

Technical Advice Note

Wetlands and Essential Freshwater 2020

18 November 2020; Updated 26 January 2023

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 halt the ongoing loss of wetlands and values by ensuring that:

- Activities that may result in losses of natural inland wetlands are avoided where at all possible, although there are some limited exemptions; and
- Where those exemptions are met, activities are subject to the Effects Management Hierarchy specified in the National Policy Statement for Freshwater Management 2020 (NPSFM).

There are also controls on activities within, and up to 100m away from, natural inland wetlands. It is important to check both the National Environmental Standards for Freshwater 2020 (NES-F) and any relevant regional plans before undertaking any activities within 100m of wetlands to determine which controls apply and whether a resource consent is required.

Where consent is required, whether under the NES-F or a regional plan, the matters outlined in the NPSFM should be addressed as part of any application for resource consent.

Introduction

The Government's Essential Freshwater (Action for Healthy Waterways) package came into effect on 3 September 2020. As part of that package, the Government has recognised that the cumulative loss of natural inland wetland¹ habitats is an ongoing issue and has introduced

¹ **Natural inland wetland** is defined in section 3.21 of the NPSFM as follows:

“natural inland wetland means a wetland (as defined in the Act) that is not:

(a) in the coastal marine area; or

(b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or

(c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or

(d) a geothermal wetland; or

(e) a wetland that:

(i) is within an area of pasture used for grazing; and

(ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species using the Pasture Exclusion Assessment Methodology (see clause 1.8)); unless

provisions in the National Policy Statement for Freshwater Management 2020 (NPSFM) and National Environmental Standards for Freshwater 2020 (NES-F) to address this issue.

National Policy Statement for Freshwater Management 2020

Policy 6 of the NPSFM states:

“Policy 6: *There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.*”

This policy is further refined by the policy in clause 3.22 (Natural Inland Wetlands) of the NPSFM, which requires regional councils to include a policy (or words to the same effect) into its regional plans. While the original policy NPSFM policy has been inserted into Canterbury’s regional plans, amendments to the relevant NPSFM policy took effect on 5 January 2023 and have yet to be incorporated. As such it is still necessary to refer directly to the policy in clause 3.22 of the NPSFM².

The policy in clause 3.22 of the NPSFM specifies that loss of extent of **natural inland wetlands** is to be avoided in the first instance³, and their values protected, but also covers situations where it may be acceptable to have a loss of wetland extent or values⁴. In these limited situations, there may be additional requirements (e.g. it may be necessary to demonstrate a functional need for the activity to occur at a particular location) and the activity is likely to be subject to the application of the Effects Management Hierarchy (see below).

(iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply.

² Please refer to Attachment 1 to this Technical Advice Note for the policy referenced in clause 3.22 of the NPSFM 2020.

³ The use of the term **avoid** in a planning context has been explored in the *King Salmon* line of caselaw and should be interpreted as “prevent the occurrence of; not allow”. See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

⁴ **Loss of value** is defined in Section 3.21 of the NPSFM 2020 as:

“loss of value, in relation to a natural inland wetland or river, means the wetland or river is less able to provide for the following existing or potential values:

(a) any value identified for it under the NOF process

(b) any of the following values, whether or not they are identified under the NOF process:

(i) ecosystem health

(ii) indigenous biodiversity

(iii) hydrological functioning

(iv) Māori freshwater values

(v) amenity values”

“Potential values” means that the activity must not preclude the potential for improvement in a value in the future.

Application of the NPSFM 2020 provisions

These provisions apply to all activities that may affect wetlands whether they are earthworks, discharges of water, or water takes, diversions and uses. They therefore have wide-ranging implications for resource consenting in and around wetlands.

Consent decision makers are required to “*have regard*”⁵ to the relevant provisions of the NPSFM and regional plans when considering applications under s104 of the Resource Management Act 1991 (RMA). This means it is important that applicants and reporting officers undertake an assessment of these policies and whether a proposal is consistent with these provisions.

In having regard to these provisions, it is therefore necessary to consider whether the proposal will avoid any loss of extent or values. Where a loss of extent or values cannot be avoided, it is necessary to determine whether the activity is one of those specified in clause (a), is specified infrastructure meeting the requirements in clause (b)(i)-(iv), or one of the specifically identified activities in clauses (c) through (f). If not, significant weight should be given to the direction to “*avoid*” the activity and strong consideration should be given to refusing consent. Only when an application meets the criteria in clauses (a) through (f) in the policy should application of the Effects Management Hierarchy be considered.

What is the Effects Management Hierarchy?

The Effects Management Hierarchy as it applies to natural inland wetlands and rivers is defined in clause 3.21 of the NPSFM:

“effects management hierarchy, in relation to natural inland wetlands and rivers, means 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”*

Where application of the effects management hierarchy is provided for by the relevant part of the policy in clause 3.22 of the NPSFM 2020, section 3.24(3) of the NPSFM requires that applicants demonstrate how the Effects Management Hierarchy has been applied to any loss of extent or values of the wetland. This includes demonstrating how the Effects Management Hierarchy has been applied to cumulative effects and loss of potential value for ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, natural character and amenity.

⁵ Section 104(1), Resource Management Act 1991

When should this information be provided?

The information above (whether an activity meets the criteria in the policy, Effects Management Hierarchy assessments) should be provided for all activities within or near wetlands.

Where that information is not provided, the application is incomplete in terms of Schedule 4 of the RMA⁶ and the application should be returned under s88 with reference to assessments required under section 3.22 of the NPSFM.

National Environmental Standards for Freshwater 2020

Given the direction to avoid further loss of values and extent of wetlands, the NES-F also include several regulations related to activities in and around **natural inland wetlands**⁷. These include controls on:

- Restoration of natural wetlands (regulations 38-39)
- Scientific research (regulations 40-41)
- Construction and maintenance of wetland utility structures⁸ (regulations 42-44)
- Construction of specified infrastructure (regulation 45)
- Quarrying activities (regulation 45A)
- Landfills and cleanfill areas (regulation 45B)
- Urban development (regulation 45C)
- Extraction of minerals and ancillary activities (regulation 45D)

⁶ Schedule 4(2)(2)(a)-(c) of the RMA requires an assessment of an activity against any relevant objectives, policies, rules (and requirements, conditions or permissions in those rules), and any other relevant requirements in a document referred to in Schedule 104(1)(b) of the RMA.

⁷ **Natural inland wetland** under the NES-F has the same definition as under clause 3.21 of the NPSFM. Refer to footnote 1 of this technical advice note.

⁸ The NES-F defines a **wetland utility structure** as:

(a) a structure placed in or adjacent to a wetland whose purpose, in relation to the wetland, is recreation, education, conservation, restoration, or monitoring; and

(b) for example, includes the following structures that are placed in or adjacent to a wetland for a purpose described in paragraph (a):

(i) jetties:

(ii) boardwalks and bridges connecting them:

(iii) walking tracks and bridges connecting them:

(iv) signs:

(v) bird-watching hides:

(vi) monitoring devices:

(vii) maimai”

- Maintenance and operation of specified infrastructure and other infrastructure (regulations 46-47)
- Sphagnum moss harvesting (regulations 48-49)
- Arable and horticultural land use (regulation 50)
- Natural hazard works (regulation 51)
- Drainage of natural wetlands (regulations 52-53)
- Other activities not otherwise addressed including (regulation 54)
 - Vegetation clearance
 - Earthworks
 - Taking, use, damming, diversion, or discharge of water

In addition to those matters, the NES-F also includes a suite of conditions for any activities permitted under the NES-F (regulation 55) and matters of discretion for any activities subject to a restricted discretionary status (regulation 56).

When undertaking activities within 100m of wetlands, it is important to check these provisions (together with the provisions of any Environment Canterbury plan) to determine whether consent is required. Where consent is required, whether under a regional plan or the NES-F, it is necessary to consider the relevant policies in the NPSFM as these will have a direct impact on whether the proposed activity is likely to obtain consent.

Conclusion

This advisory note provides Environment Canterbury's current thinking on how the Government's Essential Freshwater package will affect consenting related to wetlands, and the need to avoid further loss of extent or value of these habitats. It is likely that there will be specific questions on these provisions in regard to particular proposals, so we offer one hour's free pre-application advice to help applicants. This can be arranged through a phone call to our Customer Services team (0800 324 636). This guidance does not constitute legal advice and should not be relied on as such.

Attachment 1: NPSFM 2020 clause 3.22 Natural Inland Wetland policy

“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) wetland maintenance, restoration, or biosecurity (as defined in the National Policy Statement for Freshwater Management)*
 - (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 purpose of 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; or*
- (c) the regional council is satisfied that:*
 - (i) the activity is necessary for the purpose of urban development that contributes to a well-functioning urban environment (as defined in the National Policy Statement on Urban Development); and*
 - (ii) the urban development will provide significant national, regional or district benefits; and*
 - (iii) the activity occurs on land identified for urban development in operative provisions of a regional or district plan; and*
 - (iv) the activity does not occur on land that is zoned in a district plan as general rural, rural production, or rural lifestyle; and*
 - (v) there is either no practicable alternative location for the activity within the area of the development, or every other practicable location in the area of the development would have equal or greater adverse effects on a natural inland wetland; and*
 - (vi) the effects of the activity will be managed through applying the effects management hierarchy; or*
- (d) the regional council is satisfied that:*
 - (i) the activity is necessary for the purpose of quarrying activities; and*
 - (ii) the extraction of the aggregate will provide significant national or regional benefits; and*
 - (iii) there is a functional need for the activity to be done in that location; and*

- (iv) the effects of the activity will be managed through applying the effects management hierarchy;
or*
- (e) the regional council is satisfied that:*
- (i) the activity is necessary for the purpose of:*
- (A) the extraction of minerals (other than coal) and ancillary activities; or*
- (B) the extraction of coal and ancillary activities as part of the operation or extension of an existing coal mine; and*
- (ii) the extraction of the mineral will provide significant national or regional benefits; and*
- (iii) there is a functional need for the activity to be done in that location; and*
- (iv) the effects of the activity will be managed through applying the effects management hierarchy;
or*
- (f) the regional council is satisfied that:*
- (i) the activity is necessary for the purpose of constructing or operating a new or existing landfill or cleanfill area; and*
- (ii) the landfill or cleanfill area:*
- (A) will provide significant national or regional benefits; or*
- (B) is required to support urban development as referred to in paragraph (c); or*
- (C) is required to support the extraction of aggregates as referred to in paragraph (d); or*
- (D) is required to support the extraction of minerals as referred to in paragraph (e); and*
- (iii) there is either no practicable alternative location in the region, or every other practicable alternative location in the region would have equal or greater adverse effects on a natural inland wetland; and*
- (iv) the effects of the activity will be managed through applying the effects management hierarchy.”*