

## Technical Advice Note

### National Environmental Standards for Freshwater 2020

### Temporary Intensification Provisions and Environment Canterbury's Regional Plans

27 November 2020

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

#### Executive Summary

The Government's Essential Freshwater package aims to "stop further degradation of freshwater" and "improve water quality within five years". Farmers are therefore required to obtain resource consents for:

- conversion of more than 10 ha of land from plantation forestry to pastoral land use
- conversion of more than 10 ha of land on farm to dairy farmland
- increasing the area of irrigated dairy farmland by more than 10 ha –
  - compared with 2 September 2020.

In addition, resource consents are required for:

- conversion of land on a farm to dairy support land; and
- expansion of an area of land used for intensive winter grazing (this regulation comes into force on 1 May 2021) –
  - where this will increase the area of land used for these activities beyond the maximum of that which was occurring between 1 July 2014 and 30 June 2019.

These requirements apply *in addition to* any requirements applying to farming under Environment Canterbury's plans or any other requirements in the National Environmental Standards for Freshwater 2020 (NES-F) – these will be covered in a separate technical advice note.

This advice note addresses the relationship between the NES-F and rules regulating the use of land under the Canterbury Land & Water Regional Plan (LWRP) and Hurunui Waiau Rivers Regional Plan (HWRRP).

#### Introduction

The Government's Essential Freshwater (Action for Healthy Waterways) package came into effect on 3 September 2020. The purpose of the package is to "stop further degradation of freshwater" and "improve water quality within five years".<sup>1</sup> The package includes a new

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<sup>1</sup> MfE factsheet - Essential Freshwater Overview.

National Policy Statement for Freshwater Management 2020 (NPSFM), new National Environmental Standards for Freshwater 2020<sup>2</sup> (NES-F) and Stock Exclusion Regulations 2020. This technical advice note covers the temporary intensification provisions in subparts 2 and 3 of Part 2 of the NES-F and the way it interacts with Environment Canterbury's planning framework.

## **NES-F Temporary Intensification Provisions**

The NES-F contains “interim regulations” to restrict agricultural intensification. These regulations remain in force until the regional council gives public notice that it has implemented the NPSFM, and they will be automatically revoked on 1 January 2025. Full implementation of the NPSFM will occur as part of the future freshwater planning programme and is must be done by 31 December 2024.

Until then, the NES-F regulates:

- conversion of land used for plantation forestry to pastoral land use;<sup>3</sup>
- conversion of land on farm to dairy farmland;<sup>4</sup>
- irrigation of dairy farmland;<sup>5</sup>
- conversion of land to dairy support land<sup>6</sup>; and
- expansion of area of land used for intensive winter grazing (this regulation comes into force on 1 May 2021).<sup>7</sup>

In each case, the NES-F regulates both the use of land (or use of water in the case of the irrigation of dairy farmland) and discharge of contaminants, either by permitting both activities, or by requiring resource consent for both activities. Whether resource consents are required for conversion or expansion of one of the listed activities is determined by reference to the date or period specified in Table 1.

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<sup>2</sup> Resource Management (National Environmental Standards for Freshwater) Regulations 2020

<sup>3</sup> NES-F Subpart 2 – Agricultural intensification: temporary standards regulation (r) 16-17. See Appendix 1 for definitions of terms.

<sup>4</sup> NES-F Subpart 2 – Agricultural intensification: temporary standards r18-19. See Appendix 1 for definitions of terms.

<sup>5</sup> NES-F Subpart 2 – Agricultural intensification: temporary standards r20-21. See Appendix 1 for definitions of terms.

<sup>6</sup> NES-F Subpart 2 – Agricultural intensification: temporary standards r22-23. See Appendix 1 for definitions of terms.

<sup>7</sup> NES-F Subpart 3 – Intensive Winter Grazing r29-30. Note that even if not increasing in area, a consent for intensive winter grazing may be required if the conditions of r26 cannot be met after 1 May 2021.

**Table 1: Summary of Temporary Intensification Provisions in the NES-F**

<b>Intensification Activity</b>	<b>Consents required where there is an:</b>	<b>Consents Required under NES-F</b>
Conversion of land used for plantation forestry to pastoral land use	Increase in the area on farm used for pastoral land of more than 10 ha from 2 September 2020	Section 9 land use consent and s15 discharge permit <sup>8</sup>
Conversion of land on farm to dairy farmland	Increase in the area on farm used for dairy farmland of more than 10 ha from 2 September 2020	Section 9 land use consent and s15 discharge permit <sup>9</sup>
Irrigation of dairy farmland	Increase in the area of dairy farmland irrigated in the 12-month period preceding 2 September 2020 of more than 10 ha	Section 14 water permit and s15 discharge permit <sup>10</sup>
Use of land as dairy support land	Increase in the area on farm used for dairy support land in the reference period of 1 July 2014 and close of 30 June 2019 <sup>11</sup>	Section 9 land use consent and s15 discharge permit <sup>12</sup>
Expansion of area of land used for intensive winter grazing (IWG) - this regulation comes into force from 1 May 2021	Increase in the area on farm used for IWG beyond the maximum area used for IWG in the reference period of 1 July 2014 and close of 30 June 2019 <sup>13</sup>	Section 9 land use consent and s15 discharge permit <sup>14</sup>

## Environment Canterbury planning frameworks

Environment Canterbury has progressively implemented controls on farming activities via the Canterbury Land and Water Regional Plan and its sub-regional sections (LWRP), and the Hurunui Waiau Rivers Regional Plan (HWRRP). These controls have resulted in farming activities being regulated by a mixture of permitted activity rules and rules that require resource consent for farming activities (either for individual farms, or for collectives, typically irrigation schemes) which often require farmers to operate within a property or command area specific nitrogen load<sup>15</sup>.

<sup>8</sup> Land use consent required under r17(1) NES-F. Discharge permit required under r17(2) NES-F.

<sup>9</sup> Land use consent required under r19(1) NES-F. Discharge permit required under r19(2) NES-F.

<sup>10</sup> Water permit required under r21(1) NES-F. Discharge permit required under r21(2) NES-F.

<sup>11</sup> This reference period is defined in Part 1, r3 of the NES-F.

<sup>12</sup> Land use consent required under r23(1) NES-F. Discharge permit required under r23(2) NES-F.

<sup>13</sup> This reference period is defined in Part 1, r3 of the NES-F.

<sup>14</sup> Land use consent required under r30(1) NES-F. Discharge permit required under r30(2) NES-F.

<sup>15</sup> For clarity, the nitrogen load is the quantum of nitrogen reaching the root zone (typically measured in kg N/ha). The nitrogen concentration (measured in parts per million, or mg/L) is how that nitrogen loss manifests in the receiving environment once diluted within ground or surface water.

Limits on nitrogen load are important in managing eutrophication effects, particularly where there is a downstream sink (e.g. lake). Limits on nitrogen concentration (e.g. of ammonia and nitrate) is important

Like the NES-F, the Environment Canterbury planning frameworks regulates both the use of land for farming under s9 of the Resource Management Act 1991 (RMA) and the discharge of contaminants resulting from those activities under s15 of the RMA. Unlike the NES-F, however, where resource consent is required the LWRP and HWRRP only require resource consent under one of those sections, with authorisation for the associated land use or discharge regulated as a permitted activity under the LWRP. This is summarised in Table 2.

**Table 2: Summary of relationship between consented and permitted activity rules in LWRP and HWRRP**

<b>LWRP (regional rules)<sup>16</sup></b>	<b>Use of land for farming (s9 RMA)</b>	<b>Discharge of contaminants from farming (s15 RMA)</b>
Individual farmer	Permitted / consented (LWRP rules 5.41-5.59)	Permitted (LWRP rule 5.63)
Irrigation scheme	Permitted (LWRP rules 5.41 and/or 5.60)	Consented (LWRP rule 5.62) <sup>15</sup>
<b>HWRRP</b>		
Individual farmer	Permitted / consented (HWRRP rules 10.1 – 11.1A)	Permitted (LWRP rule 7.5.1)
Irrigation scheme	Permitted / consented (HWRRP rules 10.1 – 11.1A)	Permitted (LWRP rule 7.5.1)

While there is overlap between the provisions of the LWRP / HWRRP and the NES-F, there are also important differences that affect how these provisions interact.

### **Interaction between NES-F and Environment Canterbury planning frameworks**

The NES-F either permits or requires resource consent for both the land use (s9 RMA) and the associated discharge of contaminants (s15 RMA). However, Environment Canterbury’s plans implement a different approach, whereby, if resource consent is required, it is only required for one aspect of the activity (e.g. the use of land for farming),. Other associated aspects of the farming activity (e.g. the resultant discharge to land from farming) are authorised by permitted activity rules in the plan.

While a resource consent granted by Environment Canterbury prevails over the NES-F<sup>17</sup> regulations (so long as it was granted before 5 August when the NES-F was gazetted<sup>18</sup>), the NES-F prevails over the rules in Environment Canterbury’s plans where the plan rule is more lenient, because the NES-F only provides for limited regulations for which plan rules can be

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for managing toxicity related effects, particularly in rivers and streams, but also in groundwater (e.g. the drinking water standard of 11.3 mg/L of nitrate-nitrogen applies regardless of waterbody type).

<sup>16</sup> Sub-regional Sections of the LWRP have different rules to the regional section of the LWRP however these generally work the same way. If there is a question about a specific sub-regional rule framework please contact our Customer Services team (0800 324 636) to arrange a pre-application discussion or meeting.

<sup>17</sup> s43B(6) RMA

<sup>18</sup> s43B(6A) RMA

more lenient.<sup>19</sup> This includes situations where a plan rule permits an activity and the NES-F requires consent<sup>20</sup>.

This means that in situations where a farmer wishes to undertake agricultural intensification of a type controlled by the NES-F they may require additional consents before undertaking that activity (see Table 1 for the triggers for consent), even though those activities are currently permitted by the LWRP or HWRRP. The requirement for additional resource consents may still apply even where the farmer already holds one consent type of consent (e.g. a land use consent or a discharge permit), but where the farmer is looking to undertake a change in land use and does not hold a resource consent for the other activity specifically regulated by the NES-F. This is summarised in Table 3.

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<sup>19</sup> Regulation 6(2), NES-F

<sup>20</sup> s43B(3) and (4) RMA.

**Table 3: Summary of interaction between NES-F and farming activities in Canterbury**

NES-F intensification activity after 2 September 2020	Existing LWRP or HWRRP authorisation <sup>21</sup>	Type of consents required under NES-F <sup>22</sup>
Any of: <ul style="list-style-type: none"> <li>• Conversion of land used for plantation forestry to pastoral land use</li> <li>• Conversion of land on farm to dairy farm land</li> <li>• Use of land as dairy support land</li> <li>• Expansion of area of land used for intensive winter grazing (this regulation comes into force from 1 May 2021)</li> </ul>	Land use and discharge of contaminants both permitted activities under relevant plan	s9 land use consent and s15 discharge permit
	Existing resource consent for land use and discharge of contaminants is permitted under relevant plan	s15 discharge permit
	Existing resource consent for discharge of contaminants and land use is permitted under relevant plan	s9 land use consent
Irrigation of dairy farmland	Existing resource consent for water use <sup>23</sup> and discharge of contaminants permitted under relevant plan	s15 discharge permit
	Existing resource consent for water use and discharge of contaminants consented under relevant plan	No consents required under the NES-F for the increase irrigation of dairy farmland <sup>24</sup>

<sup>21</sup> i.e. the activity is permitted under Environment Canterbury's plans, or authorised under a resource consent from Environment Canterbury.

<sup>22</sup> This is on the basis that the farming activity is otherwise consented or permitted under Environment Canterbury plans. Where consents are required but not held, consent for both the land use and the discharge under the NES-F is required.

<sup>23</sup> The consented use of water must not exclude the irrigation of pasture for dairy cows.

<sup>24</sup> While there may be no requirement for an additional discharge or water permit, if there is an associated increase in the area of dairy farm land (i.e. the increased area of land to be irrigated wasn't already dairy farmland), then consent will be required for the conversion of land to dairy farmland.

## Who needs to apply and what needs to be included in an application for consent under the NES-F?

If a farmer wishes to undertake a change in land use of the types described in Table 3, then they are responsible for applying for the required resource consents. This includes situations where some aspects of their farming activity are authorised under a discharge permit (or land use consent) held by an irrigation scheme. Which consent they need to apply for, however, depends on the type of consents they already hold or are managed under (see Table 3). For example, if a farmer's farming land use activity under the LWRP is permitted because they are a shareholder in an irrigation scheme with a discharge permit, then they are only likely to apply for a land use consent to convert additional land to dairy farmland.

In addition to the normal requirements that must be met for a resource consent application (Schedule 4 of the RMA), the NES-F places additional conditions on the grant of any resource consent under these temporary intensification provisions. Of most relevance is that the NES-F states<sup>25</sup> that consent can only be granted for an activity specified in Table 1 if Environment Canterbury is satisfied that it will not result in an increase of either:

- the load of a contaminant<sup>26</sup> in the catchment; or
- the concentration of a contaminant in the receiving environment –
  - compared with what was occurring at the close of 2 September 2020. Any consent granted under these temporary provisions can only be for a term ending before 1 January 2031.

Where this cannot be demonstrated, the consent authority (the council) *must refuse* consent.

In practice, where a farmer already holds a farming land use consent (or in the case of an irrigation scheme, a discharge permit), the nitrogen load is already limited by the terms of those resource consents. Other contaminants are not limited, however, and neither are the concentrations discharged. Applications will therefore need to demonstrate how the proposed change in land use (intensification) will avoid an increase in contaminant loads in the catchment, or concentrations in the (local) receiving environment. Because this is likely to require a case-by-case technical assessment, we recommend contacting our Customer Services team (0800 324 636) to arrange a pre-application meeting in order to discuss these requirements and the best way to approach the assessments.

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<sup>25</sup> See r24 of the NES-F for conversion of land from plantation forestry to pastoral land use, conversion of land on farm to dairy farmland, conversion of land to dairy support land, and expansion in the area of irrigated dairy farmland

See r30(3) of the NES-F for expansion of the area of land used for intensive winter grazing.

<sup>26</sup> Note that the NES-F manages “contaminants” in general, not just nitrogen. Other contaminants that may be of concern include phosphorous, pathogens (e.g. *E. coli*), and sediment (where the activity will occur near a waterbody).

## **Conclusion**

This advisory note provides Environment Canterbury's view of how the temporary intensification provisions in the NES-F interact with Environment Canterbury's planning frameworks and existing resource consents.

Consent applicants are likely to have specific questions on how these provisions will apply to particular proposals. We encourage you to make use of our offer of one hour of free pre-application advice. This can be arranged by calling Customer Services on 0800 324 636. This guidance does not constitute legal advice and should not be relied on as such.

## **Appendix 1: Definitions**

The NES-F defines several terms used in the temporary intensification provisions:

### **Dairy cattle -**

- (a) means cattle farmed for producing milk; and
- (b) includes—
  - (i) any bull on the farm whose purpose is mating with those cattle; and
  - (ii) unweaned calves of those cattle; but
- (c) does not include dairy support cattle.

**Dairy farmland** means land on a farm that is used for grazing dairy cattle.

### **Dairy support cattle** means cattle that -

- (a) are farmed for producing milk, but are not being milked (for example, because they are heifers or have been dried off); and
- (b) are grazed on land that is not grazed by dairy cattle.

**Dairy support land** means land on a farm that is used for grazing dairy support cattle.

**Pastoral land use** is defined in the NES-F by reference to s217B of the Resource Management Act 1991:

**Pastoral land use** means the use of land for the grazing of livestock.