IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2021-488-24
CIV 2021-488-26
[2021] NZHC 3113

UNDER	Section 299 of the Resource Management Act 1991
IN THE MATTER OF	An appeal against a declaration of the Environment Court pursuant to s 310 of the Resource Management Act 1991
BETWEEN	MINISTER OF CONSERVATION First Appellant
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORFORATED Second Appellant

Continued…

Hearing:	6 September 2021 (by VMR)
Appearances:	E Lay and M Downing for the first appellant S R Gepp and E H F Toleman for the second appellant K R M Littlejohn and G E Gamboni for the respondent M J Doesburg for the interested party
Judgment:	18 November 2021

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 18 November 2021 at 3:00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

AND	MANGAWHAI HARBOUR RESTORATION SOCIETY INCORPORATED Respondent
	NORTHLAND REGIONAL COUNCIL Interested Party

Introduction

[1] The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**the Freshwater Standards**) prescribe national environmental standards for freshwater. Among other things, the Freshwater Standards set out conditions under which activities can be undertaken within or near a "natural wetland".

[2] Under the Freshwater Standards, "natural wetland" has the meaning given by the National Policy Statement for Freshwater Management 2020 (**the Freshwater Policy Statement**). The Freshwater Policy Statement defines "natural wetland" by using the definition of "wetland" in the Resource Management Act 1991 (**the RMA**), subject to three exclusions. The RMA says a 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". This is a broad definition. It includes a wetland located in the coastal marine area (**the CMA**).

[3] The Freshwater Policy Statement also has a definition of "natural inland wetland". This means a natural wetland that is not in the CMA. The Freshwater Standards, when describing their scope of application, do not use this narrower definition.

[4] The Environment Court was hearing appeals from the Northland Regional Council's decision on a proposed regional plan. In the course of hearing those appeals, an issue arose as to whether the Freshwater Standards apply to wetlands in the CMA.

[5] The Court held that the Freshwater Standards apply to the CMA to only a limited extent – namely, to that part of the CMA upstream of any river mouth.[1]

[6] The Minister of Conservation and the Royal Forest and Bird Protection Society of New Zealand appeal against the Environment Court's decision. They say the Freshwater Standards apply to natural wetlands in the entirety of the CMA – not just in that part of the CMA upstream of any river mouth. The Mangawhai Harbour

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1 *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6.

Restoration Society and the Northland Regional Council largely support the Environment Court's decision.

The statutory framework: an overview of the RMA[2]

Resource consents

[7] The RMA creates six classes of activity. From least to most restricted they are permitted activities, controlled activities, restricted discretionary activities, discretionary activities, non-complying activities and prohibited activities.[3]

National, regional and district planning documents

[8] Under part 5 of the RMA, there is a three-tiered resource management system – national, regional and district – with an associated hierarchy of planning documents.

[9] Central government is responsible for national direction. This direction is made through national environmental standards,[4] national policy statements,[5] New Zealand coastal policy statements[6] and national planning standards.[7]

National environmental standards

[10] National environment standards are in the form of regulations made under s 43 of the RMA. National environmental standards prescribe technical standards, methods or requirements for land use and subdivision, use of the CMA and of the beds of lakes and rivers, water take and use, or discharges of contaminants.[8] Among other things, national environmental standards may prohibit activities or make them non-complying, discretionary, restricted discretionary, controlled or permitted. National environmental standards may also restrict the making of rules or the granting of consent for specified matters, or require a person to obtain a certificate stating that an

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2 This is adapted from the Supreme Court's overview in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [10]–[14].
3 RMA, s 87A.
4 RMA, ss 43–44A.
5 RMA, ss 45–55.
6 RMA, ss 56–58A.
7 RMA, ss 58B–58J.
8 RMA, s 43(1)(a), referencing ss 9 and 11–15.

activity complies with a term or condition imposed by national environmental standards.[9]

[11] National environmental standards are binding and prevail over rules in regional plans and district plans, unless the national environmental standards expressly say otherwise.[10] Where a local authority's plan or proposed plan duplicates or conflicts with a provision in a national environmental standard, the plan or proposed plan must be amended without using the standard process in sch 1 of the RMA for preparing plans.[11]

National policy statements

[12] The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purposes of the RMA.[12] The purpose of the New Zealand coastal policy statement (**the Coastal Policy Statement**) is to state objectives and policies in order to achieve the purpose of the RMA in relation to the coastal environment of New Zealand.[13] Lower order planning documents (regional policy statements, regional plans and district plans) are required to give effect to national policy statements and the Coastal Policy Statement.[14]

Regional and district planning documents

[13] Regional councils and unitary councils are responsible for regional policy statements and regional plans. There must be a regional policy statement and at least one regional coastal plan (approved by the Minister of Conservation) for each region.[15]

[14] Territorial authorities (district and city councils) are responsible for district plans. There must be one district plan for each district.[16]

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9 RMA, s 43A.
10 RMA, s 43B.
11 RMA, s 44A.
12 RMA, s 45.
13 RMA, s 56.
14 RMA, ss 55, 62(3), 67(3) and 75(3).
15 RMA, ss 60 and 64.
16 RMA, s 73.

The process for preparing regional and district planning documents

[15] Local authorities must prepare regional policy statements, regional plans and district plans in the manner set out in sch 1 of the RMA.[17] Schedule 1 requires consultation with tangata whenua and others, followed by public notice and a call for submissions.[18] The local authority then holds a hearing before notifying its decision and reasons.

[16] Submitters can appeal the local authority's decision to the Environment Court.[19] On any appeal the Environment Court has the same power, duty and discretion as the local authority whose decision is under appeal.[20] The Environment Court may confirm, amend or cancel the decision to which the appeal relates and may direct the local authority to prepare changes to the proposed policy statement or plan.[21] A party to the appeal may appeal on a question of law to this Court against any decision of the Environment Court.[22]

The freshwater planning process

[17] The Resource Management Amendment Act 2020 introduced, on 1 July 2020, a freshwater planning process (**the freshwater planning process**) for freshwater management by regional councils. The freshwater planning process streamlines decisions for freshwater plans by establishing independent freshwater hearing panels with enhanced powers and by limiting appeal rights to the Environment Court.[23]

[18] The effect of s 80A of the RMA is that where only part of a plan relates to freshwater, a regional council must use the freshwater planning process for those parts that relate to freshwater and the standard sch 1 process for the balance.

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17 RMA, ss 60, 64, 65 and 73.
18 RMA, sch 1, cls 3 and 5.
19 RMA, sch 1, cls 8B, 9, 10, 11 and 14.
20 RMA, s 290.
21 RMA, ss 290 and 293.
22 RMA, s 299.
23 RMA, sch 1, part 4.

The Freshwater Standards

[19] The Freshwater Standards came into force on 3 September 2020, at the same time as the new Freshwater Policy Statement and new Stock Exclusion Regulations.[24]

[20] The Freshwater Standards have four parts, of which parts 2 and 3 are substantive. Part 2 sets standards for farming activities. Part 3 sets standards for other activities that relate to freshwater, and is in three subparts:

(a) Subpart 1 sets out the conditions under which certain activities can be undertaken within or near natural wetlands. These activities include vegetation clearance, earthworks and the taking, use and discharge of water. It classifies these activities variously as permitted, restricted discretionary, discretionary, non-complying and prohibited.

(b) Subpart 2 contains one regulation, providing that reclamation of the bed of any river is a discretionary activity.

(c) Subpart 3 deals with the effects on the passage of fish of the placement, use, alteration, extension or reconstruction of certain structures in, on, over, or under the bed of any "river or connected area".[25]

The Proposed Regional Plan for Northland

[21] Northland Regional Council (**the Council**) notified the proposed regional plan for Northland (**the proposed Plan**) in September 2017. A hearing followed in 2018. The Council's decision was notified in May 2019. A total of 23 appeals were lodged in the Environment Court, including by the Minister of Conservation.

[22] During the hearing of the appeals before the Environment Court, the consequences of the Freshwater Standards on the proposed Plan's provisions relating to mangrove removal and set-backs from wetlands became apparent. The Environment Court explained:[26]

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24 Resource Management (Stock Exclusion) Regulations 2020.
25 Freshwater Standards, reg 58.
26 *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6 at [3].

> The issues arise because "natural wetlands" are defined in the National Policy Statement for Freshwater Management 2020 **(NPS-FM-2020)** with an accompanying definition for "natural inland wetlands". These definitions make it clear that the latter exclude areas within the CMA. The [Freshwater Standards] adopts the [Freshwater Policy Statement]'s definition of "natural wetlands" but makes no such excision of the CMA from its jurisdiction. It refers only to "natural wetlands", such that [the Freshwater Standards] arguably may apply to both freshwater wetlands and wetlands in the CMA.

[23] As this had not been considered by the Environment Court or the parties, the Court invited further submissions and held a hearing as to the scope of the Freshwater Standards.

The Environment Court decision

[24] An affidavit from an expert on wetlands, Dr Phillipe Gerbeaux, was filed for the hearing. No party disputed the contents of the affidavit. The Court said Dr Gerbeaux adopted a position, accepted by all parties, that "natural wetlands" include those in freshwater, those in freshwater areas subject to varying degrees of saline intrusion, and those within the CMA itself. Dr Gerbeaux said that essentially any area supporting vegetation that can be fully or partially covered by water is a wetland. Dr Gerbeaux left open the question whether areas in the CMA that are permanently or often under water, such as eel grass beds in most New Zealand harbours, also constitute wetlands.[27]

[25] The Court said the Freshwater Standards were, with the Freshwater Policy Statement, a package "described by some as a freshwater initiative".[28] The Freshwater Standards were made under s 43 of the RMA. There was no dispute that regulations under s 43 could cover water generally, both freshwater and saltwater.

[26] The Court referred to the process the Minister for the Environment had followed in making the Freshwater Standards. The Court said that while that was happening the RMA was amended to establish a specific process for freshwater planning in s 80A. The Court said it was important to note that under s 80A a proposed regional plan does not include a proposed regional coastal plan.[29]

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27 At [8]–[9].
28 At [11].
29 At [17]–[19]. See RMA, s 80A(8).

[27] The Court referred to the definitions of "freshwater" and "coastal water" in the RMA:

> **freshwater** or **fresh water** means all water except coastal water and geothermal water
>
> **coastal water** means seawater within the outer limits of the territorial sea and includes—
>
> (a) seawater with a substantial fresh water component; and
>
> (b) seawater in estuaries, fiords, inlets, harbours, or embayments

[28] The Court said it was in this context that the Freshwater Policy Statement and the Freshwater Standards were promulgated. The Court then referred to the definitions of "natural wetland" and "natural inland wetland" in the Freshwater Policy Statement.[30] As noted earlier, the latter means a natural wetland that is not in the CMA. The Court said that the provisions of the Freshwater Standards that deal with natural wetlands make no reference to "natural inland wetlands". The Court observed:[31]

> In relation to any change in intent between the [Freshwater Policy Statement] and the [Freshwater Standards], the only significant indicator immediately available is the reference solely to natural wetlands rather than to natural inland wetlands. It is this which is at the heart of the interpretive issue and the reason for this declaration.

[29] The Court then analysed the Freshwater Policy Statement. It concluded that it was the intent of the Freshwater Policy Statement to provide an integrated approach to freshwater management, but that:[32]

> The objective was not to subsume the entire environment including the CMA and land use within the purview of the freshwater regulations or freshwater regime set up under s 80A. To do so would be anathema given the requirement to develop the regional plans and regional coastal plans separately to those for freshwater.

[30] The Court turned next to the Freshwater Standards. The Court said the Freshwater Standards did not state any specific purpose but the title of the regulations "does specifically identify freshwater and this may be indicative of an intent to cover

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30 At [21].
31 At [24].
32 At [32].

only freshwater".[33] The Court said of particular importance to its consideration of the intent and effect of the Freshwater Standards was the definition of "river or connected area":[34]

> **river or connected area** means—
>
> (a) a river; or
>
> (b) any part of the coastal marine area that is upstream from the mouth of a river

[31] The Court said this clearly included within the purview of the Freshwater Standards any area of a river within the CMA upstream of the mouth of that river. The Court said there was "a distinction between this definition and that of coastal waters". The Court referred to the definitions of "coastal waters" and the CMA in the RMA. The Court said "coastal waters" includes "water within a river that has saline content, but which may or may not be within the CMA" and that the CMA includes not only the sea itself but that part of a river a distance either five times the width of the river mouth or one kilometre upstream of the river mouth, whichever is the lesser.[35]

[32] The Court's view was that the definition of "river and connected area" was "critical" to understanding the intent of the Freshwater Standards.[36] This was because it was not possible to give an exact position for the limits of salt in freshwater. This situation created practical difficulties in ascertaining whether an area contains coastal waters or is freshwater.[37] The Court concluded that in promulgating "the freshwater management provisions" the Ministry for the Environment "wanted to provide as much certainty as possible as to the areas that would be affected by the [Freshwater Standards]".[38]

[33] The mouth of the river, the Court said, was generally established by consultation between the relevant regional council and the Ministry of Conservation.[39]

33 At [33].
34 At [35].
35 At [37]–[38].
36 At [39].
37 At [40] and [41].
38 At [44].
39 This may have been intended to be a reference to the Ministry for the Environment.

The Court said that by using the river mouth the Freshwater Standards "become more certain as to their application". The Court explained:[40]

> The condition of the water above the river mouth, as defined, is not a matter that requires particular evidence but rather is controlled by requirements of the [Freshwater Standards] and Freshwater Plans, while water below that point forms part of the estuary, harbour or embayment and is therefore is controlled by other means, being the [Coastal Policy Statement] and regional coastal plan.

[34] The Court noted that "natural wetlands include those both above the coastal marine area ('natural inland wetlands' as defined in the [Freshwater Policy Statement]) and below it".[41] "Wetland" appeared to include areas of mangrove and seagrass and might extend to seaweeds. These may inhabit the intertidal zone. The Court thought that if such areas were to be regulated by the Freshwater Standards there would be the potential for conflict with coastal plans or fisheries regulations.[42]

[35] The Court then looked at the text of the Freshwater Standards. The Freshwater Standards did not discuss mangrove or saltmarsh areas or the CMA explicitly, except when defining "river or connected area" and in a few regulations in part 2 (which deals with standards for farming activities).[43] The regulations relating to wetlands in part 3 did not make reference to any particular characteristics of the CMA, such as tidal cycles or other issues that might affect activities within wetlands there.[44]

[36] The Court acknowledged it was not possible to say that the lack of any discussion of mangroves, saltmarsh or the CMA determined whether activities in wetlands in the "coastal marine environment" were regulated by the Freshwater Standards. But the Court felt able to say that "the [Freshwater Standards] follows the [Freshwater Policy Statement] and is concerned about freshwater impacts on receiving environments". While such receiving environments clearly included the CMA and the coastal environment generally, the Court was not able to take from this that "activities in all natural wetlands are intended to be controlled by the [Freshwater Standards]".[45]

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40 At [45].
41 At [46].
42 At [48].
43 At [50].
44 At [53].
45 At [55].

[37] Although the titles to headings and paragraphs were not determinative, they led the Court to the view that the concern of the Freshwater Standards was activity that might occur on land rather than within the CMA. That is, the Freshwater Standards sought to ensure that coastal waters were not inappropriately affected or contaminated, but did not control activities within the CMA itself.[46]

[38] The Court thought the drafting was not clear as to "the area of application" of the Freshwater Standards. The drafters may have intended to include at least some areas of the CMA within the Freshwater Standards. One clear example was the definition of "river or connected area", which includes any part of the CMA upstream of a river mouth. No other clear examples could be determined from the Freshwater Standards or the Freshwater Policy Statement "except the use of the term 'natural wetlands'". If it had been intended that regulations generated for freshwater were to apply to all areas, including the CMA, "then this should have been made explicit".[47]

The Environment Court's conclusion

[39] The Court concluded the Freshwater Standards were not directed at the CMA. The Freshwater Standards only had regulatory effect upstream of the river mouth. Below that point, natural wetlands were included as part of the CMA and/or coastal waters "and are controlled by regional coastal plans and the [Coastal Policy Statement] as appropriate".[48] The Freshwater Standards were intended to apply to "all areas of freshwater and to rivers or connected areas".[49]

[40] The Court's reasons for this conclusion were:[50]

(a) If the Freshwater Standards had effect within the CMA, the Freshwater Standards would be mandatory and would have significant consequences on issues relating to marine areas and potentially under the Fisheries Act 1996.

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46 At [56]–[57].
47 At [58]–[59].
48 At [60].
49 At [62].
50 At [61].

(b) Freshwater planning instruments prepared under s 80A of the RMA would not integrate directly with the area covered by regional plans. This would lead to issues as to how these would be implemented and enforced. Given the mandatory nature of the Freshwater Standards, the Court "must construct them against the party which seeks to implement them". The Government had to be clear that it wished to constrain activities within all coastal waters as they relate to natural wetlands.

(c) Given the number of wetlands in the CMA, this would be a significant imposition for management of much of the coastline.

(d) The Freshwater Standards did not clearly indicate any intention to control areas in the CMA. There was an "extension" in respect of "rivers or connected areas". The Court considered that for clarity that had been utilised as a convenient and clear demarcation point.

[41] The Court made three declarations:

> A: The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F/Regulations) apply 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. In particular, they do not apply to the general CMA, open oceans, estuaries, bays and other areas not falling within the definition of "river or connected area".
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> B: The Court is empowered to consider the Regional Plan provisions affecting those parts of the CMA not encompassed within that definition in terms of the New Zealand Coastal Policy Statement (NZCPS) and other documents, without considering any constraints imposed by virtue of the said NES-F.
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> C: For those areas of the CMA that are covered within the definition of "rivers or connected areas" where the Regulations do apply, the NES-F will need to be considered in forming a view as to the most appropriate provisions for those areas.

Summary

[42] In summary, the Court found that the Freshwater Standards apply to the CMA only upstream of any river mouth. Although the focus of the decision was on the part of the Freshwater Standards dealing with natural wetlands (subpart 1 of part 3), the

Court's declarations were wider in scope, dealing with the application of the entirety of the Freshwater Standards.

Appeals

[43] The Minister of Conservation (**the Minister**) and the Royal Forest and Bird Protection Society of New Zealand Inc (**Forest and Bird**) filed separate appeals against the Environment Court's decision. The Northland Regional Council (**the Council**) and the Mangawhai Harbour Restoration Society Inc (**the Society**) filed notices of intention to appear on each appeal. By consent, the two appeals were consolidated, the Society was substituted as the respondent and the Council was named as an interested party under s 301 of the RMA.[51]

[44] The Minister says the Environment Court was wrong to find that the Freshwater Standards apply to the CMA only upstream of any river mouth. The Minister submits this Court should set aside all three declarations made by the Environment Court, and in substitution make two declarations:

(a) The Freshwater Standards apply to the CMA to the extent that the Freshwater Standards cover activities affecting areas falling within the relevant definitions ("natural wetlands", "river or connected area" or "receiving environment"); and

(b) The Environment Court is required to consider the proposed Plan in light of the constraints imposed by virtue of the Freshwater Standards.

[45] The declarations proposed by the Minister, like those made by the Environment Court, are declarations as to the application of the entirety of the Freshwater Standards.

[46] Forest and Bird agrees with the Minister that the Environment Court erred in finding that the Freshwater Standards apply to the CMA only upstream of any river mouth, and agrees that all three declarations made by the Court should be set aside.

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[51] It is not clear to me why (given s 302 of the RMA) the Council was named merely as an interested party.

Forest and Bird proposes that only one substitute declaration should be made, confined to the part of the Freshwater Standards that deals with natural wetlands:

(a) The Freshwater Standards apply to natural wetlands in the CMA.

[47] The Society supports the Environment Court's decision, except in two respects. First, the Society says that the Freshwater Standards do not apply to any natural wetlands in the CMA – not even to those in the CMA upstream of any river mouth. Secondly, the Society proposes that any declarations should only be in respect of the application of the part of the Freshwater Standards dealing with natural wetlands.

[48] The Council says that if the Freshwater Standards apply to natural wetlands in the CMA there will be implications for its proposed Plan for Northland. The Council has therefore maintained an interest in the appeal and has sought to be heard. The Council says it supported the appellants in the Environment Court, but that it adopts a "more neutral" position on the appeal and presents submissions to assist the Court. Nonetheless, the Council's written and oral submissions supported the Environment Court's decision (subject to the same two exceptions raised by the Society).

Issues on appeals

[49] The key issue on the appeals is whether the Freshwater Standards apply to "natural wetlands" in the CMA. A subsidiary issue is what declarations should be made.

[50] Both issues are questions of law and are therefore within the scope of an appeal to this Court under the RMA.[52]

Do the Freshwater Standards apply to "natural wetlands" in the CMA?

The issue: the scope of application of the Freshwater Standards

[51] Regulations and other enactments have a particular scope of application. Their scope may be determined temporally, spatially, by reference to activities or in some

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[52] RMA, s 299.

other way. The issue here is about the spatial scope of application of the Freshwater Standards: do they apply to natural wetlands in the CMA?

[52] National environmental standards are made under s 43 of the RMA. Section 43(4) provides for their spatial application:

> **43 Regulations prescribing national environmental standards**
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> …
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> (4) Regulations made under this section may apply—
>
> (a) generally; or
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> (b) to any specified district or region of any local authority; or
>
> (c) to any specified part of New Zealand.

[53] The "may" in s 43(4) is not permissive – national environmental standards must have *some* spatial application. The "may" merely indicates the available options as to spatial application. The default option is general application. The alternative is application to "specified" districts, regions or parts of New Zealand. "Part" is a broad term. The CMA is a "part" of New Zealand. The area outside the CMA is also a "part".

[54] Some enactments contain a provision that is explicit as to the spatial application of the enactment. The Freshwater Standards do not contain a regulation specifically addressing this. The spatial application of the Freshwater Standards can be determined only from the terms of the operative regulations in parts 2 and 3:

(a) Regulation 8 provides that part 2 (standards for farming activities) applies only to farms of a certain size.

(b) The regulations in subpart 1 of part 3 (natural wetlands) regulate activities within, or within a certain setback from, a "natural wetland".

(c) Subpart 2 of part 3 applies to the reclamation of "any river".

(d) Subpart 3 of part 3 (fish passage) regulates the placement and use of certain structures in, on, over or under the bed of "any river or connected area".

[55] The spatial application of subpart 1 of part 3 is therefore determined by the meaning of "natural wetland".

[56] This is not to say there must be a narrow focus on that term or its definition. The meaning of an enactment (including any part of an enactment) must be ascertained from its text and in the light of its purpose.[53] It is merely to say that it is this term, the meaning of which must be ascertained in the manner just described, that subpart 1 of part 3 of the Freshwater Standards uses to determine its spatial application.

[57] Mr Littlejohn, counsel for the Society, submitted that the issue before this Court was the meaning of the Freshwater Standards "as a whole", rather than the meaning of "natural wetland". For the reasons set out above, I do not accept that submission, though I accept that the meaning of "natural wetland" must be ascertained in *the context of* the Freshwater Standards as a whole.

Text: "natural wetland"; "wetland"; non-adoption of "natural inland wetland"

[58] In the Freshwater Standards, unless the context otherwise requires, "natural wetland has the meaning given by the [Freshwater Policy Statement]".[54] Clause 3.21 of the Freshwater Policy Statement gives this meaning:

> **natural wetland** means a wetland (as defined in the Act[55]) that is not:

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53 Interpretation Act 1999, ss 5(1) and 29. The Interpretation Act 1999 was repealed on 28 October 2021 (after the hearing of these appeals) by s 6 of the Legislation (Repeals and Amendments) Act 2019 (see cl 2 of the Legislation (Repeals and Amendments) Act Commencement Order 2021). Interpretation of legislation is now governed by part 2 of the Legislation Act 2019 (which came into force the same day: Legislation Act 2019 Commencement Order 2021). However, these appeals are to be determined as if the Interpretation Act 1999 had not been repealed: Legislation Act 2019, s 33. In any event, the result would be the same even if the Legislation Act 2019 applied. Section 10(1) of that Act is in the same terms as s 5(1) as the Interpretation Act 1999, except for the addition of the reference to the legislation's "context". Context was considered even under the Interpretation Act 1999: R I Carter, *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 325–327.

54 Freshwater Standards, reg 3.

55 That is, the RMA.

> (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% of) exotic pasture species and is subject to temporary rain-derived water pooling

[59] This definition refers to the RMA definition of "wetland", which is:[56]

> **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

[60] The RMA defines other terms relevant to this definition.[57] "Water" means water in all its physical forms whether flowing or not. It includes fresh water, coastal water and geothermal water. "Coastal water" means seawater, including seawater with a substantial freshwater component, and including seawater in "estuaries, fiords, inlets, harbours, or embayments". The CMA means "the foreshore, seabed, and coastal water, and the air space above the water" of which the landward boundary is the "line of mean high water springs" (except where that line crosses a river).[58]

[61] It follows from these definitions that, under the RMA, a wetland includes areas that are wet (permanently or intermittently) from seawater, shallow seawater, and land seawater margins (if they support a natural ecosystem of plants and animals that are adapted to wet conditions). Any such wetland on the seaward side of the line of mean high water springs (or the alternative line in a river) is within the CMA.

[62] It is therefore clear that, under the RMA, a wetland includes a wetland in the CMA. The Environment Court was of that view.[59] The only party to the appeals who suggested that view might be wrong was the Society. Mr Littlejohn said in his oral submissions that there was a compartmentalisation or differentiation in the RMA

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56 RMA, s 2.

57 RMA, s 2.

58 If the line crosses a river, the landward boundary of the CMA is the lesser of one kilometre or five times the width of the river mouth upstream from the river mouth.

59 *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6 at [3], [9], [22], [46], [55] and [56]. Had the Court thought a wetland could not be in the CMA, it would not even have had to enquire whether the Freshwater Standards apply "to both freshwater wetlands and wetlands in the CMA": at [3].

between the CMA on the one hand and wetlands on the other.[60] He relied on s 6(a), which provides:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> …

[63] If that was intended as a submission that, under the RMA, a wetland cannot be in the CMA,[61] I reject the submission. Section 6 identifies matters of national importance. It is not intended to, and does not, compartmentalise or differentiate between different concepts used within the RMA. There is plainly overlap between the concepts to which s 6(a) refers. Wetlands, lakes and rivers may be within the coastal environment. Wetlands may be within the margins of lake and rivers. And, as I have explained, wetlands may be in the CMA.

[64] Returning to the definition of "natural wetland" in the Freshwater Standards, this definition adopts (through the Freshwater Policy Statement) the definition of "wetland" in the RMA, which includes wetlands in the CMA. The definition excludes three types of wetland, leaving "natural" wetlands. The definition does not exclude a wetland that is in the CMA.

[65] So, having taken the trouble to exclude some types of wetlands, the drafters of the Freshwater Standards did not exclude wetlands in the CMA. This strongly supports a meaning of "natural wetland" in the Freshwater Standards as any wetland (other than one of the three excluded types), whether in or outside the CMA.[62]

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60 The Council accepted that the RMA contemplates a wetland can occur in any environment, including the CMA.

61 The submission may merely have been a broader one as to the purpose of the RMA and therefore of the Freshwater Standards. I deal with this below.

62 I therefore reject Mr Littlejohn's submission that the interpretation of the Freshwater Standards put forward by the appellants is based "solely on what is not said" (namely, not adopting the

[66] If the drafters of the Freshwater Standards had wished to exclude from "natural wetland" any wetland located in the CMA, the Freshwater Policy Statement had just the term for the job:

> **natural inland wetland** means a natural wetland that is not in the coastal marine area

[67] The Freshwater Standards do not adopt this narrower term. Instead, the Freshwater Standards adopt a term that includes a wetland in the CMA. This reinforces the interpretation of "natural wetland" in the Freshwater Standards as a natural wetland inside or outside the CMA. On the contrary interpretation put forward by the Society, "natural wetland" in the Freshwater Standards means the same as "natural inland wetland" in the Freshwater Policy Statement – the very term the Freshwater Standards do not use.[63]

"Unless the context otherwise requires"

[68] Mr Doesburg acknowledged that the broad and inclusive definitions of "natural wetland" and "wetland" in the Freshwater Policy Statement and RMA supported the interpretation of "natural wetland" in the Freshwater Standards advanced by the appellants. But he noted that the definition of "natural wetland" in the Freshwater Standards was preceded by the common qualifier "unless the context otherwise requires". He submitted the broader context of subpart 1 of part 3 "may require a constrained approach" to the broad definition of "natural wetland".[64] By "constrained approach" Mr Doesburg meant an interpretation that the Freshwater Standards do not apply to natural wetlands in the CMA – an interpretation for which Mr Littlejohn also advocated.[65]

Freshwater Policy Statement's definition of "natural inland wetland"). The interpretation is based on what is said in the Freshwater Standards. It is merely reinforced by what is not said.

63 To be clear, the Environment Court did not go that far: it held that the Freshwater Standards apply to some natural wetlands in the CMA – but only those within a "river or connected area".

64 Mr Doesburg's restrained submissions reflected, I assume, the "more neutral" position the Council said it was taking. The Society was not so restrained.

65 I observe that Mr Doesburg's submission was that the wider text required a constrained meaning of "natural wetland" *throughout* the Freshwater Standards. That would be an unusual use of the qualifier and would mean no effect was given to the adoption by the Freshwater Standards of the Freshwater Policy Statement's definition of "natural wetland".

[69] The correct approach to a qualifier such as "unless the context otherwise requires" was summarised by Arnold J, writing for the Supreme Court, in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*:[66]

> [W]here there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute's purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. While we accept [counsel's] point that the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

[70] I now turn to consider the context relied on by the Council and the Society, keeping in mind that strong contextual reasons are required to justify departure from the defined meaning of "natural wetland".

Other text in subpart 1 of part 3 of the Freshwater Standards

[71] The Society and the Council say other text in subpart 1 of part 3 of the Freshwater Standards points to "natural wetland" meaning a natural wetland outside the CMA.

[72] Regulations 38 to 54 regulate activities within, or within a certain setback from, a "natural wetland". The main activities regulated are vegetation clearance, earthworks, land disturbance, and the taking, use, damming, diversion or discharge of water. The regulations classify these activities variously as permitted, restricted discretionary, discretionary, non-complying and prohibited. The classification depends on matters such as the purpose for which the activity is undertaken and whether the activity complies with particular conditions.

[73] Mr Doesburg (whose submissions on the broader text of subpart 1 the Society adopted and agreed with) drew my attention to regs 38 and 39, which address vegetation clearance or other activities that are undertaken "for the purpose of natural

66 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [65].

wetland restoration". Mr Doesburg noted that "restoration" is defined by adopting the definition of that term in the Freshwater Policy Statement, and that the Freshwater Policy Statement definition refers to natural *inland* wetlands (that is, natural wetlands outside the CMA):

> **restoration**, in relation to a natural inland wetland, means active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its ecosystem health, indigenous biodiversity, or hydrological functioning.

[74] Mr Doesburg submitted this was an indication that regs 38 and 39 were intended to be confined to natural wetlands outside the CMA. I do not agree. Regulations 38 and 39 use the term "natural wetland restoration". In that term, the words "in relation to a natural inland wetland" (from the definition of "restoration") are otiose, since the restoration is not carried out in relation to such a wetland. The term "natural wetland restoration" plainly requires adoption of the remaining functional parts of the definition, so that the term means:

> … active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its [that is, the natural wetland's] ecosystem health, indigenous biodiversity, or hydrological functioning.

[75] Mr Doesburg made a more general submission as to the focus of the regulations in subpart 1 of part 3. He said that, as the Environment Court had noted,[67] the regulations make no reference to the CMA or to coastal concepts. Rather, he submitted, the focus of the subpart is on activities "that would typically occur on land". He made several points in this regard.

[76] First, reg 39 requires that an application for a resource consent for natural wetland restoration must include a restoration plan that includes the information set out in sch 2 of the Freshwater Standards. Mr Doesburg said that the information in sch 2 is associated with "land-based wetlands" – by which he meant wetlands outside the CMA – and this suggested reg 39 was not intended to apply to natural wetlands in the CMA:

[67] *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6 at [50]–[54].

(a) Clause 1(b) of sch 2 requires identification of the owners of the site of the activity. Mr Doesburg said the CMA is incapable of ownership.[68]

(a) Clause 2 requires a description of the features and values of the natural wetland. Mr Doesburg said these features and values have a land-based focus, including identification of the wetland's water source (cl 2 says "for example, streams, rivers, seeps, or solely rain"), any modification ("for example, drains, weirs, culverts, canals, or stop banks"), or artificial features ("for example, roads, electricity lines, buildings, and access points").

[77] I do not accept this submission. As to cl 1(b), reg 39 controls activities both within a natural wetland and within a setback (of up to 100 metres) of a natural wetland. The site of the activity will, therefore, not necessarily be within the natural wetland itself. It may be on land that is ordinarily capable of ownership. Even if the site of the activity is within the natural wetland, and the natural wetland is within the CMA, it is not the case that the entirety of the CMA is incapable of ownership.[69] I do accept there will be many instances in which a natural wetland within the CMA is incapable of ownership. But even in those instances, the information required by cl 1(b) of sch 2 can be provided by saying "the site has no owners".

[78] As to cl 2, the features and values to which it refers are as applicable to a natural wetland in the CMA as to one outside the CMA. A wetland in the CMA will have a water source – it need not be of a type specified in cl 2, which are mere examples. A wetland in the CMA may have been modified or have artificial features – the modification or artificial feature need not be one of the examples given by cl 2 either.

[79] Secondly, Mr Doesburg said regs 48 and 49 regulate sphagnum moss harvesting, an activity that he said occurs only in inland wetlands. Mr Doesburg did not refer me to any evidence to support that proposition, and there was no finding to that effect in the Environment Court. Even if there was some basis for his proposition,

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68 Mr Doesburg relied on s 11 of the Marine and Coastal Area (Takutai Moana) Act 2011.

69 See the definition of "common marine and coastal area" in s 9 of the Marine and Coastal Area (Takutai Moana) Act 2011.

that would merely mean that two particular regulations had no application to natural wetlands in the CMA. That would not say anything about the balance of subpart 1.

[80] Thirdly, Mr Doesburg submitted reg 50 relates to arable and horticultural land use, an activity that occurs on land. It is correct that those activities occur on land, but that does not indicate that reg 50 (or subpart 1) is confined to natural wetlands outside the CMA. Regulation 50 applies to vegetation clearance, earthworks and land disturbance *outside* (but within a ten-metre setback from) a natural wetland if the activity is for arable or horticultural land use. So of course the relevant activity will be occurring on land. But that does not indicate anything about the intended scope of reg 50. The regulation is just as applicable to an activity occurring on land within a ten-metre setback from a natural wetland in the CMA as it is to an activity occurring on land within a ten-metre setback from a natural wetland outside the CMA.

[81] Fourthly, reg 55 specifies general conditions that apply to most of the activities regulated by subpart 1. Mr Doesburg said the general conditions do not mention the CMA or effects that might arise from activities in the CMA (such as effects on coastal processes, risk of coastal hazards, hazards to navigation or disturbance of the seabed). I do not accept that characterisation of reg 55. The conditions in reg 55 are generic, and many are as applicable to the effects of activities in natural wetlands in the CMA (or within a setback from a natural wetland in the CMA) as to the effects of activities in natural wetlands outside the CMA. For example:

(a) The activity must not result in the discharge of a contaminant if the receiving environment includes any natural wetland and the contaminant may cause adverse effects on aquatic life.[70] Aquatic life may be in or outside the CMA.[71]

(b) The activity must not alter the natural movement of water into, within, or from any natural wetland.[72] This is applicable to a wetland in the CMA.

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70 Freshwater Standards, reg 55(3)(a)(v).
71 See the definition of aquatic life in s 2(1) of the Fisheries Act 1996, adopted by s 2(1) of the RMA.
72 Freshwater Standards, reg 55(3)(c).

(c) The activity must not contribute to the erosion of the bed or bank of any natural wetland.[73] This is applicable to a wetland in the CMA.

(d) Erosion and sediment control measures must be used to minimise adverse effects of sediment on natural wetlands. These measures must include stabilising or containing soil exposed or disturbed by the activity. The measures must remain in place until vegetation covers more than 80 per cent of the site of the activity.[74] This condition is just as applicable and relevant to an activity taking place within (or within a setback from) a wetland in the CMA as it is to one outside the CMA.

[82] Finally, Mr Doesburg said that one of the activities regulated by subpart 1 of part 3 was "earthworks". This means the "alteration or disturbance of land" by various means.[75] While acknowledging this definition is broad, Mr Doesburg submitted it was an unusual term to use in the context of the CMA. This was because s 12(1) of the RMA restricts certain activities in the CMA and uses specific terms to do so. Under s 12(1) no person may, in the CMA, "disturb" any foreshore or seabed, "deposit" substances in, on or under any foreshore or seabed, or "destroy" or "damage" any foreshore or seabed. Mr Doesburg submitted that if the activities restricted by s 12(1) were intended to be controlled by the Freshwater Standards, the Freshwater Standards would have used the terms in s 12(1), rather than use a term ("earthworks") that Mr Doesburg said was "widely understood as a land-based activity".

[83] I do not accept that submission. First, as noted, "earthworks" means the "alteration or disturbance of land". In that definition, "land" has the same meaning as in s 2 of the RMA.[76] In s 2 of the RMA, "land" includes "land covered by water" and "water" includes "coastal water". The term "earthworks" therefore includes the alteration or disturbance of land under coastal water in the CMA. Secondly, the restrictions in s 12(1) apply unless the activity is expressly allowed by, among other things, national environmental standards. For a national environmental standard to expressly allow an activity, s 12(1) does not require the national environmental

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73 Freshwater Standards, reg 55(7)(b).
74 Freshwater Standards, reg 55(8).
75 Freshwater Standards, reg 3, adopting the definition in the National Planning Standards 2019.
76 National Planning Standards 2019, definitions standard.

standard to use the same terms as used in s 12(1). Thirdly, in any event the Freshwater Standards do use one term found in s 12(1): "earthworks" includes "disturbance", and s 12(1)(c) uses the term "disturb".

[84] In summary, I do not accept that the wider text of subpart 1 of part 3 indicates that the subpart is intended to apply only to natural wetlands outside the CMA.

Title and heading – "freshwater"

[85] Mr Doesburg and Mr Littlejohn both relied on the term "freshwater" that appears in the title of the Freshwater Standards ("Standards for Freshwater") and in the heading to part 3 ("Standards for other activities that relate to freshwater"). They said this indicated that the purpose of the Freshwater Standards is to manage freshwater resources and not resources in the CMA. Mr Littlejohn submitted that if the appellants' interpretation were correct, the Freshwater Standards would have been entitled the "Standards for Water".

[86] I accept that titles and headings can be considered when ascertaining the meaning of the Freshwater Standards.[77] However, by their nature titles and headings cannot be comprehensive as to the scope of the provisions that they entitle or head. For that reason, they are usually weak indicators of meaning.

[87] In this case it is clear, even leaving subpart 1 of part 3 to one side for the moment, that the title "Standards for Freshwater" is not intended to confine the Freshwater Standards to freshwater resources. Part 2 regulates farming activities largely by reference to whether contaminants will enter "water". As noted earlier, in the RMA "water" includes both freshwater and coastal water. That meaning applies to the Freshwater Standards, unless the context requires a different interpretation.[78] The context of the Freshwater Standards does not require a different interpretation. Part 2 refers to "freshwater" on some occasions, so it is clear the use of the broader term "water" is deliberate.

[77] Interpretation Act 1999, s 5(2).
[78] Interpretation Act 1999, ss 4(1)(b) and 34.

[88] Further, part 2 provides that the conditions for some regulated activities include that the activities take place a certain distance from both freshwater bodies and the CMA.[79] This makes it clear that, notwithstanding the title, the Freshwater Standards regulate the management of both freshwater and CMA resources.

[89] A similar point can be made about the heading to part 3, "Standards for other activities that relate to freshwater". Subpart 3 of part 3 regulates structures affecting the passage of fish where those structures are in, on, over or under the bed of "any river or connected area". That term is defined to include any part of the CMA upstream from the mouth of a river. Notwithstanding its heading, part 3 therefore regulates management of resources in the CMA. It does not merely manage freshwater resources.

[90] In these circumstances, I do not accept that the title and the heading were intended to constrain the scope of application of subpart 1 of part 3 to natural wetlands outside the CMA.

Purposive interpretation

[91] The Freshwater Standards must be interpreted in light of their purpose. The Freshwater Standards do not state any specific purpose, other than for subpart 3 of part 3 (fish passage).

[92] Mr Littlejohn and Mr Doesburg submitted that the purpose of the Freshwater Standards was to regulate natural wetlands outside the CMA. There were several strands to their submissions.

Purpose: distinction in RMA between management of freshwater and coastal water/CMA

[93] Mr Doesburg submitted that the RMA drew a distinction between the management of freshwater and the management of the CMA. Mr Littlejohn made a similar submission. He said the RMA clearly distinguishes between areas where freshwater is the principal influence and areas where coastal water is the dominating

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79 For example, regs 10 and 13.

type of water present. As noted earlier, he also submitted there was a compartmentalisation or differentiation in the RMA between the CMA on the one hand and wetlands on the other.

[94] I accept the RMA draws some distinctions between the management of freshwater and the management of coastal water and the CMA. For example:

(a) The definition of "freshwater" in the RMA expressly excludes coastal water.

(b) Section 12 places restrictions on the use of the CMA. Section 14 imposes restrictions relating to the use of water, drawing distinctions between coastal water and freshwater.

(c) Section 80A, which was introduced at the same time as the Freshwater Policy Statement and the Freshwater Standards, requires regional councils to prepare freshwater planning instruments under the freshwater planning process.

[95] But the RMA does not mandate that such distinctions must be reflected in national environmental standards. Sections 43 and 43A determine the permissible scope of a national environmental standard. Both sections are in wide terms. For example, under s 43 national environmental standards may prescribe standards for (among other things) the matters referred to in ss 9 (land), 11 (subdivision of land), 12 (CMA), 13 (beds of lakes or rivers), 14 (water) or 15 (discharge of contaminants).

Purpose: common intent between Freshwater Policy Statement and Freshwater Standards as a freshwater "package"

[96] The Freshwater Policy Statement applies to freshwater and to receiving environments to the extent they are affected by freshwater.[80] It applies to natural wetlands only if they are outside the CMA. The Freshwater Policy Statement and the Freshwater Standards were introduced as part of a freshwater package.

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[80] Freshwater Policy Statement, cl 1.5.

[97] The Environment Court saw these matters as important in interpreting the Freshwater Standards. The Court said the only indication of a "change of intent" between the Freshwater Policy Statement and the Freshwater Standards was the reference in the latter solely to natural wetlands rather than to natural inland wetlands.[81] That was not sufficiently explicit to conclude that the Freshwater Standards were intended to apply to all areas including the CMA.[82] The Court also said that the Freshwater Standards "follows" the Freshwater Policy Statement "and is concerned with freshwater impacts on receiving environments".[83]

[98] Mr Doesburg said there was force to the Court's views. The Freshwater Policy Statement and the Freshwater Standards were both promulgated together as part of a package of *freshwater* reforms. Together with regulations excluding stock from waterways, the Freshwater Policy Statement and Freshwater Standards were held out as a key mechanism for protecting and restoring freshwater.

[99] Mr Littlejohn also supported the Court's approach. He submitted the Freshwater Policy Statement and the Freshwater Standards were part of a package "unambiguously designed to improve freshwater outcomes". He said this was supported by the introduction, at the same time, of the freshwater planning process in s 80A of the RMA.

[100] Mr Doesburg and Mr Littlejohn therefore submitted that the purpose of the Freshwater Standards was, like the Freshwater Policy Statement, to regulate only freshwater resources – not natural wetlands in the CMA.

[101] I accept that the context for interpreting the Freshwater Standards includes that it was introduced as part of a package with the Freshwater Policy Statement and other measures. But, with respect, I do not accept that this context supports the view that the purpose of the Freshwater Standards was limited to regulating freshwater resources.

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81 At [24].
82 At [59].
83 At [55].

[102] The Freshwater Standards do not provide that they "follow" or give effect to the Freshwater Policy Statement. National environmental standards sit alongside national policy statements as part of the national direction for resource management. Regional and district planning documents have to give effect to national policy statements and are subject to national environmental standards.[84] National environmental standards may implement policies and objectives in a national policy statement, but there is nothing in the Freshwater Standards to indicate that they were implementing *only* the Freshwater Policy Statement. The Freshwater Standards could also be implementing policies and objectives from the Coastal Policy Statement.[85]

[103] There are of course linkages between the Freshwater Standards and the Freshwater Policy Statement: the Freshwater Standards adopt definitions from the Freshwater Policy Statement. This does not mean that the Freshwater Standards share a common intent or scope with the Freshwater Policy Statement. The Freshwater Standards also adopt definitions from the National Environment Standards for Plantation Forestry, from the National Planning Standards 2019, and from the Biosecurity Act 1993. The linkage between the Freshwater Standards and the Freshwater Policy Statement that is most relevant for this appeal – the adoption of the definition of "natural wetland" rather than "natural inland wetland" – strongly indicates the two documents have (in part) a *different* scope.

[104] It is also true that the Freshwater Standards were introduced at the same time as the Freshwater Policy Statement and that they were repeatedly described as a "freshwater" package. For example:

(a) In September 2019 the Ministry for the Environment issued consultation drafts of the proposed Freshwater Policy Statement and Freshwater Standards. They were accompanied by a document from the Ministry entitled *Actions for healthy waterways – A discussion document on national direction for our essential freshwater*.

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84 See the earlier summary of the different functions of planning documents at [10]–[12].

85 The Coastal Policy Statement has policies protecting wetlands, including coastal wetlands: policies 11 and 13.

(b) As part of that consultation the Ministry issued an interim Regulatory Impact Analysis for consultation, entitled *Essential Freshwater*.

(c) After consultation, Cabinet agreed to the introduction of the Freshwater Policy Statement, the Freshwater Standards and new Stock Exclusion Regulations under the RMA. The Cabinet paper was entitled *Action for Healthy Waterways – Decisions on National Direction and Regulations for Freshwater Management*.

(d) When the Freshwater Policy Statement, Freshwater Standards and Stock Exclusion Regulations came into force, the Ministry for the Environment published factsheets referring to them as an "Essential Freshwater package".

[105] All the parties to the appeal referred to these (and other) background materials in support of their competing interpretations of the Freshwater Standards. There is doubt over the extent to which Cabinet papers can be used in the interpretation of Acts of Parliament.[86] I respectfully agree with the view of Collins J in *B v Chief Executive of the Ministry of Social Development* that the position is different in relation to regulations, given they are the prerogative of the Executive.[87] However, I very much doubt "factsheets" published by a Ministry to describe regulations could ever be a useful aid to interpretation. It is unnecessary for me to decide that point, since the factsheets do not, as I explain below, support the Council and Society's submissions as to the purpose of the Freshwater Standards.

[106] The use of the word "freshwater" in the titles to these background materials does indicate that the purpose of the Freshwater Standards is to regulate freshwater. But, as I explained earlier, a title can be only a weak indication of meaning (or in this case purpose). If the background materials are to be used as an aid to determining the purpose of the Freshwater Standards, it is necessary look beyond their titles. On doing

86 *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182.

87 *B v Chief Executive of the Ministry of Social Development* [2012] NZHC 3165 at [21]–[24]. The Court of Appeal dismissed an appeal against this decision, but expressed no firm view on whether Cabinet material could be used as an aid to interpreting regulations: *B v Chief Executive of the Ministry of Social Development* [2013] NZCA 410, [2013] NZAR 1309 at [33].

so, it is clear the purpose of the Freshwater Standards was to regulate more than freshwater. In particular, the purpose was for the Freshwater Standards to apply to natural wetlands both in and out of the CMA:[88]

(a) The September 2019 discussion document, when addressing wetlands, drew a distinction between the Freshwater Policy Statement (which would apply to "natural inland wetlands") and the Freshwater Standards (which would restrict activities considered the most destructive to "inland and coastal wetlands").[89] It said one of the key interactions between the freshwater package and the Coastal Policy Statement was that "protections for wetlands under the Freshwater [Standards] will include coastal wetlands".[90]

(b) The interim Regulatory Impact Analysis proposed, among other things, to "develop [national environmental standards] rules to apply to inland and coastal wetlands".[91] The same proposal was made in the final Regulatory Impact Analysis.[92] These papers explained that, by contrast, the scope of the Freshwater Policy Statement was limited to natural inland wetlands "given coastal wetlands are the domain of the [Coastal Policy Statement]".[93]

(c) The Cabinet paper recorded that the Freshwater Standards would impose requirements and conditions on activities that "lead to the loss of wetlands, including coastal wetlands". Policies in the Freshwater Policy Statement would also address wetlands, except coastal wetlands,

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88 Counsel told me that submissions were made on these background materials in the Environment Court. The Court's decision does not refer to them.

89 Ministry for the Environment *Actions for healthy waterways – A discussion document on national direction for our essential freshwater* (Ministry for the Environment, Wellington, 2019) at 44.

90 At 101.

91 Interim Regulatory Impact Analysis for Consultation: *Essential Freshwater Part II: Detailed Analysis* (Ministry for the Environment, Wellington, August 2019) at 254 and 259.

92 Regulatory Impact Analysis: *Action for healthy waterways Part II: Detailed Analysis* (Ministry for the Environment, Wellington, May 2020) at 207.

93 At 253 and 205 respectively.

for which policy direction was provided by the Coastal Policy Statement.[94]

(d) The Ministry published an "Overview factsheet" explaining the "Essential Freshwater package". Mr Littlejohn emphasised that this factsheet said the Freshwater Standards include measures to stop the decline in "freshwater" quality. But the Ministry also published a more specific "Wetlands factsheet". This said the Freshwater Policy Statement applies to natural inland wetlands whereas the Freshwater Standards apply to natural inland wetlands and coastal wetlands.

[107] Mr Littlejohn made the fair point that the draft Freshwater Standards that accompanied the discussion document defined "natural wetland" as a wetland as defined in the RMA "regardless of whether it is dominated by indigenous or exotic vegetation, and including coastal wetlands", subject to the same three exclusions that were carried through to the final version. That definition was therefore explicit as to its coverage of coastal wetlands, whereas the final form of the definition used in the Freshwater Standards was not.

[108] I accept there is a difference in the definition, but I do not accept the difference is material or there was any change in the purpose. The definition in the Freshwater Standards was changed to one that simply drew on the RMA definition of wetland, subject to the three exclusions. The words "regardless of whether it is dominated by indigenous or exotic vegetation, and including coastal wetlands" were unnecessary, since the RMA definition of "wetland" captures wetlands regardless of vegetation type or whether the wetland is in the CMA. It is clear from the final regulatory impact analysis and the Cabinet paper that the purpose remained the same.

[109] Quite apart from those background materials, it is readily apparent from the terms of the package that its purpose extended beyond freshwater:

94 Cabinet Economic Development Committee *Action for Healthy Waterways – Decisions on National Direction and Regulations for Freshwater Management* (20 May 2020) at [53].

(a) As I explained earlier, even putting to one side the terms of subpart 1 of part 3 of the Freshwater Standards that are in issue on these appeals, part 2 (standards for farming activities) and subpart 3 of part 3 (fish passage) regulate the management of both freshwater and CMA resources.

(b) The Stock Exclusion Regulations require the exclusion of stock from natural wetlands.[95] The definition of "natural wetland" incorporates the definition of "wetland" in the RMA, and therefore includes a natural wetland in the CMA. These regulations are therefore not confined to freshwater.

[110] In summary, I do not accept the submission that the purpose of the Freshwater Standards was to regulate only freshwater resources and not natural wetlands in the CMA.

The relevance of s 80A of the RMA

[111] As noted, a new freshwater planning process was introduced by s 80A of the RMA shortly before the Freshwater Policy Statement and Freshwater Standards came into force. The Environment Court thought this was relevant to the issue before it. The Court said that "to subsume the entire environment including the CMA and land use within the purview of the freshwater regulations or freshwater regime set up under s 80A … would be anathema given the requirement to develop the regional plans and regional coastal plans separately to those for freshwater".[96] One of the Court's reasons for concluding that the Freshwater Standards generally did not apply in the CMA was that freshwater planning instruments prepared under s 80A "would not integrate directly with the area covered by regional plans and as such would lead to issues as to how these would be implemented and enforced".[97]

95 Resource Management (Stock Exclusion) Regulations 2020, reg 16.
96 At [32].
97 At [61].

[112] Mr Doesburg said the Environment Court's comments on s 80A reflected the general scheme of the RMA to manage freshwater and the CMA separately (a point I have already dealt with). He did not otherwise submit that s 80A was relevant.

[113] Mr Littlejohn submitted the Environment Court was correct in its consideration of s 80A. He said s 80A(1) required all "freshwater planning instruments" to undergo the freshwater planning process. A "freshwater planning instrument" is defined in s 80A(2) as a proposed regional plan or regional policy statement for the purpose of giving effect to the Freshwater Policy Statement or otherwise relating to freshwater. However, s 80A(8) excludes from that definition any proposed regional *coastal* plan. Mr Littlejohn submitted this meant that if the Freshwater Standards applied to the entire CMA:

(a) A proposed regional coastal plan would have to undergo the freshwater planning process (as a "freshwater planning instrument"); but

(b) A proposed regional coastal plan would be excluded from the definition of "freshwater planning instrument" and therefore be precluded from undergoing the freshwater planning process.

[114] This, Mr Littlejohn said, would give rise to an inherent conflict. It followed that the scope of the Freshwater Standards could not extend to the CMA and therefore coastal plan provisions. The Freshwater Standards, being subordinate legislation, could not prevail over the RMA.

[115] I do not accept that submission. It is not the case that, if the Freshwater Standards apply to natural wetlands in the CMA, a proposed regional coastal plan would somehow become a freshwater planning instrument. Section 80A is clear: a proposed regional coastal plan is not a freshwater planning instrument. In my view, and with respect to the Environment Court, s 80A is irrelevant to determining the scope of application of the Freshwater Standards.

Avoiding unreasonableness and absurdity

[116] Mr Littlejohn submitted that legislation should be interpreted in a way that produces a practical, workable and sensible result. He submitted the application of the Freshwater Standards "to coastal water in the CMA" would lead to significant unintended consequences or absurdity and produce an impractical and unworkable result. He said the "entire CMA" would then theoretically be a wetland, meaning the Freshwater Standards would regulate all vegetation clearance, seabed disturbance and water diversions in the CMA. This would override a multitude of planning provisions that had been carefully crafted for the coastal areas of New Zealand.

[117] This submission put up a straw man. What is in issue in this appeal is whether the Freshwater Standards apply to natural wetlands in the CMA. No-one is suggesting the entire CMA is a wetland subject to the Freshwater Standards. While the scope of a "wetland" was not in issue on this appeal, I am reasonably confident it does not encompass the entirety of the CMA, the seaward boundary of which is the outer limits of New Zealand's territorial sea.

[118] Mr Littlejohn made a related and more restrained submission. He supported the Environment Court's observation that applying the Freshwater Standards to natural wetlands in the CMA would be "a significant imposition for management of much of the coastline".[98] He submitted that this was relevant to the interpretation of the Freshwater Standards, relying on the principle that legislation should be interpreted in a way that produces a practicable, workable and sensible result.[99] Mr Doesburg made a similar submission.

[119] The principle on which Mr Littlejohn and Mr Doesburg relied applies only where there is ambiguity or a gap to be filled.[100] That is not the case here. For the reasons I have given, the meaning of "natural wetland" in subpart 1 of part 3 is plain. Further, even if there were ambiguity or a gap, a "significant imposition" is not the

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[98] At [61].

[99] *R v Salmond* [1992] 3 NZLR 8 (CA) at 13; *Re Watercare Services Ltd* [2018] NZHC 294 at [64].

[100] *R v Salmond* [1992] 3 NZLR 8 (CA) at 13 ("In cases of ambiguity or hiatus [Acts] should be interpreted so as to be made to work"; *Re Watercare Services Ltd* [2018] NZHC 294 at [64] ("Where there are two possible interpretations …").

same as impracticable or unworkable. It is clear from the background materials that the costs and benefits of the Freshwater Standards were considered (and intended).

Other matters relied on by Environment Court

[120] In reaching its decision the Environment Court relied on some further matters that I have not addressed above. The parties dealt with these only briefly in their submissions.

[121] One of the reasons for the Environment Court's interpretation was that, if the Freshwater Standards had effect within the CMA, it would potentially conflict with, or have significant consequences for issues under, the Fisheries Act 1996.[101] The Minister said this was an error, as the activities controlled by subpart 1 of part 3 of the Freshwater Standards (vegetation clearance and the like) are not regulated under the Fisheries Act. Forest and Bird said it was an error because there is no blanket restriction on spatial overlap of management controls promulgated under the RMA and the Fisheries Act.[102] The Council and the Society submitted that the reference to the Fisheries Act was not an error (or at least not a material error), because the Environment Court merely said there was a potential for conflict with the Fisheries Act, and this was only one of the factors on which the Court relied in reaching its decision.

[122] In my view, and with respect, this was an error by the Court. The Court did not explain the potential conflict with the Fisheries Act. Mr Doesburg and Mr Littlejohn did not identify any potential conflict. None is apparent. As to it being material, this was part of the first reason the Court gave for its conclusion.

[123] The Environment Court reasoned that, given the mandatory nature of the Freshwater Standards, "we must construct them against the party [by which the Court meant the Government] which seeks to implement them".[103] All parties agreed there is no such principle of statutory interpretation, though Mr Doesburg and Mr Littlejohn

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101 At [48] and [61].
102 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532, [2019] 3 NZLR 876.
103 At [61].

submitted the Court may have intended to refer to the principle that legislation that interferes with fundamental rights must do so clearly and unambiguously. I agree that was likely the Court's intention. However, even if the Freshwater Standards interfere with some fundamental right (which is not obvious), they do so clearly and unambiguously.

[124] Finally, the Environment Court held that the Freshwater Standards use "river or connected area" as a clear and convenient demarcation point for their application. All parties agreed that this was an error in respect of the natural wetland provisions of the Freshwater Standards. I agree. As Mr Littlejohn submitted, that term is used only in the regulations dealing with fish passage, and there is no nexus between the fish passage regulations and the natural wetland regulations.

Conclusion

[125] I conclude that:

(a) The Freshwater Standards apply to natural wetlands in the CMA.

(b) The Environment Court erred in concluding that the Freshwater Standards apply to the CMA only to the extent they cover the area upstream of the river mouth.

[126] The Environment Court recorded that, in addition to the issue whether the Freshwater Standards apply to natural wetlands in the CMA, there might be related issues as to what constitutes a wetland in the CMA (for example, eel grass in harbours or kelp bed in deeper waters). The Environment Court did not attempt to resolve those issues.[104] Similarly, those issues were not addressed on the appeals before me.

What declarations should be made?

[127] Given my conclusion I will quash all three declarations made by the Environment Court.

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[104] At [9] and [10].

[128] There was an issue as to the scope of the declarations that I should make in place of those declarations. As noted earlier, the Minister sought two declarations:

(a) The Freshwater Standards apply to the CMA to the extent that the Freshwater Standards cover activities affecting areas falling within the relevant definitions ("natural wetlands", "river or connected area" or "receiving environment"); and

(b) The Environment Court is required to consider the proposed Plan in light of the constraints imposed by virtue of the Freshwater Standards.

[129] I agree that declaration (b) is appropriate, with a slight modification.

[130] As to declaration (a), that is a declaration as to the application of the entirety of the Freshwater Standards. By contrast, Forest and Bird proposed a narrower declaration, confined to the part of the Freshwater Standards that deals with natural wetlands:

(a) The Freshwater Standards apply to natural wetlands in the CMA.

[131] In my view Forest and Bird's narrower declaration is appropriate. It is hopefully clear from this judgment that the focus of submissions before me was on the application of the part of the Freshwater Standards dealing with natural wetlands. Although there was reference to other parts of the Freshwater Standards, that was merely for the purpose of determining the scope of application of the natural wetlands regulations. No submissions were made to me as to the scope of application of the other parts of the Freshwater Standards.

Result

[132] The appeals are allowed.

[133] Declarations A, B and C made by the Environment Court are quashed.

[134] In their place I make the following declarations:

(a) The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 apply to natural wetlands in the coastal marine area.

(b) The Environment Court is required to consider the proposed regional plan for Northland in light of the constraints imposed by the Resource Management (National Environmental Standards for Freshwater) Regulations 2020.

[135] The Society's written submissions resisted any costs order in the event the appeals succeeded. Costs were not otherwise traversed at the hearing. In the event costs are not agreed, memoranda are to be filed and served as follows:

(a) Any party seeking costs by 2 December 2021.

(b) Any party resisting a costs order by 9 December 2021.

[136] Each memorandum is not to exceed three pages, excluding any relevant costs schedule or annexures. I will then determine costs on the papers.

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Campbell J