pertaining to specified infrastructure should also be amended so that they also refer to "natural inland wetlands".

Amendment 2: The tests of 'national and/or regional benefit' and 'functional need'

The proposed changes to NPS-FM clause 3.22 introduce new consenting pathways for a range of activities that would not have fallen within the existing pathway for 'specified infrastructure'.

In principle these are supported, and will be a much-welcome change for the sectors affected.

However, we have ongoing concerns with the drafting of the existing pathway for 'specified infrastructure', as well as for the other new pathways. These are outlined below and in the context of the other 'amendments' below.

When the tests apply – 'maintenance' vs 'upgrade'

A preliminary issue is when the functional need test (and also the effects management hierarchy and benefits tests) applies.

In this respect:

- Clause 3.22(1)(a)(iv) does not require these tests to be met in regard to the 'maintenance or operation' of specified infrastructure.
- The tests apply at 3.22(1)(b) in relation to the 'construction' or 'upgrade' of specified infrastructure.

A particular issue that we have received feedback on from stakeholders is the lack of certainty with regard to what activities would constitute an 'upgrade'. For example, 'like for like' replacement of transmission line components with modern equivalent parts could be perceived as an 'upgrade' in the sense that it 'makes things better', even if the intention is only to maintain the current performance level using available components, and/or it has no greater environmental effect than the existing infrastructure.

It is not appropriate to apply the functional need test or 'effects management hierarchy' tests to works of this kind, as those tests are more appropriate for 'new' infrastructure or significant upgrades. As such, we request that:

- clause (a)(vi) be amended to include 'minor upgrades' (which could, if necessary be defined to include upgrades that do not substantially increase size or capacity of the infrastructure, or materially increase its effects) and

– clause (b)(i) be amended to refer to 'substantial' or 'major' upgrades.[3] Corresponding amendments to the NES-F regulations would also be appropriate.

> *Example 2: Replacement of old transmission line structures – 'upgrade' or 'maintenance'?*
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> *A section of the national grid near National Park runs through a wetland. The kingbolts attaching the cross arms at the poles of this section are failing, and Transpower may need to change all the old poles out with new poles and cross arms (like-for-like replacement) to install brand new structures across the wetland and reduce repeat (maintenance) visits. The status of this work is uncertain, and even with like-for-like replacements this work could be treated as an upgrade. Transpower would then need to work through the full effects management hierarchy (which includes community participation as part of the principles for offsetting and compensation).*

Functional need test remains problematic for specified infrastructure: NPS-FM cl 3.22(1)(b)

In our submission on the Discussion Document, we explained the difficulties arising from the 'functional need' test being applied in practice. Similar concerns were voiced by a number of other submitters. We remain of the view (set out in our feedback on the Discussion Document) that the functional need test is (if strictly applied) unworkable in the context of wetlands, and that 'operational need' (as defined in the National Planning Standards) would be a more appropriate test.

The concern arises because the functional need test could be read (in its strictest sense) as requiring specified infrastructure to have (as the term suggests) a *functional* need to locate in a wetland specifically (rather than just in a spatial location that happens to be wetland), i.e. 'can only locate in that environment'.[4] This would be, for example, in the sense that a marine farm has a *functional* need to locate in the coastal environment, or a wind farm has a *functional* need to be located on a ridgeline or windy location. This is likely to be the way in which this term is generally used in RMA planning documents; it also appears to be the way in which the term is used in the new consenting pathways for mining and quarrying.

In contrast, there are no examples (to our mind) of infrastructure related activities which 'can only occur' in a wetland environment. In other words, no infrastructure has an inherent need to locate within wetlands in a functional sense, i.e. because it cannot function otherwise. On the contrary, most infrastructure will be more difficult to construct or maintain in wetlands and they would be avoided where possible.

In this regard, we agree with the comments in the supporting documents[5] that the 'functional need' test would not be appropriate or 'fit for purpose' for urban development or landfills, because those activities 'are not constrained by location in the way a quarry is'. We consider that this exact rationale applies equally to many infrastructure activities within the 'specified infrastructure' class (and notably landfills can also themselves constitute 'specified infrastructure' when they are identified as such a regional plan.[6])

[3] It would be appropriate to use similar terms to the National Policy Statement on Electricity Transmission Activities, which refers to minor upgrades, major upgrades, and substantial upgrades. This would also improve alignment between the two national policy statements.

[4] The full definition of 'functional need' is: 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.

[5] https://environment.govt.nz/assets/publications/managing-our-wetlands-policy-rationale-exposure-draft-amendments-31May2022.pdf at p 14 and https://environment.govt.nz/assets/publications/essential-freshwater-amendments-report-recommendations-summary-submissions-may2022.pdf at p 35.

[6] For example, the proposed Wellington Natural Resources Plan lists Silverstream, Spicer and Southern landfills as 'regionally significant infrastructure' (RSI).

As such, it is not clear exactly what distinction is being drawn between these activities on the one hand, and specified infrastructure on the other, i.e. why it is considered that the functional need test is any more appropriate or workable when applied to specified infrastructure than it is when applied to landfills or urban development (which could or should itself include local infrastructure). In each case, we consider the constraints or need to locate in a wetland area will be more accurately described as technical, operational or practical, rather than 'functional'.

In a practical sense, the concerns include that:

- The inapposite use of the functional need concept in the context of specified infrastructure will lead to its meaning being strained, as decision makers strive to reach workable outcomes, which will have consequential effects on the strength of 'functional need' requirements in other planning contexts.
- While the High Court has recently taken a relatively pragmatic interpretation to the 'functional need' requirements, in the *Mt Messenger* case (*Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629), there is nothing to prevent a superior court from taking a more 'black letter law' approach and reading the 'functional need' test as a prohibition in all but name. The fact that decision makers have until now slightly strained the wording in order to achieve workable outcomes does not mean that 'functional need' is an appropriate test.

On both grounds, we consider that it would be appropriate to use different language instead of (or at least as well as) "functional need".

The case for 'operational need'

Because the policy intention is not truly concerned with the 'function' of the infrastructure, but with the practical need to for it to be located in a location that also happens to be a wetland, we consider that "operational need" is the much more apposite concept. The definition is:

> Operational need means 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.

As noted above, this approach was sought by a number of submitters, and has been included in equivalent provisions of the NPS-IB. Te Waihanga considers that a consistent approach between the two NPS would be appropriate. However, the Policy Rationale document indicates that this concept was considered too lenient or otherwise not adequate for the protection of wetlands. In response to that concern, we consider that:

- It is not accurate to characterise operational need as simply relating to "financial considerations or convenience" [7], or matters such as "financial considerations, private ownership". The definition refers to a 'need' to locate somewhere due to technical or operational constraints, which requires more than convenience or affordability.[8]

- The concern expressed in the supporting documents that the test would be too broad or lenient ignores the fact that even if operational need were added to the consenting pathway (as it is in the proposed NPS-IB, at clause 3.11(2)(b), for example), the other limbs of the 'consenting pathway' in clause (b) would still need to be made out for the activity to proceed in that location.
- In particular, there would still be a need to show national or regional benefits, and the 'effects management hierarchy' requires effects on the values of wetlands to be avoided "where practicable"

[7] https://environment.govt.nz/assets/publications/essential-freshwater-amendments-report-recommendations-summary-submissions-may2022.pdf at p34.

[8] Noting that the inability to acquire land, including under the Public Works Act (e.g. because under that regime the acquisition may not be 'reasonably necessary', given the PWA regime does not have the same rigid focus on wetland avoidance), is a very real constraint that does need to be recognized as part of the 'need' to locate infrastructure in certain places (or through certain areas in order to complete a network, in the case of linear infrastructure).

(and then minimised, and so on). These are onerous requirements, so it is not the case that adding "operational need" to clause 3.22(1)(b)(iii) would allow unrestricted intrusion into wetlands.

National and/or regional benefits test

We understand the intention of the 'national and/or regional benefits' tests, being to limit incursions into wetlands to those instances where there are clear benefits associated with doing so. In most cases this test is appropriate for specified infrastructure, as currently defined.

However, we are concerned that setting the threshold for benefits at the national or regional level may have unintended consequences. In particular:

- In order to have regional level benefits, it is likely that a quarry or landfill would have to be extremely large, and therefore likely to have greater environmental effects including on wetlands (it is difficult to imagine a quarry or landfill ever having national benefits).
- Quarries, by nature, produce low value bulky material, that is best utilised close to its source. A more localised source of aggregate materials can significantly reduce effects associated with transport (e.g. noise, traffic, dust, pavement wear, carbon emissions etc). As such, smaller quarries in locations close to where the material is needed should be encouraged, or at least not disenabled, through RMA policy.
- Similarly, landfills are generally developed at a district level; a 'regional sized' landfill would have greater effects in terms of the transport of waste, as well as greater localised effects on the environment.

Accordingly, the emphasis on regional benefits (let alone national benefits) is misplaced in this context, and should be reconsidered in relation to quarries and landfills/cleanfills (or, for example, 'district/local' benefits should be added).

Amendment 3: New consent pathway for quarrying

Te Waihanga supports the new consenting pathway for quarrying activities in the NPS-FM, and discretionary activity status in the NES-F.

That said, we consider the proposed consenting pathway in clause 3.22(1)(d) could be refined further. In particular:

- The 'functional need' test is at least able to be met in this context, as quarrying (and also mining) can logically only occur where the materials are actually located. Accordingly, there is a functional need to carry out the quarrying activity in those locations, rather than elsewhere. However, it is so self-evident that the test will be met, that we query what it would really add to the evaluation of resource consent applications.
- The reference to national or regional benefits is not appropriate, for the reasons set out above, and may if anything drive environmental outcomes that are worse overall. We suggest that if a version of this clause is retained then it would more appropriately refer to benefits or needs at a more local level.

Amendment 4: New consent pathway for landfills and cleanfills

We support this new pathway in the NPS-FM and associated dictionary activity status in the NES-F.

However, as for quarrying, we consider that a requirement to show national or regional benefits is inappropriate in this context, and a more localised focus should be adopted.

In addition, we see some difficulties with the proposed new 'best practicable location' test in clauses 3.22(c)(iv) (urban development), and (f)(iii) (landfill or clean fill), the wording is:

> "there is either no practicable alternative location for the activity, or every other practicable location would have equal or greater adverse effects on a natural inland wetland".

Our concerns are that this test:

- Invites a more substantive review of the applicant's options assessment than currently exists under the RMA (i.e. existing statutory directions and case law emphasise adequate consideration of alternatives, rather than necessarily choosing the 'best' option).
- Is unclear with regard to the spatial scale or level at which it would need to be applied. For example, would an applicant be required to prove there were no practicable locations available to them, or available within the town, or district, or region?
- Focusses too narrowly on the effects of other locations on wetlands (only), rather than their suitability in any other respect, which may result in much more significant adverse effects on other values (i.e. avoiding wetlands 'at all costs').

Amendment 5: New consent pathway for mining (minerals)

The new pathway for mining (minerals) is the same as that for quarrying.

We also support the new pathway, but note the same concerns as apply to quarrying above. That is:

- Depending on what is being mined, a regional/national benefits test may not be appropriate (although we acknowledge that this test would be more readily met for mining than it would be for quarrying); and
- The functional need test is arguably unnecessary, as mining would only ever be proposed where minerals are located (and the directions to avoid effects on wetlands where practicable (etc) are separately contained in the effects management hierarchy).

We note that the new NES-F regulations propose that discretionary activity status would not apply to the mining of coal (other than coking coal) from 1 January 2030. In our view this is a matter of climate change policy that should be addressed in primary legislation (or CCRA instruments) rather than regulations under the RMA. Only restricting this activity here through the NPS-FM suggests that coal mining in locations other than wetlands would not be restricted from that time, and the rationale for this restriction only applying to wetlands is not clear (as it appears to relate more to climate change mitigation and the 2050 Target – which Te Waihanga supports – rather than wetlands per se).

Amendment 6: New consent pathway for activities necessary for urban development

Te Waihanga supports restricted discretionary activity status for 'activities necessary for urban development', under proposed r45C of the NES-F. However we have concerns with the proposed consenting pathway in clause 3.22(1)(c) of the NPS-FM.

Uncertainty regarding what activities are included – 'urban development' is not defined

We note that 'urban development' is not defined, in either the NPS-UD, the NPS-FM, or the NES-F. This could, at the margins, lead to debate as to what activities are included. For example, it is unlikely to include transport or associated infrastructure. We consider a clear definition is essential, because this phrase is used not only in the policies in clause 3.22 of the NPS-FM, but also in the NES-F rules which determine the applicable activity status. (While some degree of evaluative judgement might be

tolerable or inevitable in assessing an application against policy directions, it should not be required in order to work out which activity status applies).

The Policy Rationale document refers to an earlier proposal to use the term "plan enabled" as part of this consenting pathway, which is defined in the NPS-UD at cl 3.4.1 to mean (in essence) housing and business use. While that was arguably too narrow, it was at least relatively certain.

The reference to "plan enabled" development in the proposals has now been replaced with a reference to "well-functioning urban environment", which is defined in the NPS-UD at Policy 1. That term describes desirable attributes of a well-functioning urban environment in broad terms, but does not provide the necessary level of clarity as to what activities might be included. For example, while it is likely to include residential and business use, it is not clear if it would extend to social infrastructure, educational facilities, community facilities, transport infrastructure, etc.

In this regard, we support the policy intention (as indicated in the Policy Rationale document) to signal that the provision is for housing "but also other aspects of good urban environments required to meet the needs of people to 'live, work and play". However, in terms of Amendment 6B we consider that the drafting is too uncertain to achieve that outcome.

> *Example 3: Schools and social infrastructure*
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> *Without a clear definition of 'urban development', there is a risk that schools and other essential social infrastructure receive no benefit from the proposed regulation 45C of the NES-F. Based on the current drafting, there is a risk that housing or business "urban development" taking place in a natural inland wetland would be a restrict discretionary activity while on the neighbouring school, zoned 'special purpose' the works would be prohibited.*

Te Waihanga considers that the definition of 'urban development' should be broad enough to include transport and other infrastructure, as well as 'educational facilities' (if not separately provided for as part of 'specified infrastructure').

Difficulties in applying the 'no practicable alternative' test for urban development

We noted some problems with the 'no practicable alternative' test as applied to landfills and cleanfills, above. The test is potentially even harder to meet when applied to urban development, and could become an impossible standard – depending on the scales at which it is applied.

For example:

- There is no guidance as to the scale at which other 'practicable alternative location' are to be identified and evaluated. E.g. is it within the land available, or within the suburb, city, district, or region?
- It is not clear whether the test is to be applied to the urban development project as a whole (e.g. a 500 lot subdivision/development project), or to individual activities or (for example) dwellings. (If the former, then it would be better for the cl (c)(iv) to refer to alternative locations for "the urban development", rather than for "the activity". Compare cl (b)(iii) which refers to the need for "the specified infrastructure in that location" rather than for "the activity").

Depending on how it would be interpreted by the courts (which is not yet knowable), this test could require the applicant to demonstrate that there was no 'practicable alternative location' for every

proposed dwelling, in any other part of the region. If that outcome was not intended then the test needs to be refined further.

Amendment 7: Include water storage in the definition of 'specified infrastructure'

Te Waihanga's preference would be that nationally significant infrastructure facilities are simply exempted from the definition of natural wetland, and/or, from the application of the NES-F/NPS-FW. This exception would apply to existing facilities including airports, ports, state highways, rail, and electricity transmission and generation. We consider that, collectively, these facilities will occupy a tiny portion of the land area of New Zealand, and an even small proportion of the high value wetlands (if any). The burden on these significant facilities of having to comply with obligations under the NES/NPS regulations in relation to low value wetlands is disproportionate to any derived benefit.

In the absence of this change, we consider that the expansion of the definition of 'specified infrastructure' to cover water storage is helpful.

However, we consider the definition of 'specified infrastructure' is still too narrow. In terms of the different limbs of this definition:

- The definition of 'lifeline utilities' includes entities which provide electricity generation/distribution, three waters infrastructure, telecom networks, roading networks, or production or distribution of petroleum or gas products. While this covers a range of different kinds of infrastructure activities it notably does not include shared use paths which might be associated with roading projects, education, health, or defence facilities, urban or economic infrastructure or ancillary assets associated with the proper functioning of any of the above infrastructure.
- The addition of regionally significant infrastructure (RSI) as identified in regional policy statements or plans is a good idea in theory, but in practice leads to inconsistent outcomes across different regions. This limb of the definition would work if there was an RMA policy requirement for regional councils to actually identify RSI in their planning instruments, but there isn't, and many don't. As a result, for example, the Wellington Region has three landfills that qualify as "specified infrastructure", while Auckland has none.
- Clause (d) refers to flood control, flood protection and drainage works. We consider this category should be expanded to also include seawalls and other structures associated with sea level rise and climate change adaptation. A consenting pathway is necessary for these activities in the NES-F, because a number of the regulations currently refer to "natural wetlands" (not "natural inland wetlands") and the courts have confirmed that the NES-F applies to coastal wetlands.

In addition, it is notable that the closely related (but confusingly slightly different) term "specific infrastructure" in the proposed NPS-IB specifically includes defence facilities. We consider it appropriate for NPSs to be consistent, and for defence facilities to be included in the NPS-FM definition of "specified infrastructure" as well.

We also consider that if it is not otherwise covered, there should be a limb added to include necessary climate change infrastructure that is required to achieve the 2050 Target (e.g. renewable generation, transmission, public transport and low carbon transport, etc).

In addition, we consider that a further clause in the definition of specified infrastructure would be appropriate to allow other categories of infrastructure to be added over time, including under the imminent Natural and Built Environments Act. We propose the following wording:

> (e) any infrastructure identified in a national policy statement or national planning framework chapter, or listed in relevant legislation.

Amendment 8: Include aquatic offset/compensation principles

We note that the new appendices 6 and 7 of the NPS-FM are very closely related to proposed appendices 3 and 4 of the NPS-IB exposure draft. Te Waihanga will be providing further feedback on the principles as part of that separate consultation.

In broad terms, Te Waihanga supports the addition of principles to the NPS-FM (in order to provide further guidance), and supports the requirement being for the applicant to "have regard" to them (in cl 3.22(3)(b)).

That said, a number of our stakeholders have raised concerns that the principles may come to be seen as fixed rules, and result in necessary projects being unable to proceed in some cases. Particular feedback was that:

- The requirement for a loss/gain calculation (item 3) can be problematic and is not a necessary process to demonstrate no net loss (the use of an offset model); and
- There may be issues with clauses (2)(b) and (2)(c) in both the offset and compensation appendices, because of the uncertainty of some project effects and also the certainty of the offset. Clause (2)(b) is inherently very precautionary, and (2)(c) is uncertain and subjective with regard to the reference to an 'acceptable timeframe'. It was considered that these clauses should be removed or reworded.
- Clause 10 of the appendices requires community participation, and it is not clear what the applicant is required to do in response to this input if it impacts on the operation or maintenance of existing infrastructure activities.

Much of the feedback on this point raised wider concerns about the effects management hierarchy (which these principles will inform) more generally. For example:

- There was a concern that evaluations under the effects management hierarchy would be triggered by relatively minor or routine works, when the considerations are by nature more appropriately directed at wholly new projects, or major upgrades. Particular clarifications sought are to clause 3.22(1)(a)(vi) and (b)(i) so that only major upgrades are required to go through the effects management hierarchy, and this requirement does not apply to minor upgrades (in the sense of like for like or 'modern equivalent' replacements). There was a concern that activities such as maintaining existing access tracks in order to access infrastructure for necessary maintenance (eg transmission lines) would need to be considered against the effects management hierarchy.
- Similarly, there was a concern that the full hierarchy should not be required when the wetland in question was assessed (by both the applicant and consent authority) as being of low value. In those situations, we consider that management of the wetland under clauses (d)-(f) of the effects management hierarchy would be sufficient.
- There is a concern that the principles are not appropriate for small scale but necessary/unavoidable activities, and seem unduly onerous for activities that must occur on existing infrastructure. Either the associated clauses of the NPS-FM should be revised so that the effects management hierarchy and principles are not applied, or the hierarchy and principles themselves should be amended.
- It was also noted that the current hierarchy framework does not enable recognition of the overall ecological outcome, and can, for example, lead to wetlands that are assessed as being low quality having to be avoided regardless of the net ecological benefit of this relative to other options (e.g. mitigating those effects through offsetting or compensation).

Amendment 10: Clarify the take, use, dam, diversion, and discharge of water

The NES-F changes include a number of amendments intended to clarify the application of the regulations to discharges of water in the vicinity of wetlands (i.e. within a 100m setback). These are described in the Policy Rationale document as "Amendment 10" (page 33).

Clarification in this area would be welcome. However, while the document suggests the regulations were not previously intended to capture the discharge of contaminants, the proposed amendments do not clearly address this issue. In particular, new clauses refer to effects of the discharge on 'the hydrological functioning or the habitat or the biodiversity values of a natural wetland', which suggests that any water quality effects associated with contaminants in water would still need to be considered. In addition, the conditions for permitted activities in reg 55(3) still contain a series of restrictions based on s 107 of the RMA regarding effects on water quality. Perhaps it was intended that effects of contaminants, as opposed to hydrological effects, would still be captured, but the comments in the Policy Rational document are confusing in this regard, and greater clarity would be useful.

Hydrological connection

For activities within 100m of a wetland to be caught by the regulations, a hydrological connection threshold and an effects threshold are proposed, such that if there is no effect or no hydrological connection the activity is not regulated by the NES-F. While these efforts to provide greater certainty are to be commended, we consider further guidance is required. In particular:

- The hydrological connection test does not contain any methodology or standards for determining whether there is a connection or not. To reduce debate in this area it would be useful to provide some guidance in terms of what level of 'connection' would qualify (for example in terms of the extent to which the discharged water would interact with the wetland).
- The second test is whether there are "likely to be adverse effects". This is rather like a direction to avoid (all?) effects, insofar as it is not clear if temporary or very minor effects would be enough to trigger the NES-F requirements.

A compounding issue is the cost and effort that will be required to carry out these assessments for all wetlands within 100m, particularly for linear infrastructure that spans hundreds of kilometres (such as the state highway network). This is even more difficult where the infrastructure operator does not have property access to the wetland or land between the infrastructure and the wetland.

Finally, the way the NES-F regulations are currently set up there is a real risk that ongoing activities such as operational stormwater discharges will end up being considered as non-complying activities because they are not considered to comply with regulation 45(5). While that regulation does not expressly require activities to be temporary only, we are aware that that is how some councils have been interpreting it, with the result that affected activities must be treated as non-complying.

Amendment 11: Allow an increase in the size of infrastructure for fish passage

This change is supported as far as it goes. However, we consider this highlights a wider problem with the size restriction, and that minor increases in size should be allowed (e.g. in the context of like for like

replacements or minor upgrades). As per the proposed approach to discharges, we consider there should be an 'exception' whereby an activity is only caught if it is likely to have greater effects as a result of the size increase.

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Appendix A. Summary table of relief sought