

SUBMISSION ON DISCUSSION DOCUMENT “MANAGING OUR WETLANDS IN THE COASTAL MARINE AREA”

SUBMITTER DETAILS

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1. Introduction

- 1.1. This is a submission on “Managing our wetlands in the coastal marine area: a discussion document on the application of the National Environmental Standards for Freshwater in the coastal marine area” (Discussion Document).
- 1.2. The Environmental Defence Society (EDS) is a not-for-profit, non-government national environmental organisation. It was established in 1971 with the objective of bringing together the disciplines of law, science, and planning to promote better environmental outcomes in resource management.
- 1.3. EDS has had extensive involvement in freshwater matters, having litigated since the early 1970s to both protect freshwater quality and support the promulgation of water conservation orders. EDS has also been a key player in Government policy relating to freshwater, initiating the Land and Water Forum and holding placements on subsequent groups. Its CEO is currently a member of the Government’s Freshwater Implementation Group.

2. Overview of submission

- 2.1. The Essential Freshwater package, which included the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F), set new national direction to protect and improve Aotearoa New Zealand’s rivers, streams, lakes and wetlands and put a stop to further loss of freshwater (and coastal water) values. EDS seeks to ensure that this direction is reflected in the management of coastal wetlands.
- 2.2. Accordingly, EDS supports Option 1 insofar as it proposes a new definition for ‘natural coastal wetlands’, thereby ensuring that the NES-F continues to apply to coastal wetlands. EDS does not, however, support Option 1 insofar as it proposes to exempt certain activities applying to coastal wetlands from the NES-F rules.
- 2.3. EDS strongly opposes the Ministry’s preferred Option 2, which would remove coastal wetlands from the NES-F’s jurisdiction. This approach is contrary to a recent High Court decision which confirmed that the NES-F was designed to capture coastal wetlands. Issues

with delineating the spatial extent of those areas can be resolved by inserting the definition of 'natural coastal wetland' proposed in the Discussion Document.

3. Importance of wetlands and threats to them

- 3.1. Wetlands are one of the country's most valuable ecosystems. The importance, characteristics and functions of wetland ecosystems are well known. Wetlands are an essential habitat for highly diverse flora and fauna and support a high proportion of threatened species – 67% of freshwater and estuarine fish species and 13% of nationally threatened plant species, as well as critically endangered birds.¹
- 3.2. Wetlands also provide ecosystem services in the form of reducing flood flows by acting as buffers for flooding, they store carbon and purify water by filtering out nutrients and sediment.² They are areas of cultural and spiritual importance to Māori.
- 3.3. The importance of these functions and the value of wetlands in providing them exists for both inland and coastal wetlands. Inland wetlands are estimated to provide \$5 billion in ecosystem services annually. This figure increases to \$16 billion for coastal wetlands.³
- 3.4. The value of wetlands has not been reflected in land use practices affecting these areas. There has been extensive historic and ongoing loss of Aotearoa New Zealand's coastal and inland wetlands.⁴ Those that remain are in a severely degraded state.⁵ This only increases the significance of these areas, their unique biodiversity and the ecosystem services they provide.
- 3.5. There is ongoing concern about the deteriorating condition of inland and coastal wetlands resulting from loss and extent and buffers, fragmentation, water quality and quantity issues, stock access and invasive species. Estuaries throughout the country are being seriously damaged by sediment smothering the seabed and shellfish. Increasing sediment is also accelerating the expansion of mangroves.⁶

4. Existing regulatory framework and perceived duplication

- 4.1. The Discussion Document discusses the management of coastal wetlands under regional coastal plans and national instruments and the perceived duplication of including coastal wetlands in the NES-F. EDS does not consider that the NES-F duplicates coastal wetland regulation. Rather, EDS considers that the NES-F provides a mechanism to integrate the

¹ Ministry for the Environment, 2019, "Action for Healthy Waterways: A discussion document on national direction for our essential freshwater", p 46

² Ministry for the Environment & Stats NZ, 2020, *New Zealand's Reporting Series: Our Freshwater 2020*, p 26

³ Ministry for the Environment, 2019, "Action for Healthy Waterways: A discussion document on national direction for our essential freshwater", p 46

⁴ *Interim Regulatory Impact Analysis for Consultation: Essential Freshwater (Part II: Detailed Analysis)*, 2019, p 251

⁵ Ministry for the Environment & Stats NZ, 2022, *New Zealand's Environmental Reporting Series: Environment Aotearoa 2022*, p 19, referring to Ausseil et al, 2011

⁶ Ministry for the Environment, 2019, "Action for Healthy Waterways: A discussion document on national direction for our essential freshwater", p 26

policy direction on wetlands by providing national level direction on wetland management across all domains.

- 4.2. National policy statements set objectives and policies of national significance and may include more specific direction on how to apply these (e.g., by stating methods or requirements that apply).
- 4.3. Relevant to the current consultation, the National Policy Statement for Freshwater Management 2020 (NPSFM) contains direction for the management of natural inland wetlands. The NPSFM seeks to ensure there is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.⁷ This sets clear environmental bottom lines with respect to avoiding further loss of natural inland wetlands. The NPSFM also seeks to manage impacts of up-catchment land use on receiving environments, which includes coastal wetlands.
- 4.4. The New Zealand Coastal Policy Statement 2010 (NZCPS) contains direction for the management of the coastal environment, including coastal wetlands.⁸ The NZCPS requires that adverse effects on certain values are avoided. This includes the requirement to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on specific indigenous ecosystems and habitats.⁹ The NZCPS also seeks to preserve the natural character of the coastal environment by protecting it from inappropriate subdivision, use and development.¹⁰ Natural character is expressly defined to include consideration of coastal wetlands.¹¹
- 4.5. The NES-F was issued alongside the NPSFM in 2020 as part of the Essential Freshwater package. However, there is nothing in the NES-F to indicate it was intended to only implement the NPSFM.¹²
- 4.6. The NES-F includes restrictions on activities including drainage, damming, diversion, water takes, reclamation, disturbance of the bed, and clearance of indigenous vegetation. These activities adversely affect coastal and inland wetlands alike. By controlling these activities across domains, the NES-F integrates and implements the policy direction contained in both the NPSFM and NZCPS. Once gazetted, the NES-F will also complement and reinforce the proposals for wetland restoration in the proposed national policy statement for indigenous biodiversity.¹³

⁷ NPSFM 2020, Policy 6

⁸ The coastal environment is defined as including areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these (Policy 1(2)(c) NZCPS)

⁹ Including those that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh (Pol 11 (b)(iii) NZCPS)

¹⁰ Policy 13 NZCPS

¹¹ Policy 13(2)(c) NZCPS

¹² *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113 at [102]

¹³ Ministry for the Environment, 2019, "Action for Healthy Waterways: A discussion document on national direction for our essential freshwater" p 46

- 4.7. The policy direction provided in the NPSFM and NZCPS, and the technical standards in the NES-F, provides a regulatory framework for the management of wetlands at a national level. The preservation and protection of Aotearoa New Zealand's wetlands and the indigenous biodiversity that inhabit them is a matter of national importance.¹⁴ As such, national direction for their management is appropriate.
- 4.8. Regional and district planning documents must give effect to national policy statements and are subject to national environmental standards.¹⁵ National environmental standards are binding and prevail over rules in regional and district plans unless the standards expressly say otherwise. Notably, the NES-F enables a rule in a district and regional plan to be more stringent than the regulations. However, plan rules may only be more lenient in specific circumstances relating to fish passage.¹⁶
- 4.9. The rules regulating activities in and within setbacks of coastal wetlands differ across regional councils, resulting in varying levels of protection for coastal wetlands and their values.¹⁷ Regulating coastal wetlands under the NES-F will provide a consistent level of protection for coastal wetlands across Aotearoa New Zealand. It will not constrain the ability of regional councils to provide greater stringency if required for the management of coastal wetlands in the region.
- 4.10. Where a plan duplicates or conflicts with a provision in a national environmental standard, the plan must be immediately amended. This is not the significant undertaking that the Discussion Document makes it out to be. Plan amendments to address duplication or conflicts are to be carried out without going through the Schedule 1 RMA process i.e., they do not have to be notified and can be made automatically.

5. Definition of a natural coastal wetland

Identification of issue and the Ministry's preferred option

- 5.1. The first issue raised in the Discussion Document relates to the application of the NES-F to coastal wetlands. The issue identified is that the physical extent to which the NES-F applies within the coastal marine area (CMA) is unclear as the NES-F's 'natural wetland' definition could be interpreted as capturing a greater area of CMA than originally intended.
- 5.2. The High Court has stated that it was unlikely that the NES-F wetland provisions were intended to apply to the entire CMA.¹⁸ However, it did not go as far as specifying the

¹⁴ See ss 6(a) and (c) RMA, and direction in the NPSFM and NZCPS

¹⁵ Ss 55, 62(3), 67(3) and 75(3) RMA and *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* at [102]

¹⁶ NES-F Regulation 6. E.g., Reg 6(2) which states a rule may only be more lenient if it relates to regulations 70 to 74 (culverts, weirs, and passive flap gates) and if the rule is made for the purpose of preventing the passage of fish in order to protect particular fish species, their life stages, or their habitats

¹⁷ For example, the activity status for most activities (including disturbance and reclamation) in the proposed West Coast Coastal Plan is discretionary, whereas the Auckland Unitary Plan earthworks is non-complying or discretionary depending on the volume of sediment and level of significance of the marine area. *Interim Regulatory Impact Analysis for Consultation: Essential Freshwater (Part II: Detailed Analysis)*, 2019, p 251

¹⁸ *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* at [117]

physical extent of what constitutes a natural wetland within the CMA. As such, the parameters of what constitutes a coastal wetland remain undefined.

5.3. The Ministry seeks to resolve this issue by amending the NES-F so its provisions do not apply to wetlands in the CMA (Option 2 of the Discussion Document). Rather, it prefers that coastal wetlands be managed by the NZCPS, regional coastal plans and section 12 of the RMA. The Ministry relies on its future work plan for estuaries as an opportunity to provide further protections for wetlands in the CMA.

5.4. The Ministry's preferred approach:

- Does not align with the original intent of the NES-F. The NPSFM has two wetland definitions: a broad definition of 'natural wetland' and a narrower definition of 'natural inland wetland'. The NES-F could have, but did not, use the narrower definition. Instead, it applies the broad definition because its drafters intended to capture inland *and* coastal wetlands. As stated by the High Court:¹⁹

"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.

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"

- Is completely at odds with the High Court's recent determination on this issue, that the NES-F applies to coastal wetlands.

5.5. Effectively, the Ministry's preferred option is to make the issue go away by not dealing with it at all. It appears that the basis for this position is twofold: that uncertainty over coastal wetland identification would remain and that certain activities currently regulated under the NES-F will not have adverse effects on coastal wetlands.

5.6. For the reasons discussed below, EDS considers that the proposed definition identifies coastal wetlands with sufficient certainty. This is particularly so as the proposed boundaries have already been mapped. Given that the inclusion of coastal wetlands within the NES-F is also in line with the original policy intent of the document, as recently confirmed by the High Court, EDS does not consider that there is any justification for excluding coastal wetlands from the NES-F's jurisdiction.

¹⁹ *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* at [65] - [66]

5.7. Whether or not the activities regulated under the NES-F will have adverse effects on coastal wetlands is a separate and subsequent consideration.²⁰ It is important that these two issues are not conflated.

EDS's preferred option

5.8. EDS acknowledges that retaining the status quo does not provide enough certainty about the spatial extent of coastal wetlands subject to the NES-F. EDS therefore supports amendment of the NES-F to clarify the physical extent to which it applies in the CMA. The inclusion of a definition of 'natural coastal wetland' in the NES-F will provide certainty as to where the NES-F regulations do and do not apply in the CMA.

5.9. To be clear, EDS supports the retention of wetland definitions in the NES-F which includes both inland and coastal wetlands. EDS does not support the Ministry's preferred approach of removing coastal wetlands from the NES-F's jurisdiction.

5.10. Aotearoa New Zealand's coastline is one of the longest and most diverse of any country in the world. The country's coastal wetlands are associated with harbours, estuaries, and sheltered coastal areas.²¹ Terminology used to describe different kinds of coastal hydrosystems and coastal wetlands is inconsistent, confusing and at times conflicting.²² Natural wetlands include those in freshwater, those in freshwater areas subject to varying degrees of saline intrusion and those within the CMA itself.²³ To adequately protect and preserve these areas and regulate activities that may result in adverse effects on them, a precise definition of coastal wetlands is required.

5.11. EDS supports the proposed definition of 'natural coastal wetland' set out in the Discussion Document (Option 1). The definition is comprised of three limbs, all three of which must be complied with. Coastal wetlands must be:

- Within the CMA
- Part of a tidal estuarine hydrosystem
- In an area not exceeding six metres at low tide

5.12. The six metre depth requirement is consistent with the Ramsar Convention on Wetlands, to which New Zealand is a signatory.²⁴ However, unlike the Ramsar definition which covers all nearshore areas up to six metres depth, the definition proposed in the Discussion Document limits application of the regulations to only those areas that are part of a tidal estuarine hydrosystem.

5.13. The areas that are captured by the proposed definition are important 'ecotones', transition zones between intertidal (estuarine) areas and subtidal (marine) areas. They are areas that

²⁰ *Man O War Station Limited v Auckland Council* [2017] NZCA 24

²¹ Gerbeaux and Hume, 2022, *What constitutes a wetland in the New Zealand Coastal Marine Area? A scientific perspective*, *New Zealand Journal of Marine and Freshwater Research*, 56:3, 333-339, p 333

²² Gerbeaux and Hume, 2022, n 21, p 336

²³ Gerbeaux and Hume, 2022, n 21, p 334

²⁴ Article 2, Ramsar Convention

support valuable habitat for flora and fauna and should be recognised as coastal wetlands under the NES-F.²⁵

- 5.14. The Discussion Document's proposed definition is not limited to the *margins* of estuaries and intertidal areas (as originally proposed in the 2019 Action for Healthy Waterways Discussion Document).²⁶ Rather, it encapsulates all parts of hydrosystems that meet the definition.
- 5.15. It is acknowledged that this may result in a larger area of such hydrosystems being covered. However, EDS considers that this is justified. If an activity on the margins of an estuary or inter-tidal hydrosystem is likely to have adverse effects that need to be regulated under the NES-F, then it can be reasonably anticipated that the same activity would result in adverse effects if undertaken within the estuary or inter-tidal hydrosystem. Thus, notwithstanding the fact that the definition may be broader than originally anticipated, its application is warranted.
- 5.16. The above proposed definition has been crafted collaboratively by the Department of Conservation, the Ministry and technical experts. As stated in the Discussion Document, the proposed definition is "implementable, as all proposed boundaries have already been mapped through various national projects".²⁷ As mentioned above, the Ministry's reason for not adopting a definition i.e., that uncertainty over natural coastal wetland identification would likely remain an issue and that substantive guidance would be needed for councils and resource users to help determine if a habitat is a natural coastal wetland, does not therefore hold weight.
- 5.17. Finally, it is noted that the proposed definition of coastal wetland does not extend to non-tidal systems such as Waituna Lagoon or Te Waihora which are not within the CMA.²⁸ It should be made clear that these coastal hydrosystems, which have an intermittent connection with the sea and alternate between lacustrine and estuarine hydrosystems, come within the definition of natural inland wetlands.

6. Application of the NES-F consenting pathways to coastal wetlands

- 6.1. EDS strongly opposes the Discussion Document's proposals in Option 1 to exempt coastal wetlands from some NES-F regulations. The justification for such exemptions is that the application of the NES-F to the CMA could "prevent or constrain activities unlikely to cause the loss or degradation of natural wetlands" or that the activity will have minimal impacts.²⁹ EDS does not agree and considers all activities regulated under the NES-F have the potential to adversely affect coastal wetlands.³⁰

²⁵ Gerbeaux and Hume 2022, n 21, p 337

²⁶ See Ministry for the Environment, 2019, "Action for Healthy Waterways: A discussion document on national direction for our essential freshwater", p 46: "Coastal wetlands are natural wetlands found around the margins of estuaries and intertidal areas, and include saltmarsh and mangrove areas"

²⁷ Discussion Document, p 13

²⁸ Gerbeaux and Hume 2022, n 21, p 337

²⁹ Discussion Document, p 3 and 13

³⁰ Noting the comments below that regulations controlling the harvesting of sphagnum moss and horticultural and arable land use are unlikely to apply to coastal wetlands at present

- 6.2. The NES-F regulates activities (vegetation clearance, earthworks and the take, use, damming, diversion or discharge of water) for select purposes through specific consenting pathways. These are provided for as permitted, restricted discretionary, discretionary, non-complying or prohibited activities. For example, vegetation clearance, earthworks and the take, use, damming, diversion or discharge of water for the purpose of constructing specified infrastructure is generally provided for as a discretionary activity.³¹
- 6.3. Where an activity is for a purpose not specified in the regulations, it defaults to a non-complying activity.³² This appears to form part of the Ministry's justification in exempting coastal wetlands from the NES-F regulations. There appears to be a concern that activities for purposes not provided in the NES-F, but with minimal adverse effects, will be captured by the non-complying rule.
- 6.4. EDS acknowledges this issue, however, it does not justify removing national controls for activities affecting coastal wetlands. The activities that are proposed to be exempted from the NES-F do have adverse effects on coastal wetlands. It is therefore not appropriate to apply a blanket approach to removing controls. Instead, consideration should be given to developing a more nuanced framework for the protection for coastal wetlands (discussed further below).
- 6.5. In the interim, a precautionary approach is required.³³ There may be limited circumstances where the effects of an activity on a coastal wetland may be minor (noting that this will be especially relevant for activities associated with purposes not specified in the NES-F). However, given that the protection of coastal wetlands is a matter of national importance under Part 2 RMA and the NZCPS, EDS considers that the approach in the NES-F is appropriate.

Take, use, damming, diversion or discharge of water

- 6.6. Natural hydrology is key to wetland health whether it is freshwater or estuarine. The take, use, damming, diversion or discharge of water can change the salinity of the wetland with resulting effects on ecosystems and species. Further, the damming of a salt marsh could shift this from being an estuarine system to a freshwater system, as occurred with the damming of the Marie Neverman Reserve in 2010 as part of the wetland restoration efforts. It is therefore not correct to say that take, use, discharge and damming of water will have minimal impacts on coastal wetlands.³⁴

Vegetation clearance

- 6.7. Mangroves are an indigenous species uniquely adapted to live in the mid intertidal zone and are found only in the northern areas of Aotearoa New Zealand. They provide a range of ecosystem services such as trapping sediment and nutrients running off land, cleansing our

³¹ Regulation 45, NES-F

³² Regulation 54, NES-F

³³ Policy 3 of the NZCPS requires that a precautionary approach towards proposed activities be taken when effects on the coastal environment are uncertain, or little understood, but potentially significantly adverse. This is particularly important for wetland ecosystems given their rarity

³⁴ Discussion Document, p 13

coastal waters, sequestering carbon and mitigating against coastal erosion. They also exhibit natural character values and provide important essential nursery habitat for fish and feeding grounds for native birds like at-risk banded rail.

- 6.8. Carving out the clearance of mangroves from the NES-F and leaving their management to regional plans, which offer varying levels of protection and are often not well enforced, is not appropriate and will not give effect to the policy direction in the NZCPS³⁵ or section 6(a) or (c) of the RMA.

Sphagnum moss and horticultural and arable land use

- 6.9. While the regulations relating to sphagnum moss and horticultural and arable land use are unlikely to apply to coastal wetlands at present,³⁶ EDS does not see the need to limit their application to inland wetlands only (as, by virtue of the activities regulated, they would not apply to the management of coastal wetlands). This would also future proof against the possibility of saline plants being harvested and used for commercial production sometime in the future.

7. Further work to be undertaken by the Ministry for the Environment

- 7.1. The Discussion Document includes further policy work to be undertaken by the Ministry for the Environment to address the specific risks faced by wetlands in the CMA, such as sedimentation, harmful marine activities, emerging contaminants and climate change. The Discussion Document also refers to work being undertaken to determine the consequences of the NES-F applying to coastal wetlands, and whether coastal activities and structures can be incorporated into the existing consenting pathways.
- 7.2. EDS supports this further work being undertaken. However, leaving coastal wetlands unprotected in the interim is not appropriate (as would be the case if Option 1 or 2 were adopted). Rather, the protections that currently exist under the NES-F should remain in situ until a more nuanced framework for the management of coastal wetlands is developed.
- 7.3. EDS also does not agree that the NES-F may not be the best means to address these issues.³⁷ For the reasons stated above, the NES-F integrates the policy direction for wetlands contained in the NPSFM and NZCPS. Given the impact that land use (in particular, sedimentation which comes primarily from the land) has on wetlands, there needs to be clear land/water policy linkages that allow for restrictions on land management to protect future ecosystem functionality.

³⁵ Namely Policies 11 and 13 NZCPS

³⁶ This is especially so for sphagnum moss, which does not grow in saline environments. Note also the comments in *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* at [79] – [80]

³⁷ As proposed in the Discussion Document, p 20

8. Conclusion

- 8.1. The proposed option put forward by the Ministry for the Environment goes against the original policy intent to encapsulate the management of both coastal and inland wetlands in the NES-F. It will provide the least amount of protection to Aotearoa New Zealand's coastal wetlands and will not give effect to the NZCPS or section 6 RMA.
- 8.2. The preservation and protection of Aotearoa New Zealand's natural wetlands is a matter of national importance. Human activities on land and in the CMA can result in adverse effects on these hydrosystems and the indigenous flora and fauna they contain. To give effect to higher order policy direction, and resolve any ambiguity as to application, EDS supports the inclusion of a clear definition of coastal wetlands and the application of the NES-F to these areas.