

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

Decision [2022] NZEnvC 016

IN THE MATTER OF the Resource Management Act 1991
AND a matter of appeals under Clause 14 of
Schedule 1 to the Act
AND in a matter of Stock Exclusion-Topic 16
of the Proposed Northland Regional
Council combination land and water
plan
BETWEEN FEDERATED FARMERS OF NEW
ZEALAND
(ENV-2019-AKL-114)
MINISTER OF CONSERVATION
(ENV-2019-AKL-122)
ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
(ENV-2019-AKL-127)
Appellant
AND NORTHLAND REGIONAL
COUNCIL
Respondent

Court: Judge J A Smith (Presiding) – in Court at Auckland
Commissioner R M Bartlett – in Court at Auckland
Commissioner S K Prime – by VMR in Northland
Hearing: 10 – 12 November 2021 at Auckland and by VMR
Last case event: Memoranda as to īnanga spawning area from parties December
2021



Livestock Exclusion (Topic 16)

Appearances: S J Ongley and M Downing for the Minister of Conservation
(Minister) – by VMR
 P D Anderson and W B Jennings for Royal Forest and Bird
 Protection Society of New Zealand Incorporated **(Forest and
 Bird)** – by VMR
 P R Gardner for Federated Farmers of New Zealand **(Federated
 Farmers)** – in Court
 M Doesburg for Northland Regional Council – in Court
 J S Baguley for Far North District Council and Whangarei
 District Council – appearance excused on basis issues resolved

Date of Decision: **11 FEB 2022**

Date of Issue: **11 FEB 2022**

DECISION OF THE ENVIRONMENT COURT

We conclude:

A: The minimum area for natural wetlands to be fenced will be 500 m² rather than 2,000 m² as currently in the plan for the reasons we have set out. We attach hereto as “D” the suggested wording which we adopt in this regard as supported by the Northland Regional Council and Federated Farmers. The Regional Council is accordingly to make changes to their plan C.8.1.3 - Access of livestock to rivers, lakes and wetlands – discretionary activity: the word ‘2,000 m²’ is removed to read ‘500 m²’.

B: There is agreement by all parties that sheep should be excluded from īnanga spawning areas. We adopt the suggested wording of the Regional Council in respect of sheep, which are excluded from īnanga spawning areas but not otherwise.

C: The definition of ‘īnanga spawning site’ is also the subject of Topic 9 and we tentatively adopt the following wording:

The margins of rivers and estuaries that are inundated by spring high tides.

Advice Note: In the context of this definition “margins of rivers and estuaries that are inundated at spring high tide” refers to the area of land adjacent to the water in a river or estuary that is not normally covered in water, but that is covered in water during high tides near full and new moon, when the tidal range is at its highest. This occurs twice a month all year round.

D: We do not consider we have jurisdiction for the other definition changes sought and accordingly adopt the Regional Council position on those matters also.

E: The Northland Regional Council is to prepare and circulate to the parties the final wording of the relevant provisions in accordance with this decision. Parties are then invited to provide comment to the Council within 15 working days as to the definition for 'inanga spawning site' and the final wording for the exclusion of livestock and sheep. If there are any other consequential amendments sought these are to be specified within the same 15 working day period. Any further comments in response are to be provided within an additional 10 working days. The Regional Council is then to compile the comments and file these with the Court with differences identified for final decision and approval of relevant wording. This includes the District Council matters resolved.

F: Costs are not encouraged but are reserved. Any application is to be filed within 30 working days, reply within a further 10 working days and final reply (if any) within a further five working days.

REASONS

Introduction

[1] This was a hearing in relation to the stock exclusion provisions of the Proposed Northland Regional Plan (**PRP**). The PRP is a combined Regional planning document for land and water, including the Coastal Marine Area (**CMA**).

[2] The PRP hearings have been interrupted both by COVID-19 and by some practical issues that have arisen with the introduction of the new National Policy Statement for Freshwater Management (**NPSFM 2020**), Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**) and the Stock Exclusion Regulations 2020 (**SER**). All of these documents came into force after the plan was promulgated, after the Council decisions were issued and, in fact, after most of these matters had been through mediation and were prepared for hearing

or were set down.

[3] The NPSFM-2020, NES-F and SER changes were introduced around August 2020 and became operative around September 2020. The Court had the hearings set down for PRP appeals from March to August 2020 disrupted significantly by the onset of the COVID-19 lockdowns. Thus, the Court was recommencing hearings on the PRP after the lockdown from late March 2021.

The changing legal background

[4] One previous hearing the subject of a subsequent declaration, *Bay of Island Maritime Park Inc v Northland Regional Council*,¹ arose as a result of that original hearing having been part heard when lockdown commenced and the NES-F being introduced in the interim period before the hearing could recommence.

[5] The decision of the High Court on that declaration appeal has now been issued but was not available during the course of this hearing.² Given the parties' positions that this matter did not turn upon the outcome of that declaration, we doubt there is any direct relevance. However, we have considered that decision and concluded that the issues it raises (concerning wetlands and the CMA) are not directly relevant to the provisions that are in dispute for the purpose of this hearing.

[6] However, given the huge uncertainty that has arisen by virtue of the various changes to the policy statements, standards and regulations, we proceed with this decision with that particular caveat in mind.

Hearing PRP appeals

[7] The Court began to process the remaining appeals in early 2020. These included areas such as the Mangawhai estuary, and issues in relation to controls over mangrove removal and modification. That hearing was partway through when the COVID-19

¹ *Bay of Island Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6 (Environment Court); *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113 (High Court).

² Above n 1. The High Court decision was issued on 18 November 2021.

lockdown took place in March 2020.

[8] Subsequently, a number of appeals had to be reallocated for hearing once sittings of the Court were enabled. The result was that, by the time certain matters on the PRP were reached again, such as īnanga spawning sites and mangrove removal, a new NPSFM 2020, Standard NES-F 2020 and the SER had been introduced. Both the Court and experts were caught off guard with this development.

[9] This led to a decision that the Court needed, as a preliminary issue, to decide whether or not the NES-F definition of wetlands included some or all wetland (including mangroves) areas within the CMA. That focussed as a separate hearing for declaration, and the decision was appealed by the Minister of Conservation and Forest and Bird. I should add that Ministry for the Environment was neither a submitter nor party to any of the relevant PRP matters for hearing.

[10] Given the workload of the Court, the parties were asked to advise which of the remaining matters before the Court could still proceed notwithstanding that appeal. The parties identified this matter, among others, as being able to be finalised.

The role of the Court in relation to plan appeals

[11] It is clear that the government has embarked upon consideration of major reforms in relation to the environment and the Resource Management Act 1991 (**RMA**). This includes wetlands and freshwater. Programmes such as the Three Waters programme reflect ongoing discussions between various stakeholders including, we understand, the Minister of Conservation, Forest and Bird and Federated Farmers, concerning the future of water controls.

[12] Nevertheless, immediately after the COVID-19 lockdown in 2020, and part way through the hearing process for these appeals, significant changes were made in relation to water policies for New Zealand. These included the introduction of three new documents. This was by way of National Policy Statement and Standards both provided for under the RMA. In addition, the government also promulgated regulations (SER).

[13] The NPSFM 2020 replaced the 2017 NPSFM, which replaced the 2014 and earlier versions. The frequent change of these documents has meant that many of the plans that reach the Court are based upon earlier generations of the NPSFM.

[14] The Proposed Northland Regional Plan is no exception. It was prepared in light of the 2014 NPSFM. We understand that, on the publication of the 2017 NPSFM, there were further attempts to “retrofit” particular objectives and policies of the 2017 NPSFM into the regional document. That then proceeded through a Council notification and hearing process and appeals were filed in 2019. Extensive mediation followed throughout 2019 under a strict regime for managing these appeals in relation to the PRP.

The role of the Court and the role of the Crown

[15] When dealing with these appeals the Court has been faced with some very difficult issues in the context of a changing statutory scene. We appreciate that, as an Environment Court, we are a creature of statute. Nevertheless, the Court itself is a judicial institution, and is seen as separate from the government. Different bodies, including the Minister of Conservation, the Ministry for the Environment and others, are also functionaries of the Crown.

[16] We note that a whole of Crown submission for various Crown entities was made on Topic 14 Protected Areas but otherwise issues were addressed by particular departments or ministries.

[17] We have always understood the modified Westminster system in New Zealand to comprise:

- (a) government – who consider and pass legislation including regulation and other controls;
- (b) executive or state functions who implement such legislation, regulation and government policy; and

- (c) the courts who interpret the legislation and regulation and use determinative powers as to its application and enforcement where necessary.

Generally, relationships between organs of government and the Crown reflect a comity of mutual respect for the various constitutional roles they perform. All these elements comprise the Crown which include political, operative and determinative/corrective elements. They rely on each element respecting the role of the other.

[18] In some areas, including natural resources and the environment, political implementation and determinative goals can be mixed and create tension. Clear separation of the functioning elements becomes critical. Recent events worldwide demonstrate the ways in which the rule of law can be severely compromised where the objectives of one element of Government seeks to influence the judiciary.

[19] Among the plethora of documents provided to us was one issued under the name of the Ministry for the Environment – New Zealand Government entitled “Defining ‘natural wetlands’ and ‘natural inland wetlands’” issued in September 2021 around one month prior to this hearing. With the subheading “Guidance to support the interpretation of the National Policy Statement for Freshwater Management 2020 and the Resource Management (Natural Environmental Standards for Freshwater) Regulations 2020.

[20] It does not disclose authorship and is not signed as a regulation or by a Minister. It says it was published in September 2021 by the Ministry for the Environment. The document is attached as “**A**”. The disclaimer makes it clear it has no regulatory force:

- (a) “The information does not alter the laws of New Zealand, other official guidelines, or requirements”; and
- (b) it does not constitute legal advice or take responsibility for its accuracy.

[21] 1.1 of the guideline notes that it cannot provide legal interpretation or overrule legal decisions, “it clarifies what the Ministry for the Environment’s policy intends”. We invite consideration of the following 25 pages which are critical of both court and

tribunal decisions and interpretation of previous Ministry for the Environment advice to the Auckland Council.

[22] It contains several statements of concern:

- (a) at the bottom of page 5 it states that the guideline advises how to apply the current definitions;
- (b) it notes the courts declarations and states the “Crown” has appealed this decision;
- (c) at 6.2, page 17, it refers to a letter written to the Auckland Council by the Ministry for the Environment and states: “The letter misinterpreted how the phrase ‘induced wetland’ is used and is incorrect. This guide **should be relied on as the Ministry’s position.**” (emphasis added);
- (d) At Part 11, page 24, the document describes the February 2021 decision³ and states “The Crown has appealed the Environment Court’s decision and that appeal has yet to be heard”.

[23] With respect to the Ministry, this seems a significant overstep of the lines of comity between the functions of the Crown.

[24] In particular, the Minister of Conservation appealed the decision not the Crown. Neither the whole of government nor the Ministry for Environment submitted or appealed the provision. In other areas such as Marine Protection Areas the Court has had whole of government submissions at hearing where multiple agencies are involved.

[25] If the guideline at **A** is intended to instruct the Court, then we cannot and should not take it into account. For current purposes, we understand our statutory duty is to determine the case devoid of any sector influence.

³ *Bay of Islands Maritime Park Incorporated v Northland Regional Council* [2021] NZEnvC 006.

[26] The submission by the Minister for Conservation that the Court “must give effect to the NPSFM 2020 to the extent it is practical to do so within the scope of the given plan change, submissions or appeals”⁴ must be subject to the role of Council to implement the policies and regulations and our limited powers on appeal and legislative requirements.

[27] Ms Ongley, for the Minister, was careful to distance herself from the statements in the guideline (“A”) and advised the Court clearly that she acted only for the Minister of Conservation. Accordingly, we see any inclusion of the wider documents as unfortunate and it is not part of the Minister of Conservation’s case that we should give any weight to the September 2021 guidelines.

[28] From the Court’s perspective, the politicisation of the environmental space is unnecessary and could cause significant harm – not only to the administration of the environmental proceedings of the Court but other functionaries including Councils. It is clear from recent case law in the environmental field that much of the litigation in this Court is spurred by various government departments unhappy with outcomes before the Council and the Courts.

[29] If jurisdiction is to be removed from the discretion of the Courts, then the same should be done clearly rather than by implication. We have put aside any implied directions in the guideline, but the entire Court is uneasy at the implications of the documents and its potential ramifications.

The role of this Court on these appeals

[30] One of the core concerns of this Court is that we now appear to be asked to redesign the Northland Regional Plan in accordance with the NPSFM 2020, NES-F 2020 and the SER – none of which existed at the time the Council considered the provisions. Our role is to deal with appeals from the Regional Plan and, in that regard, we sit in the role of and have the same powers of the Council for that purpose.

[31] We do not understand that this Court is given powers beyond the terms of the

⁴ Legal submissions for the Minister of Conservation dated 8 November 2021 at [16].

appeal to retrofit the PRP to meet requirements that came into existence after its creation.

[32] We have stated in previous decisions that we should have regard to the provisions of the new documents, and wherever possible try and ensure that there are practicable and workable outcomes that will not conflict with or be immediately overcome by the adoption of the new provisions. That is an argument for consistency, rather than a mandatory requirement to implement and achieve the policy statements, standards or regulations. The obligation to do so is set clearly on the Council with the Policy and regulatory documents setting out the Council duties into the future.

The role of the s 274 parties

[33] Ms Baguley had appeared in previous call-overs for the Far North District Council and Whangarei District Council. However, shortly prior to the hearing she advised that she understood the parties had reached an agreement. Parties agree the final wording will protect waterways one kilometre upstream from public water takes. On this basis the District Councils would otherwise abide by the decision of the Court and sought leave not to appear. Other parties confirmed this position. We understand the wording will be captured within the final drafting of the provisions, consequent upon this hearing.

Policy statements, standards and regulations

[34] Ms Legarth, Planner called for the Minister, noted the issues we are dealing with are significant to the National Policy Statement for Freshwater Management. Although issues of Te Mana o Te Wai have been present for some years and are reflected in this plan, including changes made by the 2017 policy statement, it could not be said in any way that the current plan is intended to implement and achieve the NPSFM 2020.

[35] More particularly, appeals have been filed well before the policy statement, standards or regulations, including the SER, came into force in September 2020.

[36] The Court process, involving extensive mediation and negotiation, also took

place prior to the introduction of those regulations. If it had not been for the COVID-19 emergency, this case would probably have been heard and decision issued prior to the regulations coming into force.

[37] We do not understand that the statutory role of this Court as an appellate authority for plans, is intended to redesign plans at appeal stage to meet subsequent legislative requirements. Provisions are included in the first schedule to the Act for the **Council** to introduce plan variations, and the Council has the ability to withdraw plan changes in part or in full. These devices have uniformly been used, including in the Bay of Plenty region where various plans prepared in accordance with Freshwater Policy Statements were withdrawn when new NPSFM were introduced.

[38] The second major restriction on this Court is that it can only make decisions in terms of the appeals before it and the submissions that were made to the Council at that time. It could not be said that any of those submissions could or did seek compliance with these new policy statements or regulations that had not even been introduced at that stage. In fact, as we understand it, the plan was prepared in accordance with NPSFM 2014 but was adapted after the 2017 NPSFM was released, but prior to notification of the Regional Plan.

Section 32 and new approaches

[39] In terms of our role under the Act, s 32 makes it clear that we are to consider the most appropriate provisions to achieve the settled objectives and policies of the PRP. Where these objectives and policies are not settled or consideration of the most appropriate objective or policy is incomplete, previous case law requires us to consider the most appropriate way to achieve and implement superior documents including policy statement, standards and the Act. We accept this would include policy statements existing as at the time of the Plan being generated. Given the objectives and policies of the PRP are settled, the purpose of this hearing and the question is, what is the best way in which this Court can achieve and implement the operative PRP objectives and policies. Given that, there is doubt that we can then achieve different objectives and policies not in existence when the Plan was generated, or policies and objectives settled.

[40] This Court concludes it does not have jurisdiction nor would it be appropriate for this Court to attempt to implement and achieve the NPSFM 2020, the NES-F 2020 or the SER within the scope of this hearing.

[41] Nevertheless, to the extent that we may be examining choices, in terms of the scope of our authority under the appeals and provisions, we can take into account the practicality of achieving an outcome, assess the efficiency and effectiveness in achieving the objectives, and seek to avoid conflict with the later documents if this is available to us.

[42] The Court however has been faced with an argument that the NSPFM 2020, the NES-F and the SER is a starting point for consideration of these appeals. Thus, we must consider more restrictive provisions but not those that are less restrictive.

[43] We acknowledge that if the Court was to conclude that some provisions were more appropriate but conflicted with the relevant SER or the NES-F, then the provisions of s 87 and the regulations would mean that the **Council** would need to remove those provisions to avoid any conflict or more liberal approach. We note however under s 32(4), if the proposal before the Court imposes:

... a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

[44] The parties acknowledged that this applies to the NES-F 2020 but not to the regulations for stock exclusion which were promulgated under s 360 of the Act and therefore are not a standard. In the circumstances, it would appear to us that this Court would need to be satisfied that any more restrictive provisions were justified in terms of the regulation.

[45] This again creates difficulty for the Court because of the lack of analysis at Council level and the difficulty of examining whether a prohibition or restriction is in the package of regulations that apply, or individual regulation on individual topics. Put simply, in this case, it would be whether or not the stock exclusion provisions

contained within this plan can survive given that this area has now been the subject of regulation.

[46] The regulations in themselves contain a series of controls and if it is necessary to examine every control the difficulty then is examining each individual control versus the controls as a package. The clearest example for the sake of this case is the issue about control of sheep. This was the subject of particular consideration for the purposes of the SER and a determination was made that the regulations should not cover sheep. The Appellants now seek that sheep are covered by the rules, in addition to the SER.

Council obligation to avoid conflicts with SER

[47] The High Court has recently released a declaration that the freshwater regulations also cover wetlands within the CMA. The prospects for overlap of the PRP and SER provisions are obvious. Mr Doesburg acknowledges that the Council will need to examine both the NES-F 2020 and the SER to determine which provisions conflict with its plan. The Council will need to consider the provisions that are more liberal and more restrictive in its plan and then remove any conflicts. They have not undertaken this work.

[48] An example of the problem that arises is the use of the word 'destroy' in the original plan. Parties seek to include the word 'damage' to reflect the definitions of vegetation clearance in the SER. Mr Doesburg acknowledges that the Court would be unlikely to approve provisions in the PRP that introduce duplication or conflict, but that it is otherwise the **Council's** role under s 44A to remove existing duplication or conflict.

[49] In the interim period before duplication or conflict is removed, s 43B of the Act provides that rules in plans that are either more or less stringent than the national environmental standard prevail over the standard, if the standard expressly says that rules can be either more or less stringent.

[50] Another similar argument is the fact that the regulations currently use the word

‘stock’ rather than ‘livestock’ which is the term used in the PRP.

[51] Again, there are many anomalies beyond those we have discussed for the purpose of this case between the NES-F 2020, the SER and the PRP. As is also clear, it is likely that there are some inconsistencies between the NPSFM 2020 and the Regional Plan but probably at a level below objectives and policies given the parties general agreement that the objectives and policies fortuitously meet those provisions in any event.

Conclusion as to the role of this Court on this appeal

[52] It is clearly the duty of the **Council** to amend its plan to meet the requirements of the standards and regulations. We were told those standards and regulations are currently under review.

[53] The Minister, Forest and Bird and Federated Farmers are all parties to the discussions being undertaken in respect of those regulations. The Court is not privy to the discussions or the projected outcomes of that, nor would it be appropriate to take into account wording changes that might occur in the next six to nine months.

[54] What we can say is that it is likely that there may be some changes and further regulations. If this Court altered the provisions of this plan in accordance with the current regulations, it may make them inconsistent with later documents. This level of crystal ball gazing is not the role of the Environment Court. In this regard, we are an appellate authority from the decision of the Council on its 2017 plan change. That plan relates to land, freshwater and coastal water.

[55] The relationship between the NSPFM 2020, the NES-F and the SER are, at this stage, relatively inchoate where areas of the plan have been subject to appeal. In several cases we have been faced with more direct comparisons. Nevertheless, the considerations in relation to wetlands and the declaration that followed arose during the course of the hearing as witnesses began to appreciate the impact of the new documents on the provisions that had been before the Court earlier in relation to mangroves.

[56] We have concluded that it is not the role of the Environment Court to adapt this plan to meet the current freshwater policies, standards or regulations. These documents are matters to which we can have regard in considering the most appropriate wording. Where the result of our decision is in conflict with those documents, this is a matter for the Council to resolve.

The future approach

[57] For the sake of completeness, the Court has now spent some considerable amount of time on these issues. Given the public discourse in this area it should make a number of points:

- (a) all parties before this Court (and we stress this includes Federated Farmers) agree that water quality in Northland needs to be improved;
- (b) at this stage, there is still debate as to what approaches may achieve the best environmental outcomes. The continuing debates in the courts has meant that the implementation of the various government policy statements have largely not taken place as desired because of the changes to the policy statements and the introduction of the standards and regulations;
- (c) as we have noted, water quality in Northland is poor and needs to be improved;
- (d) the situation may be exacerbated by climate change and there is potential for peak and low flows (drought conditions and serious flood conditions) to occur more frequently and/or at greater magnitude.
- (e) there is no doubt that the provisions that have already been introduced into the PRP, including through the appeals process, for water quantity and water quality will have significant long-term benefits;
- (f) stock exclusion rules are part of the approach, but a multi-factorial approach is necessary and is adopted in this plan;
- (g) there has been a relatively high take up of the Fencing Accord in Northland with around 72 percent of waterways fenced. There seems to be a common

agreement that protecting riparian margins has significant advantages for water quality and lowering sediment concentrations;

- (h) the Court has already adopted relatively stringent PRP provisions in relation to cropping and disturbance near waterways;
- (i) there is common agreement that īnanga spawning sites need to be protected. These are not covered under either the freshwater standard or the regulation and there is an agreement, including from Federated Farmers, that these provisions should be introduced. The difficulty here is what constitutes an īnanga spawning site. That is a subject of the decision of this Court⁵ identified in Topics 7 and 9 but also arises in this area of stock exclusion; and
- (j) the government holds large estates in Northland and throughout New Zealand. We were not given the actual area or percentage of land owned by the Crown in Northland, but we understand that the Minister of Conservation holds around 20 percent. We suspect that much of that is native bush or forestry and also includes lakes and wetlands i.e., the Aupōuri and Kaimaumau-Matutangi wetlands.

Exemplars and Farm Management plans

[58] We also understand there are other areas that are leased for farming, i.e., some Treaty settlement lands and other farms. The prospect of these farms being used to model farm management plans and to undertake more detailed studies on land improvement measures to improve water quality would seem to be an early step in modelling appropriate approaches in the farming community.

[59] The concept of farm management plans is set out in s 217F of the RMA, Part 9A. Again, all the parties before us support the concept of farm management plans. The issues are around the complexity of designing and implementing such plans without any form of modelling or template and the difficulties around certification

⁵ *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77.

cost. Nevertheless, practicable and workable farm management plans could be adopted on exemplar properties. We see much more potential in this than on relying entirely on mandatory regulations or plan provisions.

[60] We are also concerned at the utilisation of multiple steps including policy statements, regulations, standards and the PRP without a direct cohesion between them. This creates uncertainty and doubt.

[61] As one of the planners before this Court said, the understanding and interpretation of these documents as between each other and with the PRP is very complex. To this end, the issues concerning “wetlands” that were addressed in the High Court decision from the declaration of this Court are compounded by different utilisation of the phrase in the SERs and the interrelationships of these documents with the definition of wetland in the PRP.

Outcome on scope of hearing

[62] We have accordingly concluded that this Court should stick to the terms of the appeals before it given the uncertainty of the various and other alternative approaches.

[63] To that end, we have concluded that the alteration of the word ‘stock’ to ‘livestock’ is a matter outside the scope of this appeal and the regularisation of the documents is a matter for the Council not this Court.

[64] Another submission related to the SER covering **damage**. The appellants sought the inclusion of the word ‘damage’ to the PRP rather than ‘destroy’. We acknowledge the common sense of this provision but note that the regulations already take effect and have priority. It is the duty of the Council to undertake the necessary examination of the documents to ensure that they comply.

[65] We understand that there are six issues before this Court:

- (a) the inclusion of the word ‘damage’ in Rules C.8.1.2, E.3.4.1 and E.3.5.1;
- (b) a 500 m² or 200 m² limit as the appropriate size threshold at which

- livestock should be excluded from natural wetlands;
- (c) the inclusion of sheep for certain exclusion controls;
 - (d) the exclusion of livestock (including sheep) from hill country areas and/or by amending the definition of 'livestock' to include sheep;
 - (e) general integration issues of the PRP with the regulations and standards; and
 - (f) the definition of īnanga spawning sites, which is also covered by the decision on Topics 7 and 9.⁶

[66] For the reasons we have set out, we consider that the inclusion of the word 'damage' is beyond the scope of this hearing, as is the issue of integration with the SER.

[67] This leaves us with issues relating to the inclusion of sheep in 'livestock' and the definition of 'livestock' changed to 'stock' and whether these are beyond our scope.

[68] In relation to sheep, there is both a scope issue as to whether this is raised in the appeals (except for īnanga sites where all parties and the Court accept that the īnanga spawning sites can also exclude sheep given the scope and the nature of the submission) and also whether on the merits of this it is justified to exclude certain livestock from waterbodies in hill country areas, beyond the requirement in the SER.

Exclusion from īnanga spawning sites

[69] The definition of 'īnanga spawning site' provided in the Court's interim decision is now supported by the Council, subject to some minor amendments. The Council's proposed amendments are:

Īnanga spawning site

The vegetated margins of rivers within 100 metres of the upper reach of the tidal prism that become inundated during Spring High Tides.

⁶ *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 77.

[70] In relation to īnanga spawning sites, the Minister’s wording for īnanga spawning sites was ‘the margins of rivers and estuaries that are inundated by spring high tides’.

[71] It would be fair to say that both parties agree that the best method would be to map the īnanga spawning sites, but this has not been done to date. Failing full mapping we acknowledge that any particular wording is likely to have difficulties. It may be the reason that the Council left the term undefined.

[72] After the hearing the court concluded that the issue with drafting was complex. A minute was issued to the parties on both Topic 9 and 16 suggesting a definition:⁷

The margins of rivers and estuaries that are inundated during high spring tides within a hundred metres upstream or downstream of the saltwater wedge.

[73] Since then the Council has advised it will not be mapping ‘īnanga spawning sites’ in the near future. We will return to the definition of īnanga spawning after discussing sheep exclusion generally.

Exclusion of sheep from other areas

[74] As already noted, the Minister had a detailed submission before the Council. The appeal stated:⁸

Rule C.8.1.2 does not require sheep to be excluded from lakes, significant wetlands, and īnanga spawning sites, and is therefore not supported. While sheep have less affinity for directly entering water than other stock and are less likely to cause bank erosion and slumping as they are lighter, the camping and browsing habits of sheep mean they can have an adverse effect on indigenous vegetation in riparian margins and wetland edges, thereby affecting spawning habitats.

...

Relief sought

...

Amend clause (3) of Rule C.8.1.2 to require sheep to be excluded from any īnanga spawning sites identified by the Regional Council.

⁷ Minute of Judge J A Smith dated 1 December 2021.

⁸ Notice of appeal by the Minister of Conservation dated 17 June 2019 at [7.34] and [7.39].

[75] We must then consider the wording of C.8.1.2(3) which effectively excludes livestock from any īnanga spawning sites identified by the Council. If the Council is not to map the spawning sites in the forthcoming freshwater plan change, under this PRP any spawning sites may not be covered by the provision. This matter arises because the Council has stated it no longer intends to carry out the mapping required to identify such sites. We would expect that the Council or the Department of Conservation may hold or develop a database to record the locations of īnanga spawning sites identified by themselves or other parties to facilitate the adoption of this clause and effectively exclude livestock from those sites.

[76] We conclude the word in C.8.1.2.3 “identified by Council” must be removed from the plan. This means we rely on the definition of īnanga spawning sites. Beyond īnanga spawning sites there is no particular mention of sheep in the balance of the appeal beyond livestock.

[77] The definition of ‘livestock’ in the plan does not include sheep, nor does the definition of ‘stock’ within the SER. Accordingly, any exclusion of sheep as now sought would be a restriction beyond that in the regulations.

[78] Dr West in his evidence tells us that:⁹

... Sheep have direct impacts of grazing on vegetation in riparian and wetland areas.

In my opinion, stock exclusion controls should prevent the worst of those impacts on key habitats (i.e. wetlands, margins of dune lakes) and life-cycle stages (i.e. īnanga spawning) and recognise increases triggered by climate changes predicted in Northland.

[79] In his substantive evidence on the impact of livestock (including sheep) on wetlands, freshwater fish habitat, including īnanga spawning habitat, Dr West quotes from the *Interim Regulatory Impact Analysis for Consultation: Essential Freshwater Part II: Detailed Analysis* (MFE 8, August 2019):¹⁰

Livestock entering water bodies contaminate the water directly, and damage the banks of the water body. This is particularly serious with heavy livestock

⁹ Statement of evidence of David William West dated 20 August 2021 at [4.6]-[4.7].

¹⁰ Statement of evidence of David William West dated 20 August 2021 at [6.1].

(cattle and deer) and pigs. ...

[80] Dr West went on to tell us:¹¹

... Sheep are generally recognised to have a lesser impact on waterways than other types of livestock, as they are lighter, and tend to avoid entering water (e.g., McDowell & Wilcock 2008; Reeves & Champion 2004). However, while studies show that sheep do have a lower impact on waterways, they do still have an impact. Although the scale of impact has not been well studied, it is generally accepted that sheep can impact receiving waterbodies through impacts of nutrient and sediment runoff on water quality, and altering riparian condition (e.g., McDowell & Wilcock 2008). Particular concerns arise regarding the impact of sheep on consumption-removal of plant cover, in relation to īnanga spawning habitats.

Dr West then went on to discuss īnanga spawning habitats in detail.

[81] This evidence supports strongly the exclusion of sheep and all other livestock from īnanga spawning sites. That was explicitly a point of appeal by the Minister and is clearly before this Court. In fact, there is agreement by all parties that sheep should be excluded from these areas.

[82] Even if there is jurisdiction, the question is whether or not the evidence otherwise supports the exclusion of sheep from other areas. It is clear that this matter was explicitly before the government at the time of the introduction of the SER and sheep were not included within the definition of 'stock' in the SER. Similarly, it is clear that the Council considered whether sheep should be included within the scope of this Plan and concluded for the purposes of this plan that sheep were not within the livestock definition and not subject to the exclusion rules.

[83] We agree that further research is required in this area but at this stage we are unable to conclude that the most appropriate outcome in this case is the inclusion of sheep as an additional species to the general livestock exclusion rule. This was neither the subject of notification, nor in our view is it covered in the appeal by the Minister which relates only specifically to exclusion of sheep from īnanga spawning sites.

[84] Accordingly, on the basis of both scope and on its merits, we do not consider

¹¹ Statement of evidence of David William West dated 20 August 2021 at [6.2].

that a sufficient case has been made out to exclude sheep from any of the wetland areas subject to fencing. We note that the rule requiring fencing of wetlands has the practical effect of excluding almost all stock including sheep.

Stock fencing areas

[85] The parties have agreed that the fencing requirement in the proposed plan for wetlands at or above 2,000 m² is insufficient. This was the explicit subject of an appeal by the Minister and there does not appear to be any argument that the Minister simply required wetland areas to be fenced. Thus, the question of size is moot.

[86] In the decisions version of the original PRP Rules C.8.1.2, C.8.1.3, E.3.4.1 and E.3.5.1 include a size threshold of 2,000 m² at which livestock must be excluded from natural wetlands. Both the Minister and Forest and Bird seek that this is amended to 200 m², whereas the Council and Federated Farmers support a 500 m² threshold. The Council and Federated Farmers have agreed that 500 m² is a small but practicable area to fence.

[87] To date no natural wetlands are identified in the Northland Regional Plan or Policy Statement. Nor have any wetlands that support a population of threatened species been identified.

[88] The Council now accepts that the 2,000 m² is too large and agrees that a smaller area should be protected but have settled on 500 m². It appears to be in part because this is the figure adopted in the SER even though these regulations have come into force much later.

[89] That being said, it appears that the reason for the Council's change of view, supported by Federated Farmers, is based upon firstly the discussion through mediation and subsequently on the evidence of Dr West around the predominance of wetlands smaller than 2,000 m², and secondly, around the mandatory SER.

[90] We attach hereto marked as "B" tables showing the wetland areas in two catchments. One being Doubtless Bay with some 51,431.57 hectares, with 49,288.92

hectares inland of the coast. The total extent of wetlands within Doubtless Bay is 1,272.1 hectares according to Dr West, taken from photographic examination. Of this, 48.57 hectares of wetlands are smaller than 500m², and 10.79 hectares of wetlands are smaller than 100 m². Accordingly, approximately 38 hectares of wetlands have areas between 100 m² and 500 m² and some 1,220 hectares have larger wetlands.

[91] The Waihou wetlands' information gives a total catchment of 28,142.11 hectares, in which 27,902.5 hectares are inland of the coastal environment. There are some 374.74 hectares of wetland. Of these, 27 hectares of wetland are smaller than 500 m², and 4.97 hectares of wetland are smaller than 100 m, yielding wetlands of around 22 hectares between 100 m² and 500 m². However, drilling down into the data further we see that, of the wetlands smaller than 500 m², the mean size is 110 m² and the median 58 m². Unfortunately, the figures have not been adjusted to remove the 1,154 odd wetlands less than 50 m² in size. Even so, there appear to be around 1,500 wetlands between 100 m² and 500 m² in Doubtless Bay and around 900 in Waihou wetlands.

The values within these wetlands

[92] None of these wetlands have been mapped and all parties agree the best course of action would be to map the wetlands and identify any particular values, particularly threatened species.

[93] Dr West's position is that, given we do not know whether they contain valuable species, a precautionary approach would be to protect them all.

[94] The argument for the Council and Federated Farmers is that the cost of doing this for the benefit of the extra small area of wetland gained is not justified and was the reason the figure of 500 m² was chosen as being the smallest practical size.

[95] We have looked at the map annexed as "C". It can be seen from this that much of the area that Dr West has mapped is along watercourses. His view was that little of it appears to have been fenced, although the official figures show some 72 percent of the waterways have been fenced in Northland. Where the areas are not associated

with a watercourse, they could be described as residues of wetland areas where an argument might be made that the entire area should be fenced and allowed to return to its wetland state. Many of these smaller areas associated with waterways would be included in the fencing of the waterway itself or by small extensions to include a wider area if this was appropriate.

[96] In our view, this type of matter is best addressed as part of the Farm Management Plans when they are introduced. We have concluded that requiring fencing of areas below 500 m² is not warranted because:

- (a) there is a significant cost in installing very small fenced areas. Mr Jones in his evidence conceded that he had calculated fences on a linear basis rather than taking into account the strainer posts that would need to be established at corners within any small fenced area;
- (b) fencing streams in this way is likely to cause obstruction both at the upstream and downstream ends in heavy flow. It may lead to stock entrapment which is likely to have the opposite effect to that intended (this is where stock force their way into the wetland area because of grazing conditions and are unable to leave again);
- (c) Dr West agreed that issues of connectivity and ecotones are important within these areas and therefore fencing of streams and rivers along their length would have greater benefits (although he would of course include any associated wetlands within them);
- (d) we have also concluded that the move to a 500 m² fencing requirement for wetlands is itself a significant imposition on the farming community but has been agreed by Federated Farmers. Over the life of the plan, we would expect this provision alone to significantly improve the values of these larger wetlands; and
- (e) we have heard in previous cases, and it was acknowledged in this case, that there can be edge effects of fencing. Although fencing does create a boundary against stock, it also allows weed species within the area to

proliferate. For this reason, we consider that with an area of 500 m² the core of the wetland is likely to be protected from the edge effect and be able to resist any encroachment of weeds from the edge while wetland species regenerate.

[97] Overall, we conclude that the better approach is to have wetlands 500 m² and above fenced. This would catch most of the larger ponded areas rather than those areas that are part of, or associated with, a continued waterflow such as streams. We conclude that any fencing on these streams or rivers should be done in a continuous fashion along their banks to protect riparian margins, rather than simply identifying and fencing the wetlands within them.

[98] We have concluded that the most appropriate provision is 500 m² for the following reasons:

- (a) it is the most appropriate way to achieve the purpose of the Act, which is of course the long-term improvement of water quality and the protection of wetlands, particularly because it is practicable, i.e., there can be a reasonable expectation that compliance will be achieved, and it is efficient and effective both in terms of achieving the plan rule and in finding acceptance within the farming community;
- (b) we agree that in doing so we envisage a cooperative approach with farmers through the development of farm management plans and initiatives by the Council. We have been told that there are some fencing allowances already being provided for and we would anticipate that there may be further studies and provision of funding from central government to assist farmers in implementing these provisions. We were told that some initiatives are already under evaluation currently;
- (c) we acknowledge that the social, cultural and economic impacts of these initiatives need to be taken into account. To that extent the evidence from Mr Jones was clear that the economic impacts on individual farmers could be very significant if they were required to fence down to 100 m². Even

at 500 m² there is likely to be a significant cost, for which assistance may need to be given or time for implementation allowed;

- (d) there are clear benefits to fencing larger wetlands compared to those that are smaller and not associated with waterways. Overall, we consider a better outcome would be to fence larger areas to incorporate a number of small wetlands such as shown in Doubtless Bay. That however requires cooperation and discussion with the owner. We have reasonable expectation that cooperation might be achieved given the high rate of fencing along stream margins under the accord;
- (e) we conclude that at the 500m² level there is likely to be little impact upon employment overall or on the operation of farms, but we would be concerned at the more significant imposition at the smaller size; and
- (f) we also take into account the current state of the discourse between farmers and those seeking more restrictive provisions on the environment. We consider that this plan in this regard strikes the correct balance between prescription and cooperation. Together those two matters are likely to be more effective than a more significant imposition upon the operation of farms and the cost associated therewith. In our view, s 32 requires us to undertake such a practical evaluation as to the realism of the provision and whether it will achieve its objective.

Inclusion of sheep in livestock definition

[99] We note that the parties have agreed to the inclusion of a new condition (1A) in Rule C.8.1.2, to read:

C.8.1.2 Access of livestock to the bed of a water body or continually flowing artificial watercourse – permitted activity

The access of livestock to natural wetland, the bed of a lake or a continually flowing river, or a continually flowing artificial watercourse is a permitted activity, provided:

...

1A) the access does not cause or induce noticeable slumping, pugging or erosion of the bed of the waterbody.

[100] 'Livestock' is defined in the plan as dairy cows, dairy support cattle, beef cattle, pigs and deer. The definition has not changed.

[101] The Minister and Forest and Bird now also seek to extend that condition to sheep. The Council submits that this amendment is beyond the scope of submissions.

[102] The submission of the Minister also sought to include new wording that access to livestock "does not cause or induce noticeable slumping, pugging or erosion".

[103] The Minister did specifically seek that sheep be excluded from significant wetlands and lakes, but not from natural wetlands, rivers and artificial watercourses. The Minister also specifically sought a condition excluding sheep from īnanga spawning sites.

[104] Again, we have concluded that the Minister's submission was very precise and clear. It sought to exclude sheep from significant wetlands and lakes. It did not seek that rule applies to natural wetlands, rivers and artificial watercourses as well.

[105] The Minister did seek a condition excluding sheep from īnanga spawning sites. The provisions from the Minister arguably only seek sheep be excluded from the beds of lakes and natural wetlands. The Minister's appeal in fact included a modified Table 12 which explicitly provided that there would be no exclusion required for sheep from continually flowing rivers, streams and artificial watercourses and natural wetlands.

[106] Forest and Bird did make a submission that C.8.1.2 apply to sheep but did not pursue this in their notice of appeal.

Conclusion

[107] We conclude that there are only two issues which can be considered by the Court in relation to sheep in this hearing and these are the exclusion of sheep from:

- (a) lakes greater than one hectare and significant wetlands; and
- (b) īnanga spawning sites.

[108] There is no jurisdiction for this Court to go further in terms of this appeal.

Merits

[109] We now address the question for each of those two areas.

[110] We note immediately that exclusion of sheep from īnanga spawning sites is largely agreed. The only issue being the definition of 'īnanga spawning site', we will come to that shortly.

[111] The parties agree that the SER does not control the access of sheep to significant wetlands and/or lakes. Currently, we do not understand there to be any significant wetlands identified in the plan and this appears to be the reason for the Minister's proposed exclusion of stock from natural wetlands greater than or equal to 100 m².

[112] One particular issue on which we do not feel we have sufficient evidence is in relation to the exclusion of sheep from lakes greater than one hectare and significant wetlands. It appears to be accepted that sheep do not have an affinity for water. Photographs we saw of cattle grazing in the edge of the lake therefore would not apply to sheep, which are most unlikely to enter water at all but may undertake some light grazing particularly of exotic grasses around the edges.

[113] For our part, the SER do not prevent such access and we can see no reason currently that they should be imposed in terms of this plan. They were not the subject of any proposed provision nor was it adopted by the Council, having heard the submissions of Forest and Bird and the Minister.

[114] Mr Gardner for Federated Farmers made the point that browsing of palatable grasses is not necessarily damaging or destroying of that species. It can have beneficial effects in that it may reduce palatable exotic grasses and allow native non-palatable

species to become dominant.

[115] For lakes greater than one hectare and significant wetlands we do not have enough detail at this stage to satisfy us that the exclusion of sheep is necessary to achieve and implement the provisions of the plan. To the extent that the SER is relevant, we note that the PRP needs to adopt an approach largely based on consideration of the cost benefit analysis. We must be satisfied that the provision is efficient, effective and also practicable. We can envisage that there may be situations where excluding stock from browsing palatable species may have an adverse effect on the native grasses that might be present.

[116] Again, we would have thought the proper place to address this sort of issue is within the farm management plans or in discussion with owners of particular blocks of land. Many of the significant wetlands, for example, if they are greater than 500 m², are likely to be fenced under the provisions in any event.

[117] We do accept that there can be issues around the margins of dune lakes and we understand that the Department of Conservation controls those. We suspect there are issues around the cost of fencing and the practicality of fencing where it may allow exotic species to proliferate within the fenced area. Nevertheless, we have not had sufficient evidence to satisfy us that exclusion of sheep is necessary in this case. We do agree that further work should be done and is part of the mapping of significant wetlands which should occur. We would have thought this is one of the specific issues that should be addressed, and consideration then given to introducing a change, including margins within the significant wetland areas identified.

Īnanga spawning sites

[118] The definition of Īnanga spawning sites was the subject of a previous decision in which the Court gave some suggested wording relating to the tidal prism. Perhaps it is worth restating our understanding of the Īnanga spawning cycle. Adult Īnanga live upstream, and on spring tides when stream or river flow is higher (around two times a month) they travel downstream until they find saline water, i.e. the saltwater intrusion or wedge, then travel to the nearest available habitat upstream to spawn.

Eggs then have time to develop until another next high spring tide flushes the young downstream.

[119] In practice, most of the īnanga spawning sites we have seen are very small areas, and their locations can be anywhere from right at the mouth of the river to points many kilometres upstream. For the purpose of this hearing, for example, we went to one site that would have been six to eight kilometres upstream given the relatively flat nature of the upper reaches of Ruakākā River. Others, such as that at Parahaki, are only a kilometre or so from the town basin.

[120] The concept of mapping īnanga spawning habitat is appropriate. However, we agree with the Minister that we should not leave the protection of īnanga spawning habitat until these areas are mapped, especially when it appears there is no Council timeframe for such mapping.

[121] In relation to our hearing on Topic 9, the Court provided a tentative definition of īnanga spawning site:

the margins of the inundated area within 100 m of the upper reach of tidal prism during Spring High Tides.

[122] The parties were given an opportunity to find workable wording. The parties responded in August 2021 proposing slightly different definitions and these were the subject of submissions and debate during the hearing. The wording proposed and the discussions were predicated on the understanding that the Council intended to include the mapping of īnanga spawning sites in its freshwater plan, to be developed in the near future, such that any definition we decide would be an interim one to be replaced by the outcome of such mapping.

[123] Following this hearing, in a minute dated 1 December 2021 we proposed an amended definition and again circulated it to the parties including those to Topic 9. We summarise the responses to both of our draft definitions (August and November) so that the genesis of the finding we have eventually made can be understood.

Responses to the definition

[124] The Council supported the intent of the definition in the interim decision and proposed minor amendments:

The vegetated margins of rivers within 100 metres of the upper reach of the tidal prism that become inundated during Spring High Tides.

[125] The reasons given for this were:

- (a) referring to “vegetated” margins would clarify that areas that do not contain vegetation (a requirement for spawning) would not be captured; and
- (b) the reference to “the inundated area” with “river” would clarify that it is the margin of the rivers that are protected, rather than the margins of inundated areas.

The Council proposed that a diagram might help illustrate the concept.

[126] Horticulture New Zealand agreed with the position of the Council.

[127] The Minister was concerned with the use of the words “vegetated margins” and we agree. Areas that may be cleared for whatever reason would then be excluded from consideration when they may have been or possibly will in the future be appropriate habitat for īnanga spawning as a result of changes in farming practices or with climate change. We consider that limitation in this way would be unreasonable and unnecessary. There are a number of natural changes that can occur in waterways for example bank instability as a result of flooding and natural erosion, as well as livestock effects. There is already a 10 m setback for earthworks and the exclusion of livestock and sheep from īnanga spawning sites is agreed by all parties so any margins that can support vegetation are likely to do so already.

[128] Accordingly, the protections that are provided for in this plan and in fact in the various policy statements and SER may see a return to a more fully vegetative riparian domain. We also agree that the intention was to include margins of rivers and estuaries

which have intrusion of freshwater. We are still concerned at the question as to whether or not the intent is to cover all areas of the estuary edge and all areas of river, even if they are ones that would not be spawning habitat because they are routinely saltwater dominant and therefore are not spawning sites.

[129] Federated Farmers generally supported the Council's position but considered that the definition should be clarified to make it clear on its face that inanga spawning sites are within rivers, and that the position from which the 100m setbacks are set, in any given situation, is fixed. Their suggested wording was:

The vegetation margins of the areas within rivers that become inundated during Spring High Tides, and that are within 100 metres of the point on either bank of each river that marks the upper reach of the tidal prism during any Spring High Tides over that period.

Federated Farmers noted that the clarification sought could also be achieved by retaining the Council's proposed definition, but also including an advice note to the same effect.

After December 2021

[130] Now that the prospect of mapping in the foreseeable future was no longer planned by the Council, the Minister could not support the Court's interim definition as it said it might have done on the understanding that mapping was shortly to occur.¹² The Minister's memorandum, supported by an affidavit from Dr West, reiterated the considerable variability of spawning locations due to the interaction of river flow / discharge rate, the size of the spring tide and the interaction between the two. Spawning could occur 100 metres or more upstream or downstream of the saltwater wedge but the saltwater wedge location itself could vary by several hundred metres over a matter of weeks as demonstrated by the example of the Ruakākā River, seen in a map attached to Dr West's affidavit. Accordingly, the Minister proposed a revised definition seeking a greater "zone of protection" that would also protect potential spawning habitat:

¹² Legal submissions on behalf of Minister of Conservation – Topics 9 and 16: Land Preparation & Stock Exclusion dated 10 December 2021.

The margins of rivers and estuaries that are inundated during spring high tides within a kilometre upstream and downstream of the upper saltwater limit, measured during such tides.

[131] The Minister indicated that a definition was preferable to leaving the term undefined but retained her primary position.

Evaluation

[132] We conclude we must reconsider the definition, as it may remain in place for some time, to provide protection for īnanga spawning sites / habitat in the longer term. In the absence of mapping, we have considered the matter afresh.

[133] The Minister's definition, setting a distance of a kilometre up and downstream of the upper saltwater limit, troubles us somewhat as the length of stream over which the location of the saltwater wedge can move must depend to a degree on topography / slope. While it is clear from our visit to the Ruakākā River, that on low-lying or flat land the tidal influence extends a long way inland and the location of the saltwater wedge must vary considerably, subject to tidal and river influences, it seems to us that the same is not true where the slope of the land increases more rapidly away from the estuary and the length of stream along which the saltwater wedge can migrate must be shorter.

[134] We conclude we should remove any specification of a distance up or downstream from the upper limit of the saltwater wedge as its variability of location seems to defeat that purpose. We return to the definition originally proposed by the Minister by way of relief, which puts the onus back on individual landowners who are best placed to have a familiarity with the areas inundated at high spring tides. That definition is as follows:

The margins of rivers and estuaries that are inundated by spring high tides.

Advice Note: In the context of this definition "margins of rivers and estuaries that are inundated at spring high tide" refers to the area of land adjacent to the water in a river or estuary that is not normally covered in water, but that is covered in water during high tides near full and new moon, when the tidal range is at its highest. This occurs twice a month all year round.

Definitions of wetland and implications for the Regional Plan

[135] Finally, we now tread where angels fear, into the area of wetlands. The RMA defines wetland as:

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.

[136] As noted by the High Court, this includes wetlands whether they occur in freshwater, saltwater or brackish waters.¹³ It would also include geothermal wetlands and those that may be tolerant to particular conditions, such as sphagnum moss.

[137] The SER defines natural wetland as:

- ... a wetland (as defined in the Act) that is not –
- (a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former wetland); or
 - (b) a geothermal wetland; or
 - (c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling.

[138] Natural wetland is defined in the proposed plan, however, as:

Any wetland including an induced wetland and a reverted wetland, regardless of whether it is dominated by indigenous vegetation, but does not include:

- (a) a constructed wetland, or
- (b) wet pasture, damp gully heads, or
- (c) areas where water temporarily ponds after rain, or
- (d) pasture containing patches of rushes,
- (e) artificial water storage facilities; detention dams; reservoirs for firefighting, irrigation, domestic or community water supply; engineered soil conservation structures including sediment traps; and roadside drainage channels.

¹³ *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113.

Notes:

- 1) The Regional Council's wetland mapping indicates the extents of known wetlands – these can be found on the Regional Council's website.
- 2) The relationship between the various types of wetlands is shown in Appendix H.6 Wetland definitions relationships

General comment

[139] In the context of these differences, we appreciate there have been a number of significant changes introduced to the RMA by the adoption of a new freshwater planning regime. As we understand it, future plans are to be prepared and dealt with by the Freshwater Commissioners under the Act which is a separate process to that before the Environment Court. This freshwater planning process requires the Council to take action but the process itself is addressed at s 80A(5) by reference to the Chief Freshwater Commissioner who convenes the necessary hearings panel to conduct the public hearings of submissions. This process essentially requires a separate freshwater planning instrument. Thus, the current combined regional plan will eventually be replaced by a freshwater plan and other plans.

[140] Given the decision of the High Court on wetlands within the CMA, there may be a need for some consideration as to the interaction of that process and the general RMA Schedule 1 process. Again, we are unable to comment more on this.

[141] Overall, we recognise there are differences between the various documents, and these differences have been recognised by the Minister for the Environment. Document "A" adopts interpretation and notes intentions that may be beyond those displayed in the legislation.

[142] To that extent, the Court is in a very complex position where the Ministry for the Environment and the Minister of Conservation engage in matters both at a policy and regulatory level and also before this Court. Arguably, the intention of the government is to operate in this area at least until the new resource management legislation is in place.

[143] In this case we must be cautious of becoming involved in any political process

especially when we are invited to comment on or incorporate statutory documents within planning decisions by parties. Clarity is required before the Court would be able to operate with confidence in this area, given the differing definitions adopted in regional plans, NPSFM 2020, NES-F 2020 and SER. The exact interaction of these provisions is unclear to the Court, as it is to the experts who gave evidence before us.

Outcome

[144] We conclude:

A: The minimum area for natural wetlands to be fenced will be 500 m² rather than 2,000 m² as currently in the plan for the reasons we have set out. We attach hereto as “D” the suggested wording which we adopt in this regard as supported by the Northland Regional Council and Federated Farmers. The Regional Council is accordingly to make changes to their plan C.8.1.3 – Access of livestock to rivers, lakes and wetlands – discretionary activity: the word ‘2,000 m²’ is removed to read ‘500 m²’.

B: There is agreement by all parties that sheep should be excluded from īnanga spawning areas. We adopt the suggested wording of the Regional Council in respect of sheep, which are excluded from īnanga spawning areas but not otherwise.

C: The definition of ‘īnanga spawning site’ is also the subject of Topic 9 and our intention is to adopt the following wording:

The margins of rivers and estuaries that are inundated by spring high tides.

Advice Note: In the context of this definition “margins of rivers and estuaries that are inundated at spring high tide” refers to the area of land adjacent to the water in a river or estuary that is not normally covered in water, but that is covered in water during high tides near full and new moon, when the tidal range is at its highest. This occurs twice a month all year round.

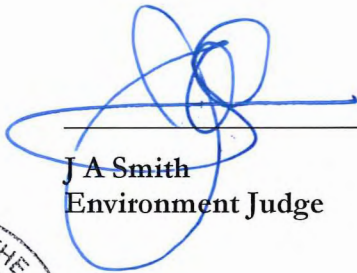
D: We do not consider we have jurisdiction for the other definition changes sought and accordingly adopt the Regional Council position on those matters

also.

E: The Regional Council is to prepare and circulate to the parties the final wording of the relevant provisions in accordance with this decision. Parties are then invited to provide comment to the Council within 15 working days as to the definition for 'inanga spawning site' and the final wording for the exclusion of livestock and sheep. If there are any other consequential amendments sought, these are to be specified within the same 15 working day period. Any further comments in response are to be provided within an additional 10 working days. The Regional Council is then to compile the comments and file these with the Court with differences identified for final decision and approval of relevant wording. This includes the District Council matters resolved.

F: Costs are not encouraged but are reserved. Any application is to be filed within 30 working days, reply within a further 10 working days and final reply (if any) within a further five working days.

For the Court:



J A Smith
Environment Judge



"A"

Defining 'natural wetlands' and 'natural inland wetlands'

Guidance to support the interpretation of the National Policy Statement for Freshwater Management 2020 and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020



Ministry for the
Environment
Manatū Aho Te Taiao

New Zealand Government

Disclaimer

The information in this publication is, according to the Ministry for the Environment's best efforts, accurate at the time of publication. The Ministry will make every reasonable effort to keep it current and accurate. However, users of this publication are advised that:

- The information does not alter the laws of New Zealand, other official guidelines, or requirements.
- It does not constitute legal advice, and users should take specific advice from qualified professionals before taking any action based on information in this publication.
- The Ministry does not accept any responsibility or liability whatsoever whether in contract, tort, equity, or otherwise for any action taken as a result of reading, or reliance placed on this publication because of having read any part, or all, of the information in this publication or for any error, or inadequacy, deficiency, flaw in, or omission from the information in this publication.
- All references to websites, organisations or people not within the Ministry are for convenience only and should not be taken as endorsement of those websites or information contained in those websites nor of organisations or people referred to.

This document may be cited as: Ministry for the Environment. 2021. *Defining 'natural wetlands' and 'natural inland wetlands'*. Wellington: Ministry for the Environment.

Published in September 2021 by the
Ministry for the Environment
Manatū Mō Te Taiao
PO Box 10362, Wellington 6143, New Zealand

ISBN: 978-1-99-003376-6

Publication number: ME 1590

© Crown copyright New Zealand 2021

This document is available on the Ministry for the Environment website: environment.govt.nz.

Contents

1	Purpose	5
1.1	Legal status of guide	5
1.2	New terms introduced	5
1.3	Future amendments to the wetland definitions	5
2	Policy intent and summary of the NPS-FM and Freshwater NES wetland provisions	6
2.1	New policies and regulations to protect 'natural wetlands'	6
2.2	Application of the New Zealand Coastal Policy Statement	7
2.3	The NPS-FM protects the of extent and values of every individual natural inland wetland	7
2.4	'Natural wetland' applies regardless of wetland condition	8
2.5	'Natural wetland' applies regardless of wetland size	8
3	Wetland definitions in the RMA 1991 and NPS-FM	9
3.1	Wetlands in the RMA	9
3.2	'Natural wetlands'	9
3.3	'Natural inland wetlands'	10
3.4	A process to assess 'natural wetland' and 'natural inland wetland' status	11
4	Wetland delineation protocols	12
4.1	Using the protocols to resolve uncertainty or dispute	12
4.2	Limitations of the WDPs	12
4.3	Further assessment to determine a 'natural wetland'	13
5	Wetlands constructed by artificial means	14
5.1	Why they are excluded	14
5.2	Exceptions to this exclusion	14
5.3	Examples of wetlands constructed by artificial means	14
5.4	No timeframe for consideration	15
6	Induced wetlands	16
6.1	Examples of induced wetlands	16
6.2	Previous advice retracted	16
7	Geothermal wetlands	18
8	Improved pasture	19
8.1	Intent of this exclusion	19

8.2	Assessing temporary rain-derived pooling	19
8.3	Timeframes for assessing this exclusion	20
8.4	Self-established exotic pasture species in areas that are not under active management	20
8.5	Further guidance to come	21
9	Providing protection for all other wetlands	22
10	Distinguishing wetlands from other waterbodies	23
11	Coastal wetlands	24
12	Next steps	25

Figures

Figure 1	Assessing 'natural wetland' and 'natural inland wetland' status under the NPS-FM	11
----------	--	----

1 Purpose

The National Policy Statement for Freshwater Management (NPS-FM) 2020 introduced the terms 'natural wetlands' and 'natural inland wetlands'. This guide shows how to apply those definitions and clarifies the policy intent. The full definitions are in section 3 below.

This guide also covers common queries about the definitions and recent relevant case law.

The terms 'natural wetlands' and 'natural inland wetlands' are also used in the Resource Management (National Environmental Standard for Freshwater) Regulations 2020 (Freshwater NES) and the Resource Management (Stock Exclusion) Regulations 2020 (Stock Exclusion regulations).

For a quick guide to defining 'natural wetlands', for the purposes of the NPS-FM and NES-F, see the flowchart in section 3.

1.1 Legal status of guide

While this guide cannot provide legal interpretation of RMA national instruments or overrule legal decisions, it clarifies what the Ministry for the Environment's policy intends.

1.2 New terms introduced

The guide introduces two new terms not used in the NPS-FM. These terms have no legal status and are used to help interpret the NPS-FM. They are:

- inland saline wetland
- induced wetland.

1.3 Future amendments to the wetland definitions

The Ministry has received feedback that applying the definition of 'natural wetland' in the NPS-FM can cause problems. For example, some heavily modified, pasture-dominated wetlands have been captured as 'natural wetland' areas even though part (c) of the definition seeks to exclude these areas (see definition in 3.2 below). This is not the intention and could unnecessarily restrict changes in land use and development in these areas.

As of the date of publication of this guide, changes to the Freshwater NES and NPS-FM are being considered to correct this. Amendments to the definition of 'natural wetland' under the NPS-FM may be one way to resolve implementation challenges.

This guide advises how to apply the current definitions. It will be amended if any changes are made.

2 Policy intent and summary of the NPS-FM and Freshwater NES wetland provisions

New Zealand has lost most of its wetlands, and wetland loss is ongoing, with almost 5400 hectares of freshwater wetland lost to non-natural causes between 1996 and 2018.¹ Many of those remaining are rare and valuable ecosystems.

2.1 New policies and regulations to protect 'natural wetlands'

The Essential Freshwater package came into force in September 2020. It included the Freshwater NES, the NPS-FM and Stock Exclusion regulations. The package introduced policies and regulations to protect 'natural wetlands' with nationally consistent standards. The NPS-FM applies to 'natural inland wetlands' while the Freshwater NES and Stock Exclusion regulations refer to 'natural wetlands' (see section 3).

The term 'natural wetlands' does not include all wetlands in New Zealand, so some are not affected by the Essential Freshwater regulations. Under sections 6(a) and 6(c) of the Resource Management Act 1991 (RMA) councils have to recognise and provide for matters of national importance, such as the preservation of the natural character of wetlands, the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. This would include some wetlands not covered by the 'natural wetlands' definition due to the broader definition of a wetland under section 2 of the RMA.

The Freshwater NES regulates potentially damaging activities in or near natural wetlands to make sure there is no further loss or degradation of natural wetlands. From 1 July 2025 the Stock Exclusion regulations will control stock access to natural wetlands larger than 500 square metres on low slope land.

The wetland policies in the 2020 NPS-FM are intended to protect both the extent and values of all remaining natural inland wetlands, regardless of their size and condition (see Policy 6 below).

NPS-FM (2020) Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

For more information about council obligations for natural inland wetlands, see the [Essential Freshwater wetlands factsheet](#)².

¹ See Denyer K and Peters M. 2020. *The Root Causes of Wetland Loss in New Zealand: An Analysis of Public Policies and Processes*. Pukekohe: National Wetland Trust.

² Note, this content now needs updating to align with the recent Environment Court decision on coastal wetlands in the CMA (see section 11).

2.2 Application of the New Zealand Coastal Policy

Statement

The New Zealand Coastal Policy Statement 2010 (NZCPS) administered by the Department of Conservation, provides direction on wetlands in the ‘coastal environment’.³

While the NPS-FM applies to ‘natural inland wetlands’, there may be areas where both the NZCPS and NPS-FM apply to wetland areas, for example, inland saline wetlands, and some freshwater wetlands in the coastal environment but outside the coastal marine area (CMA).⁴

The intent of the Freshwater NES was that it would apply to wetlands in the coastal marine area, however this has been challenged in the Environment Court (Bay of Islands Maritime Park Incorporated v Northland Regional Council [2021] NZEnvC 006). The Crown has appealed this declaration (see section 11).

2.3 The NPS-FM protects the extent and values of every individual natural inland wetland

The intent of Policy 6 is that the extent of all individual natural inland wetlands is maintained – regardless of their ecological state or size. This is to prevent fragmentation of remaining wetland habitat.

The policy intent to protect the extent of all individual natural wetlands is supported by the requirement to prioritise the mapping of any natural wetland larger than 500 square metres or at risk of loss of extent (clause 3.23(4)(a)) and, if there is any uncertainty or dispute, to use the wetland delineation protocols (clause 3.23(3)). Councils also must provide for and promote wetland restoration in their regional plans.

Recent planning decisions have interpreted Policy 6 to mean that the overall extent of natural inland wetlands should be protected⁵. The Ministry does not recommend this approach. Instead, Policy 6 should be interpreted to protect the extent of individual natural wetlands, where any activity that causes destruction of natural wetland extent is only available as a last resort under limited circumstances that comply with the provisions in 3.22; that is:

- The activity must be for one of the prescribed purposes in clause 3.22 (1(a))

³ Policy 1(2)(c) of the NZCPS (DOC, 2010) recognises that the coastal environment includes “areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands and the margins of these”.

⁴ RMA (1991): coastal marine area means the foreshore, seabed, and coastal water, and the air space above the water—

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.

⁵ For example, in the Matawii water storage reservoir fast-track consenting decision (23 October 2020), the judge agreed with the applicant’s view on the NPS-FM that “if the overall extent of natural wetland is not reduced, then the policy is met provided that their values are protected, and their restoration promoted” [para 340].

- The activity must meet the 'functional need' test in clause 3.22 (1(b))
- The full effects management hierarchy must be applied as per clause 3.22 (1(b(iv)))

2.4 'Natural wetland' applies regardless of wetland condition

Natural wetlands include degraded wetlands. The NPS-FM definition of 'natural wetland' applies regardless of wetland condition. The wetland delineation protocols do not distinguish based on wetland condition. Both native/endemic and exotic wetland species are considered when assessing a wetland (see section 4).

Even degraded wetlands, such as those that have been highly modified, drained or invaded by weeds, play an important role in hydrological regulation and carbon sequestration, and may be a habitat for many threatened species. The NPS-FM directs councils to consider restoring wetlands (see Policy 6 and clause 3.22 (4)). Protecting degraded wetlands recognises their potential for future restoration.

Some degraded wetland areas are excluded (see exclusion (c) of clause 3.21(1)). These wetlands have been modified for grazing and their use as improved pastures can continue (see section 8).

2.5 'Natural wetland' applies regardless of wetland size

There is no minimum size for a natural wetland. The NPS-FM and Freshwater NES apply to areas of any size that meet the 'natural wetland' and 'natural inland wetland' definitions (respectively).

Damage or loss of many small wetlands would add up to a larger net loss. Some wetland types are naturally smaller than 0.05 ha in size, such as kettle holes, springs and seepages. Some wetland types are (or support) rare ecosystems or species in a particular region, so even small examples of that wetland type must be protected.

Some parts of the NPS-FM and Stock Exclusion regulations do identify size thresholds:

- Under the NPS-FM (3.23), councils must identify and map wetlands 0.05 ha or greater unless they are of a type that is naturally smaller than 0.05 ha (such as ephemeral wetlands) and known to contain threatened species. Regional councils are also encouraged to map and control activities in wetlands smaller than 0.5 ha, even if these are not known to contain threatened species (see section 9).
- The Stock Exclusion regulations specify that by 2025 stock must be excluded from wetlands larger than 0.05 ha on low slope land, or those smaller than 0.05 ha where they support a population of threatened species. Stock includes beef cattle, dairy cattle, dairy support cattle, deer and pigs.

Despite the thresholds for some activities, councils are obliged under the NPS-FM and Freshwater NES to protect natural inland wetlands and natural wetlands regardless of size or whether they are mapped.

3 Wetland definitions in the RMA 1991 and NPS-FM

'Natural inland wetlands' defined and protected under the NPS-FM are a subset of 'wetlands' as defined in the RMA.

The Freshwater NES, Stock Exclusion regulations, and the NPS-FM, control activities in natural wetlands to protect the extent and values of remaining natural wetlands. Given the intentionally restrictive nature of the rules, it is essential that the definitions do not capture more wetland areas than intended. Some wetland areas, including geothermal wetlands, wetlands constructed by artificial means and wetlands in areas of improved pasture (without permanent wetland hydrology) have been excluded from the definition (see section 3.2).

Councils still have obligations to protect all wetlands under the RMA s 6(a) and 6(c), as discussed in section 2.1.

3.1 Wetlands in the RMA

Wetland is defined in the Resource Management Act 1991 as follows:

"**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."

A wetland under the RMA may contain endemic/native or exotic wetland species. Wetlands with introduced vegetation can still offer valuable habitats for native flora and fauna and provide other important ecosystem functions. The RMA definition should not be interpreted to mean that plants and animals must both be present, but that the area supports a 'natural community' of plants and/or animals.

The wetland delineation protocols can be used to identify wetlands under the RMA, with some caveats (see section 4).

3.2 'Natural wetlands'

The NES and Stock Exclusion regulations apply to 'natural wetlands' as defined in the NPS-FM, a subset of the RMA's broad definition of wetlands.

The NPS-FM definition of 'natural wetland' (clause 3.21) uses the RMA definition of 'wetland' as a starting point, but excludes three categories (emphasis added):

A 'natural wetland' means a wetland (as defined in the Act) that is **not**:

- (a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or
- (b) a geothermal wetland; or
- (c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50 per cent of) exotic pasture species and is subject to temporary rain-derived water pooling.

See section 5 for more information about the exclusion for wetlands constructed by artificial means. Wetlands that have been constructed to offset impacts on or restore an existing or former natural wetland, and induced wetlands, are treated as natural inland wetlands.

See section 7 for more information about the exclusion for geothermal wetlands.

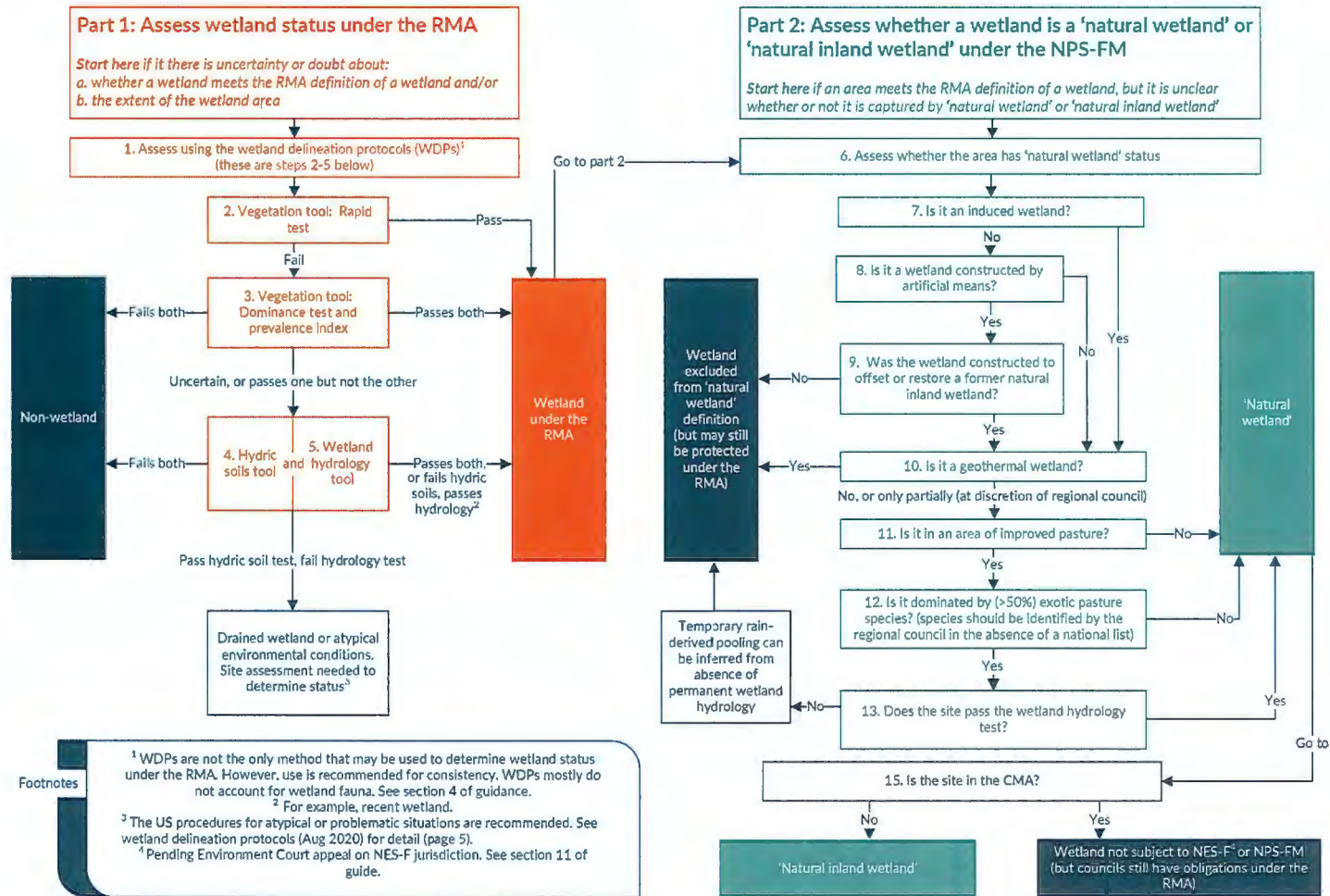
See section 8 for more information about the exclusion for areas of improved pasture.

3.3 'Natural inland wetlands'

The NPS-FM applies to 'natural inland wetlands', which are a subset of 'natural wetlands' that are not in the coastal marine area. This includes both freshwater and inland saline wetlands.

3.4 A process to assess 'natural wetland' and 'natural inland wetland' status

Figure 1 Assessing 'natural wetland' and 'natural inland wetland' status under the NPS-FM



4 Wetland delineation protocols

4.1 Using the protocols to resolve uncertainty or dispute

The wetland delineation protocols can be used to assess whether an area meets the definition for a wetland under the RMA. They cannot be used to distinguish between an RMA wetland and a 'natural wetland'.

The wetland delineation protocols are incorporated by reference into the NPS-FM (1.8). Under clause 3.23(3), in case of uncertainty or dispute about the existence or extent of a natural inland wetland, a regional council must have regard to the wetland delineation protocols. Using the protocols is recommended rather than alternative methods for wetland delineation, as this will improve national consistency on what is considered a wetland under the RMA.

The protocols are a set of three tools that help determine if an area has wetland characteristics based on the vegetation, soil type and hydrology. The protocols have been adapted to a New Zealand context from the US Corps of Engineers Wetlands Delineation Manual.⁶

Key resources:

[Wetland delineation protocols \(WDPs\)](#)

[Vegetation tool](#)

[Hydric soils tool](#)

[Hydrology tool](#)

[New Zealand Wetland delineation data form](#)

[Quick reference for using the WDPs](#)

4.2 Limitations of the WDPs

- The wetland delineation protocols do not account for wetland fauna under the RMA (except for the hydrology tool, which uses freshwater invertebrates as an indicator of hydrology).
- The protocols have not been tested to delineate wetlands that are in or extend into the coastal marine area (CMA), including connected areas.
- The protocols have not been tested to delineate geothermal wetlands.

⁶ Environmental Laboratory 1987, and US Army Corps of Engineers updates.

4.3 Further assessment to determine a 'natural wetland'

The wetland delineation protocols can be used to assess whether an area meets the definition for a wetland under the RMA. However, to determine whether an area is a 'natural inland wetland' under the NPS-FM, the area must also:

1. meet the definition of 'natural wetland' in the NPS-FM, which is narrower than those areas captured by the wetland delineation protocols because of the three exclusions in (a) (b) and (c).
2. be outside the coastal marine area to be considered a 'natural inland wetland'.

Where a wetland meets or appears to meet the definition under the RMA, but there is doubt about whether it meets the criteria of a 'natural inland wetland' under the NPS-FM, more assessment may be needed. Specifically:

- use a site history to assess whether a wetland has been constructed by artificial means and is being maintained for that purpose (see section 5)
- determine if the wetland was constructed to offset impacts on or restore an existing or former wetland as part of an offset requirement (see section 5)
- distinguish between geothermal and natural inland wetlands (see section 7)
- assess ground cover of pasture species. A national methodology for assessing ground cover of pasture species to help solve this issue has been proposed for development by MfE (see section 8.6.1).

5 Wetlands constructed by artificial means

New and existing wetlands and waterbodies constructed by artificial means are excluded from the NPS-FM definition of a 'natural wetland'. It is not the intent of the NPS-FM or Freshwater NES to regulate activities that affect these wetlands and waterbodies because they should be able to be maintained over time for the purpose for which they were constructed. However, if the wetland was constructed as part of offsetting it is considered a 'natural wetland' and the NPS-FM and NES-F regulations apply (see 5.2 below).

5.1 Why they are excluded

Wetlands constructed by artificial means were excluded to avoid discouraging anyone from constructing a wetland or restricting the ability to maintain a wetland or waterbody constructed by artificial means for a specific purpose, such as nutrient attenuation.

'Wetlands constructed by artificial means' includes wetlands and waterbodies that have been deliberately constructed for a specific purpose and that may require maintenance over time (for example, vegetation or silt removal) to continue to fulfil that purpose. This includes areas of wetland habitat that have formed in or around any deliberately constructed waterbody. See the list in 5.3 for examples.

5.2 Exceptions to this exclusion

This exclusion does not apply to wetlands constructed to offset impacts on or restore an existing or former natural wetland. The reason for this is that these wetlands should continue to fulfil that role and need protection to ensure this occurs.

This exclusion does not include induced wetlands (see section 6 for examples of induced wetlands.)

5.3 Examples of wetlands constructed by artificial means

'Wetlands constructed by artificial means' include wetlands and waterbodies that have been deliberately constructed by artificial means for a particular purpose, including for any of the following purposes:

- nutrient attenuation
- effluent treatment and disposal systems, including pond or barrier ditch systems, and areas installed for sediment control
- stormwater management
- reservoirs for firefighting
- hydroelectric power generation
- irrigation

- stock watering
- domestic and community water supply
- water storage ponds
- landscaping to create a wetland or waterbody
- other artificial water-storage facilities, including artificial watercourses under the RMA and engineered soil conservation structures, including sediment ponds and sediment traps
- hunting.

These wetlands and waterbodies may develop associated wetland habitat as a direct or unintentional result of being built and maintained. So, the definition of ‘wetlands constructed by artificial means’ also extends to the incidental wetlands created as a result of these waterbodies.

These are not the same as induced wetlands, which are incidental wetlands created by any other human activity (see section 6).

5.4 No timeframe for consideration

There is no timeframe in the NPS-FM definition for the consideration of wetlands constructed by artificial means. The exclusion applies no matter when the wetland was constructed.

The exclusion is based on whether the waterbody needs to be maintained over time so that it can continue to fulfil its purpose. Councils will need to make a case-by-case assessment as to whether this has been happening. Where it has not been maintained over time it may be considered ‘a natural wetland’.

See section 9 for cases where protection of the NPS-FM does not apply. Councils can still choose to protect these wetlands under the stringency clauses.

6 Induced wetlands

‘Induced wetlands’ are wetlands that have resulted from any human activity, except the deliberate construction of a wetland or waterbody by artificial means (see section 5). They are considered ‘natural wetlands’.

In a highly modified landscape, as we have across New Zealand, wetlands often result from human activities or changes to the landscape. Many wetlands that we have today have historically been induced through these activities, such as deforestation, and have often developed significant values over time and warrant protection.

Wetlands that have been unintentionally induced through human activities, for example, as a consequence of in-stream works such as culverts, or through the effects of increased sedimentation caused by deforestation, or as a result of climate change, are not considered wetlands constructed by artificial means. The term ‘constructed’ in ‘wetlands constructed by artificial means’ reflects a deliberate course of action to create and maintain over time a wetland or waterbody. So, induced wetlands are captured by the definition of ‘natural wetland’, meaning the Freshwater NES, Stock Exclusion regulations and NPS-FM apply.

Where a wetland is induced as the result of ‘specified infrastructure’ or ‘other infrastructure’ (lawfully established before 3 September 2020) then the Freshwater NES provides a consent pathway to maintain the infrastructure within or adjacent to the induced wetland (rules 46 and 47).

Where a wetland is induced as the result of a wetland or waterbody constructed by artificial means for a specific purpose, it falls under ‘wetland constructed by artificial means’ (see section 5).

6.1 Examples of induced wetlands

- wetland induced through an overflowing culvert
- wetland induced as an unintentional result of forestry
- remnant wetland habitats, eg, those associated with drainage channels and other works installed to drain a natural wetland
- wetland induced through stock pugging
- wetland induced through roading works.

6.2 Previous advice retracted

A letter previously sent to Auckland Council from the Ministry stated:

A “wetland that has formed as a result of a structure or earthworks or a culvert or weir being placed within a watercourse or as a result of a stormwater pond on another site including an inadvertently ‘induced wetland’ is not intended to come within the definition of ‘natural wetland’ in the National Policy Statement for Freshwater Management 2020 (NPS-FM). Therefore, these wetlands are not captured by the rules in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F).

The letter misinterpreted how the phrase 'induced wetland' is used and is incorrect. This guide should be relied on as the Ministry's position.

7 Geothermal wetlands

Geothermal wetlands are not defined in the NPS-FM or the Freshwater NES. We recommend using the Johnson and Gerbeaux geothermal wetland typology to distinguish these from 'natural wetlands' (see below).

Johnson and Gerbeaux (2004) describe geothermal wetlands as:

"A hydrosystem where the dominant function is geothermal water (heated by volcanic activity to 30°C or more); geothermal wetlands may have water temperatures below this, yet be influenced by chemicals from current or former inputs of geothermal-derived water. Geothermal wetlands occur predominantly in the central North Island and include volcanically active habitats of fumarole margins, hot surface waters, heated soils that are permanently or intermittently wet, and shallow water at land margins."

The scope of the Essential Freshwater package (NPS-FM, Freshwater NES and Stock Exclusion regulations) does not include geothermal wetlands because they are complex and dynamic, especially at small scales where it may be difficult to separate out wetland components from their terrestrial surroundings.

Temperature is not always a defining feature of geothermal wetlands, and chemical composition will occur on a continuum. Where a geothermal wetland grades into a natural inland wetland, only the part of the wetland that is geothermally influenced is excluded from the definition. The regional council must make a case-by-case decision on how to treat these. Geothermal wetlands also cannot be distinguished from 'natural wetlands' using the wetland delineation protocols.

For simplicity, MfE recommends considering the whole wetland area as a 'natural inland wetland' if part of it meets the definition. Discretion, however, is left to the regional council.

Geothermal wetlands are likely to still fall under sections 6(a) and 6(c) of the RMA.

8 Improved pasture

The NPS-FM defines **improved pasture** in clause 3.21 (1) as follows:

An area of land where exotic pasture species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing.

8.1 Intent of this exclusion

Areas with some wetland characteristics (except for current wetland hydrology), that are within areas of improved pasture that were being actively managed as improved pasture at the commencement date of the NPS-FM are excluded from the definition of a 'natural wetland'. These areas have been so heavily modified for pasture grazing, for example, through extensive historical drainage, that they should not be captured by the strict rules of the Freshwater NES and Stock Exclusion regulations or the NPS-FM natural wetland policies.

To be excluded from the definition of a 'natural wetland', the area must also have ground cover of more than 50 per cent exotic pasture species, and the presence of temporary rain-derived pooling (defined below as the absence of wetland hydrology).

In practice, this means the NPS-FM and Freshwater NES will not apply to many areas with some wetland characteristics (except for current wetland hydrology) in landscapes modified for pasture grazing. However, these areas may still qualify as areas of significant indigenous vegetation or significant habitats of indigenous fauna under 6(c) of the RMA and need protection, as discussed in section 2.1.

8.2 Assessing temporary rain-derived pooling

Instead of directly assessing an area for temporary rain-derived pooling, the Ministry recommends using the wetland delineation hydrology tool to determine if an area has permanent wetland hydrology.

Due to the wording of the definition, temporary rain-derived pooling must be present for an area to be excluded under (c) (rather than an absence of wetland hydrology).

We understand this is difficult to assess, as temporary rain-derived pooling may not be present or visible at the time of field visits. We recommend that councils take the pragmatic approach outlined below, of using the hydrology tool to assess the presence of permanent wetland hydrology:

- Temporary rain-derived pooling is any visible water pooling that does not meet the standard for wetland hydrology as defined by the hydrology tool.
- If a wetland has permanent wetland hydrology (as defined by the hydrology tool) it is considered a 'natural wetland', and temporary rain-derived pooling is irrelevant.
- If permanent wetland hydrology is absent, this can imply the presence of temporary rain-derived pooling. No further assessment is required. The area may then be considered

under exclusion (c) if it is within an area that was being managed as improved pasture at the commencement date of the regulations (see section 8.3) and has more than 50 per cent cover of pasture species.

Hydrological indicators must be assessed during the growing season and not outside this time window. The growing season differs across New Zealand. The table in the hydrology tool (table 1, page 12) gives approximate start and end dates for each local authority.

This recommended approach avoids some unintended outcomes of the policy wording. If temporary rain-derived pooling is directly assessed, then identical areas of improved pasture on sloping ground and flat ground would be classed differently (as rainwater will pool on a flat surface but not a slope); an assessment of temporary rain-derived pooling could be made only on days following rainfall; and areas with wetland hydrology would be able to be excluded as 'natural wetlands' if they also undergo temporary rain-derived pooling. We do not recommend this approach.

The temporary rain-derived pooling requirement for the improved pasture exclusion was originally included in the definition to ensure areas of pasture that were temporarily wet due to rainfall were excluded from consideration as a 'natural wetland' and could be distinguished from areas with true wetland hydrology. This was in the absence of a New Zealand tool to assess wetland hydrology.

Manaaki Whenua Landcare Research has since developed the hydrology tool, which completes the suite of delineation protocols. This now means that the presence of wetland hydrology should be identified during the delineation process, particularly for cases where it is not clear through the vegetation and soils.

8.3 Timeframes for assessing this exclusion

The area must have been managed as improved pasture at the commencement date of the NPS-FM (3 September 2020) to be excluded from the definition.

Future pasture expansion or improvement, or pasture expansion or improvement after the commencement date, is not a basis for an area to be excluded from the 'natural wetlands' definition. Areas that were previously managed as improved pasture before this date, are also not considered.

Assessment of state at commencement date should be done with the best available information, for example, aerial photographs or ecological survey data.

8.4 Self-established exotic pasture species in areas that are not under active management

The definition of 'natural wetland' does not exclude areas with wetland characteristics where some exotic pasture species have self-established and there has been no management for livestock grazing. The definition can only apply to improved pasture areas that were being actively managed for livestock grazing and exotic pasture production at the commencement date of the NPS-FM.

8.5 Further guidance to come

To help implement the improved pasture exclusion, feedback on this document called for two further pieces of technical guidance. These are:

8.5.1 A methodology for assessment of 50 per cent exotic pasture species on the ground

The requirement of '50 per cent cover of exotic pasture species' should be interpreted as a percentage of ground cover of exotic pasture species, determined through an ecological assessment. The feedback from practitioners is that it is hard to assess percentage cover in the field.

A methodology to assist with this assessment has been proposed for development by MfE. This methodology will also address queries around scale of assessment.

In the meantime, however, councils should use their own discretion to assess this requirement.

8.5.2 National list of exotic pasture species

There is no national list of exotic pasture species. Several councils have, however, produced their own lists of pasture species, which may be a starting point. This includes the list published by Greater Wellington Regional Council, which collates pasture species from NZ Grasslands Association in their [wetland technical determination guidance](#). In the absence of a national list, regional councils should define their own lists of exotic pasture species, as there are regional differences in species used.

The Ministry for the Environment is looking at producing a national list of exotic pasture species. If successful, this will be appended to this guide.

9 Providing protection for all other wetlands

Councils are able to provide additional protection for any wetland, including wetlands constructed by artificial means, geothermal wetlands and wetlands in pasture areas in accordance with the stringency clauses in the NPS-FM (3.1 (2)(a)) and Freshwater NES (regulation 6(1)) and may retain or develop rules for these types of wetlands in their district or regional plan.

10 Distinguishing wetlands from other waterbodies

Lakes and rivers are covered by their own definitions in the RMA, which are the same as those used in the NPS-FM. However, there is an overlap between these and the waterbodies captured by 'natural inland wetland'. In the RMA and NPS-FM:

Lake means a body of fresh water which is entirely or nearly surrounded by land.

River means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).

In many situations there is no clear boundary between a wetland and surrounding lakes or other waterbodies. The full extent of some shallow lakes may be included within a natural wetland and considered part of the extent of the natural wetland.

These situations must be assessed on a case-by-case basis, using an ecological assessment where necessary, to distinguish whether a wetland comprises lakes and/or rivers.

11 Coastal wetlands

The definition of 'natural wetland' at clause 3.21 of the NPS-FM was intended to cover coastal wetlands within the coastal marine area (CMA), as set out in the [interim RIA](#) for the NPS-FM (p 248-251).

In February 2021, the Environment Court issued a declaration to the effect that the Freshwater NES does not apply to the majority of coastal wetlands (Bay of Islands Maritime Park Incorporated v Northland Regional Council [2021] NZEnvC 006).

The Court found that the Freshwater NES applies "to the coastal marine area (CMA) only to the extent that they cover the area of CMA upstream of the 'river mouth' as defined in the Resource Management Act 1991". The Court stated that "in particular, the Freshwater NES did not apply to the general CMA, open oceans, estuaries, bays and other areas not falling within the definition of "river or connected area".

The Crown has appealed the Environment Court's decision and that appeal has yet to be heard. In the meantime, the legal position is that the jurisdiction of the Freshwater NES does not extend to the CMA, other than upstream of a river mouth.

12 Next steps

This document is intended to assist interpretation of the definitions where it is unclear whether or how the 'natural wetland' definition applies. Further guidance is likely to be needed to clarify the improved pasture definition discussed in section 8.5. This could include additional visual guidance with photographs/ examples to help identify 'natural wetland'.

All Ministry guidance is available as a draft for six months from the date of publication prior to being finalised. If you have feedback on this guide, or to contact us about the development of further guidance and resources, please email freshwater@mfe.govt.nz. We will review feedback in February 2022.

"B"

Doubtless Bay wetlands – total catchment area 51431.57 ha / area inland of coastal environment 49288.92ha														
DOC mapping														
Ha	Total polygon #	Total polygon length (m)	Total extent *	Mean*	Mode*	Median*	In CMA*	Coastal environment outside CMA*	Inland of CMA*	Inland of coastal environment	<100m from a river or lake*	Intersect with NRC mapped wetland**		
												CMA	Inland CMA	Inland of Coastal Environment
<0.005	2856	61456	5.15	0.0013	0.0011	0.0014	0.17	0.31	5.83	4.76	0.43	0.16	1.96	1.73
<0.01	3634	105935	10.79	0.0030	0.0011	0.0020	0.29	0.55	12.13	10.12	0.85	0.29	3.41	3.02
<0.05	5267	291918	48.57	0.0092	0.0011	0.0042	1.75	2.43	47.65	45.31	4.65	1.60	8.82	7.43
<0.2	6098	552551	134.05	0.0222	0.0011	0.0060	6.68	9.34	130.87	123.71	15.16	6.16	18.08	12.92
>0.2	666	1020322	1138.0	1.7087	0.3054	0.4885	68.94	63.92	1133.4	1004.07	113.0	55.6	516.7	452.1
All	6764	1572873	1272.1	0.1881	0.0011	0.0081	75.63	73.27	1264.3	1127.79	128.1	61.8	534.8	489.7

*All areas measurements in hectares (ha) **. Using only NRC 'known wetlands' and 'saltmarsh and mangrove' layers
Wetland mapped inland of coastal environment:
DOC 1191/49289x100 = 2.4% wetland. NRC (known&saltmarsh) 1067.779652/49289x100 = 2.2% (0.08% if Lake Ohia is taken out!)

Waihou wetlands – total catchment area 28142.11 ha / area inland of coastal environment 27902.50ha														
DOC mapping														
Ha	Total polygon #	Total polygon length (m)	Total extent *	Mean*	Mode*	Median*	In CMA*	Coastal environment outside CMA*	Inland of CMA*	Inland of coastal environment	<100m from a river or lake*	Intersect with mapped wetland**		
												CMA	Inland CMA	Inland of Coastal Environment
<0.005	1154	27772	2.18	0.0019	0.0004	0.0015	0.0006	0.0050	2.18	2.17	0.0576	0.0071	0.0160	0.0168
<0.01	1535	51434	4.97	0.0032	0.0004	0.0023	0.0077	0.0104	4.97	4.96	0.1346	0.0071	0.0378	0.0386
<0.05	2450	165652	27.02	0.0110	0.0004	0.0058	0.0555	0.0104	26.97	26.87	0.7559	0.0175	0.1520	0.1482
<0.2	2888	305499	69.28	0.0240	0.0004	0.0087	0.0555	0.32	69.23	68.91	2.0816	0.0175	0.5313	0.0777
>0.2	182	277281	374.71	2.0589	0.4876	0.3656	28.4687	205.38	346.23	140.85	41.5	27.6	217.8	14.6

All	3070	582780	444.00	0.1446	0.0004	0.0100	28.5242	205.71	415.47	209.76	43.6	27.6	218.4	14.7
<p>*All areas measurements in hectares (ha) **Using only NRC 'known wetlands' and 'saltmarsh and mangrove' layers Wetland mapped inland of coastal environment: $DOC\ 209.76/27902.5 \times 100 = 0.75\%$; NRC (known&saltmarsh) $14.65/27902.50ha \times 100 = 0.05\%$</p>														

Total extent of Northland NRC 'known wetlands' In hectares (ha)	Area Inland of Coastal Environment Regionwide (ha)	Extent of NRC 'known wetlands' outside CMA (ha)	Extent of NRC 'known wetlands' landward of coastal environment (ha)	% area landward of coastal environment NRC have mapped as 'known wetlands'	Average % extra found in DOC mapping (combined from the two catchments)	Estimated total wetland area (excluding CMA and wet heathland)	Total land area of Northland Ha	% of Northland that is inland wetland (Excluding CMA and wet heathland)
32421	1124722	31693	24461	2.2%			1,328,576	

"C"



Figure 1. 2018 aerial photo of the Awapoko catchment in Doubtless Bay showing wetlands mapped in 2021 for the DOC Ngā Awa Project. Numbers next to wetlands are size of wetland in square metres. Note the many of the remaining small wetlands occur in heads of small stream valleys and are positioned to attenuate nutrient and sediment inputs to streams if fenced and protected.

“D”

C.8.1.3 Access of livestock to rivers, lakes and wetlands – discretionary activity

The access of livestock to a natural wetland that is larger than 2000 500m², the bed of a lake or a continually flowing river, or a continually flowing artificial watercourse that is not:

- 1) a permitted activity under Rule C.8.1.2 Access of livestock to the bed of a water body or continually flowing artificial watercourse – permitted activity, or
- 2) a permitted activity under Rule E.3.5.1 Access of livestock to the bed of a water body in the Whangārei Harbour catchment – permitted activity, or
- 3) a permitted activity under Rule E.3.4.1 Access of livestock to the bed of a water body or continually permanently flowing watercourse in the Mangere catchment – permitted activity, or
- 4) a non-complying activity under Rule C.8.1.4 Access of livestock to an outstanding freshwater body or the coastal marine area – non-complying activity,

is a discretionary activity.

For the avoidance of doubt this rule covers the following RMA activities:

- Allow livestock to enter or pass across an artificial watercourse or the bed of a natural wetland that is not part of the bed of a lake or river (s9(2)).
- Allow livestock to enter or pass across the bed of a lake or river (s13(2)).
- Discharge of a contaminant to water or onto or into land incidental to the activity (s15(1)).