



Submission on the application of the NES-F to the CMA

1. Introduction

The New Zealand Infrastructure Commission, Te Waihanga is an autonomous Crown entity established under the New Zealand Infrastructure Commission / Te Waihanga Act 2019. The main function of Te Waihanga is “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”.¹

Te Waihanga has been tasked with elevating infrastructure planning and delivery to a more strategic level and by doing so, improve New Zealanders’ long-term economic performance and social, cultural and environmental wellbeing. It is through this lens that Te Waihanga makes this submission.

Te Waihanga made a submission in July 2022 on the exposure draft of proposed changes to the National Policy Statement for Freshwater Management (NPS-FM) and the National Environmental Standards for Freshwater (NES-F).

¹ Section 9, New Zealand Infrastructure Commission/Te Waihanga Act 2019.

2. General feedback

2.1 General submission

Te Waihanga welcomes the opportunity to comment on the Ministry for the Environment's (MfE) discussion document on the application of the NES-F to the coastal marine area (CMA).

As set out in the submission of Te Waihanga on the exposure draft for the NES-F and NPS-FM, we agree that further guidance is needed as to whether the NES applies to wetlands in the CMA or not. The current position is ambiguous following the High Court's decision in *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113 where it was recognised that the NES-F regulations apply in the coastal environment. It is resulting in situations such as submitters in resource consent processes arguing that all of the CMA qualifies as a 'wetland' because in terms of the RMA definition of 'wetland' it is wet and it is land.

Te Waihanga's submission is that the NES-F should not apply to the CMA. **In that respect, we agree with MfE's preferred option 2: amend the NES-F so its wetland provisions do not apply to the CMA.** This amendment will provide greater clarity to NES-F users that the NES-F does not apply to wetlands in the CMA.

3. Specific feedback

3.1. Do you agree that the current application of the NES-F to the CMA requires amendment?

Yes.

We have been hearing concerns from our stakeholders about the current settings in the NES-F and the resulting difficulties for their operations. The key issues include:

- Uncertainty as to what could be captured as a 'wetland'. This is particularly the case with respect to alleged 'wetlands' that are permanently or ordinarily underwater, to which the methodologies developed for terrestrial wetlands do not readily apply (for example, we are aware of submitters claiming that the whole of the CMA is potentially a wetland, based on a literal application of the RMA definition).
- Associated with this (and as noted in 'section 3, policy problem' in the Discussion Document), the potential for the NES-F to constrain activities or require additional consents in situations where the activity in question does not have any material effect on the wetland. By way of example, we are aware of a situation where a discharge from an existing wastewater treatment plant potentially requires resource consent under the NES-F because the outfall is within 100m of a coastal wetland (even though the outfall does not discharge to the wetland directly). In that situation a consent requirement is potentially triggered under regulation 55(3) because it is difficult to rule out traces of sediment being discharged to the CMA and then indirectly entering the wetland as part of normal coastal processes (even though there is no associated adverse effect).

We consider that retaining the status quo would over time mean considerable cost and uncertainty for both infrastructure providers and councils.

3.2. Do you agree with the proposal to amend the NES-F wetland provisions to no longer apply to the CMA

Yes, for the reasons above.

3.3. Do you think the wording changes proposed in the preferred option make it clear that the NES-F would no longer apply in the CMA

Yes.

However, a lingering uncertainty if the NES-F is updated to refer to "natural inland wetlands" is what controls would apply to wetlands that are partially within the CMA (i.e. below mean high water springs). In other words, would such a wetland (and again we are aware of an example in the wastewater treatment plant situation described above) be treated wholly or partly as an inland wetland and partly as a coastal one?

To avoid future debate on this issue, it would therefore be preferable if the definition of “natural inland wetland” specifically excluded all wetlands where *any part of that wetland* is within the CMA. (We suggest that wetlands in this category would still be in the ‘coastal environment’, which is a broader than the CMA, such that plan provisions directed by the NZCPS would appropriately apply).

3.4. Are there any reasons to prefer other options?

No.

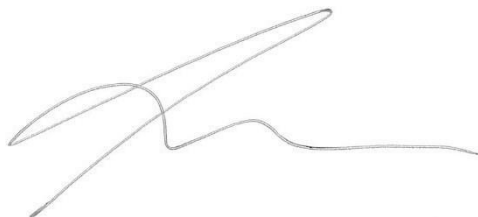
We consider that activities within the CMA (and coastal environment) are already very tightly managed under the RMA pursuant to the NZCPS and regional coastal plans, and that additional regulation under the NES-F adds uncertainty and cost with limited (if any) environmental benefit.

On balance, Option 1 (amend the NES-F) is not favoured because it would be a significant work programme, require substantial amendments, and introduce a risk of further unintended consequences. The Discussion Document itself notes that the full implications for coastal activities and structures are not fully understood at this stage. However, in the longer term, perhaps when the NES-F is next reviewed, Te Waihanga would support Option 1 being implemented in order to clarify where and how the NES-F applies to the CMA, including the exclusion of discharges near coastal wetlands (given the complications of assessing ‘indirect entry’ of discharged substances to wetlands as part of the coastal water column).

Accordingly, at the current time we prefer Option 2. Again, we do not consider this Option would create a regulatory ‘gap’ given the extent to which activities in the coastal environment are already managed, and in that context we do not consider there are any sound policy reasons for distinguishing activities that affect ‘wetlands’ in the CMA from activities that affect other parts of the CMA.

3.5. Is there any additional relevant information that you think the Ministry should consider?

No.



David Hall
General Manager, Policy
New Zealand Infrastructure Commission, Te Waihanga

Electronic address for service of Te Waihanga: David.Hall@tewaihanga.govt.nz

Telephone: (04) 886 3484