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INTRODUCTION

1. The Royal Forest & Bird Protection Society of New Zealand has been Aotearoa's independent voice for nature since 1923. Forest & Bird has helped make Aotearoa a better place to live for generations by working with communities to protect forests, lakes, and rivers from destruction, campaigning to create marine reserves and eco-sanctuaries, and working to save threatened species.
2. Forest & Bird's constitutional purpose is:

   > *To take all reasonable steps within the power of the Society for the preservation and protection of the indigenous flora and fauna and the natural features of New Zealand.*

3. The protection of wetlands is squarely within the scope of this constitutional purpose and is an important issue for Forest & Bird, as well as a crucial issue for the future of Aotearoa.

OVERARCHING SUBMISSION POINTS

4. Forest & Bird remains strongly opposed to the removal of the NES rules that protect wetlands. The proposed changes, which offer a consenting pathway to landfills, mining, quarrying, urban development and any water shortage effectively strip wetlands of any meaningful protection, contrary to the express requirements of section 6 of the RMA and Policy 6 of the NPSFM.
5. It is bad law to make environmental limits, and then change them whenever they actually have an impact. That is the point of limits. They should drive behaviour change, and be a clear line in the sand beyond which further damage is not acceptable. So much development

is now provided with an exemption, it is hard to think of many situations where the original NES rules will still apply.

6. The approach of making limits and then removing them whenever asked gives Forest & Bird little faith in the Government's intention to improve our resource management system, by way of the replacement of the RMA. A central part of that reform is the introduction of environmental limits. If this is how limits are going to be treated, we question whether the reforms are going to be an improvement at all, or simply the business as usual approach that has led to the current biodiversity crisis.

7. Our primary position therefore is that no new pathways should be provided for, and that the effects management hierarchy and offsetting provisions should be improved so that wetlands impacted by infrastructure are protected as far as possible. Further, the approach to managing wetlands in pasture needs to change, so that the NES rules will apply if a change in land use from pastoral use is contemplated.

8. The so called 'gateway tests' proposed for the new pathways provide little no protection, and in some instances, would make it easier to destroy wetlands than terrestrial areas of biodiversity under the proposed National Policy Statement for Indigenous Biodiversity. The gateways need significant strengthening if they are to provide any assurance that these activities will be appropriate.

9. The Ministry has placed heavy reliance on aquatic offsetting in justifying the inevitable loss of wetland values and extent by way of these new consent pathways. This ignores the significant uncertainties inherent in trying to offset wetland loss.

10. It also is misleading. Under the NPSFM, the buck stops with aquatic compensation, not offsetting. Compensation is directly contrary to policy 6 of the NPSFM, and will allow the loss of wetlands in exchange for 'something else' – not even necessarily wetland related. Compensation has no place in wetland management, and should be deleted from the NPSFM.

11. While Forest & Bird sought better provisions around offsetting and compensation, this has not been accepted, and these approaches remain vague and of little worth under the NPSFM.

12. Overall these provisions are likely to add up to permanent loss of wetlands. This outcome is contrary to s 6(a) and 6(c) of the RMA, which respectively provide for the preservation of the natural character of wetlands and the protection of significant indigenous biodiversity.

13. The Government's proposed changes make a mockery of attempts made to address the loss of wetlands and the degraded state of freshwater in New Zealand. Forest & Bird says that the proposed changes that provide a consenting pathway for landfills, quarrying, mining and urban development must be rejected. If they are to remain, the effects management hierarchy must be significantly improved, to include actual limits. It also needs to directly link to mandatory offsetting (and compensation) requirements. The changes Forest & Bird has proposed attempt to ensure that wetlands are appropriately protected, while providing for the possibility of certain activities in an improved regulatory framework.

14. While the changes to the definition of 'natural wetland' are at least partly positive, Forest & Bird says that existing pasture use should be provided for by way of a permitted activity, not an exclusion to the definition. This will at least mean that the values of pasture wetlands can be considered and appropriately protected when land use change is contemplated, in accordance with s6.

15. We also say that more thought needs to be given to how to manage wetlands and terrestrial biodiversity in an integrated way.

16. In our 2021 submission, we outlined the extent of wetland loss across Aotearoa, some of the commitments the Government has made to wetland protection and restoration, and the value of wetlands. We have repeated much of that section of our submission below because the Government does not seem to understand the significant value of wetlands and the extent of loss that has happened, and continues to happen, and the magnitude of response that is required to stop (and reverse) the damage.

17. We consider there is a gross disconnect between the very real risk of ecological collapse of our wetland systems in Aotearoa and the Government's policy response.

WETLAND LOSS

18. Stats NZ states most of Aotearoa's wetlands have been drained, leaving just 10 per cent of the original extent of wetlands as of pre-human times.[1]

19. Most wetlands that have been historically destroyed are used for intensive pastoral farming and are known as "high producing grasslands" (65%) with the remainder having been converted to other land uses such as crops, forestry and urban.[2]

20. Wetlands are still being drained today. A Manaaki Whenua Landcare Report indicated that between 2001-2016, 214 wetlands were completely destroyed and an additional 746 wetlands had been damaged or partially destroyed, in that they had reduced in size.[3]

21. The extent of wetland mapping is largely incomplete as national wetland mapping requirements were only standardised in 2020 and do not require mapping of many small wetlands or wetlands dominated by pasture. In this regard, the findings by Manaaki Whenua Landcare are likely to reflect a fraction of the wetland loss that has occurred in recent decades.

22. A report published in 2020 by National Wetlands Trust found that 5400 hectares of wetland was destroyed by human activity between 1996 and 2018. The investigation found that nearly all (90%) of these wetlands were converted to grassland.[4]

23. A study prepared for Environment Southland showed that the region drained 10 per cent of its wetlands between 2007-2017, further stating that 40 per cent of these wetlands were drained for dairy farming. This is especially detrimental given that Southland is the second largest region for wetlands by area in New Zealand.[5]

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[1] Wetland extent | Stats NZ

[2] Ausseil, A. -. E., Jamali, H., Clarkson, B. R., & Golubiewski, N. E. (2015). Soil carbon stocks in wetlands of New Zealand and impact of land conversion since European settlement. Wetlands Ecology and Management, 23(5), 947-961. doi:http://dx.doi.org/10.1007/s11273-015-9432-4

[3] Belliss, S, Shepherd, J, Newsome, P, & Dymond, J (2017).An analysis of wetland loss between 2001/02 and 2015/16. Landcare Research Contract Report LC2798 for the Ministry for the Environment.

[4] ROOT-CAUSES-OF-WETLAND-LOSS-IN-NZ_Jan-2021.pdf (wetlandtrust.org.nz)

[5] Ewans, Richard. "Environment Southland Wetland Inventory Project: Monitoring Wetland Extent on Non-Public Conservation Land in the Southland Region -Interim Report for 2016." Wetland Inventory Project 2015-16 PART 1.Pdf, EcoSouth, 15 July 2016. Source Environment Southland.

24. These figures show that there has been massive loss of Aotearoa's wetlands historically, and that this loss is ongoing. Any weakening of the NPS policy direction and the NES rules will only exacerbate that loss.

WETLANDS AS HABITAT, ECOSYSTEMS, AND CARBON SEQUESTERS

25. It has been determined that "wetlands of the world provide more ecosystem services per area than any other habitat type".[6]

26. New Zealand's wetlands connect our country to the rest of the world. Many are unaware that some migratory birds travel "distances of up to 12 thousand kilometres non-stop from the Arctic" to arrive here, a place they call home for part of the year.[7]

27. New Zealand's wetlands are home to countless unique and wonderful species:

    a. the rare moth Houdinia flexilissima, the caterpillar of which was only recently found by scientists in the stems of the thin Giant Cane Rush in Waikato bogs. This moth may be the thinnest caterpillar moth in the world and is thought to be unique (endemic) to Waikato.[8] [9]

    b. rare and threatened Australasian Bittern/matuku which has been observed using networks of wetlands within a 15 km radius with the ability to travel over 550 km in under 2 weeks visiting "raupō-fringed lakes, spring-fed creeks with cover and areas of rank-grass along paddock/drain edges."[10]

    c. All five of New Zealand's mudfish count on wetlands and are most notably known for their ability to survive in and around ephemeral wetlands as they burrowing into mud can survive for weeks in a semi-desiccated state. [11] The Canterbury mudfish is the country's most threatened mudfish species and has suffered greatly at the hand of agriculture draining wetlands over the last 3 decades.[12]

    d. Two of the iconic whitebait are well distributed but with reduced abundance and as At-Risk with extinction. The īnanga and giant kōkopu galaxias species depend on wetlands for feeding and breeding and are an integral part of the New Zealand culture.[13]

    e. The rare gollum galaxias depends on swamps of Southland and shallow lakes of Catlins.[14]

    f. The swamp helmet orchid, and recently feared to be extinct, the yellow bladderwort, which both have their last surviving populations in or near the

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[6] W.K. Dodds, K.C. Wilson, R.L. Rehmeier, G.L. Knight, S. Wiggam, J.A. Falke, H.J. Dalgleish, K.N. Bertrand. Comparing ecosystem goods and services provided by restored and native lands. Bioscience, 58 (9) (2008), pp. 837-845

[7] Ramsar Wetlands - National Wetland Trust of New Zealand | Learn More

[8] Swamps | National Wetland Trust of New Zealand | Types Of Wetlands

[9] Fred the Thread — Science Learning Hub

[10] Australasian bittern | New Zealand Birds Online (nzbirdsonline.org.nz)

[11] Wetland wildlife – Te Ara Encyclopedia of New Zealand

[12] New Zealand's wetlands at risk: 2 February 2018 (doc.govt.nz)

[13] Ibid.

[14] Ibid

internationally significant New Zealand Ramsar wetland Whangamarino Wetlands.[15] [16]

28. A 2012 article investigated New Zealand's 72 naturally uncommon ecosystems and applied the IUCN's ecosystem Red-List Criteria, which are based on changes in extent of ecosystems and reductions in ecosystem processes. The authors' investigation concluded that of the ecosystems evaluated, 45 (63%) were classified as threatened, 11 of which were wetland ecosystems (representing 69% of the 15 wetland ecosystems considered to be naturally uncommon). The research states that "[t]he highest number of threatened plant species were in wetland ecosystems [...] notably ephemeral wetlands (28 species), lake margins (25 species), [and] seepages and flushes (17 species)."[17]

29. Ephemeral wetlands were evaluated and were ranked as Critically Endangered B1 which signifies "very severe decline throughout >90% of extent distribution."[18] We note the advice we sent the Ministry in 2020, which notes that many important ephemeral wetlands will not be classified as 'natural wetlands' under the NPSFM exclusion for pasture.

30. Seepages and flushes were evaluated and ranked as Endangered B2 which signifies "very severe decline throughout >70% of extent distribution." [19] We reiterate that these are often significant wetlands that will often not be captured under the NPSFM/NES because of the pasture exclusion to the 'natural wetland' definition.

31. It is estimated that "40% (by area) of wetlands occur on private land in New Zealand"[20] and research warns that "key threats such as drainage will continue in the absence of more explicit statutory measures or enforcement to achieve sustainable land use management."[21]

32. This same research indicates that if wetland loss continues at the rate observed in Southland, then "ecological consequences will likely occur".[22]

33. The ecological consequences referred to are well documented in scientific literature:

> *(1) reduced extent of threatened wetland types, indigenous vegetation and rare ecosystems (Williams et al. 2007);*
>
> *(2) reduced capacity of wetlands to attenuate nutrient and sediment runoff (Hefting et al. 2013; Tanner et al. 2015);*
>
> *(3) reduced storage of carbon (Ausseil et al. 2015);*

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[15] Ibid
[16] Rare plant discovered in Whangamarino wetland threatened plant survey - NZ Herald
[17] Holdaway RJ, Wiser SK, Williams PA. Status assessment of New Zealand's naturally uncommon ecosystems. Conserv Biol. 2012 Aug;26(4):619-29. doi: 10.1111/j.1523-1739.2012.01868.x. Epub 2012 Jun 25. PMID: 22731663.
[18] Ibid
[19] Ibid
[20] Robertson HA 2016. Wetland reserves in New Zealand: the status of protected areas between 1990 and 2013. New Zealand Journal of Ecology 40: 1–11.
[21] Robertson, Hugh & Ausseil, Anne-Gaelle & Rance, Brian & Betts, Harley & Pomeroy, Eva. (2018). Loss of wetlands since 1990 in Southland, New Zealand. New Zealand Journal of Ecology. 43. 10.20417/nzjecol.43.3.
[22] Ibid

(4) reduced habitat for threatened flora and fauna (Richardson et al. 2015; O'Donnell & Robertson 2016);

(5) increased susceptibility to fire (Burge 2015);

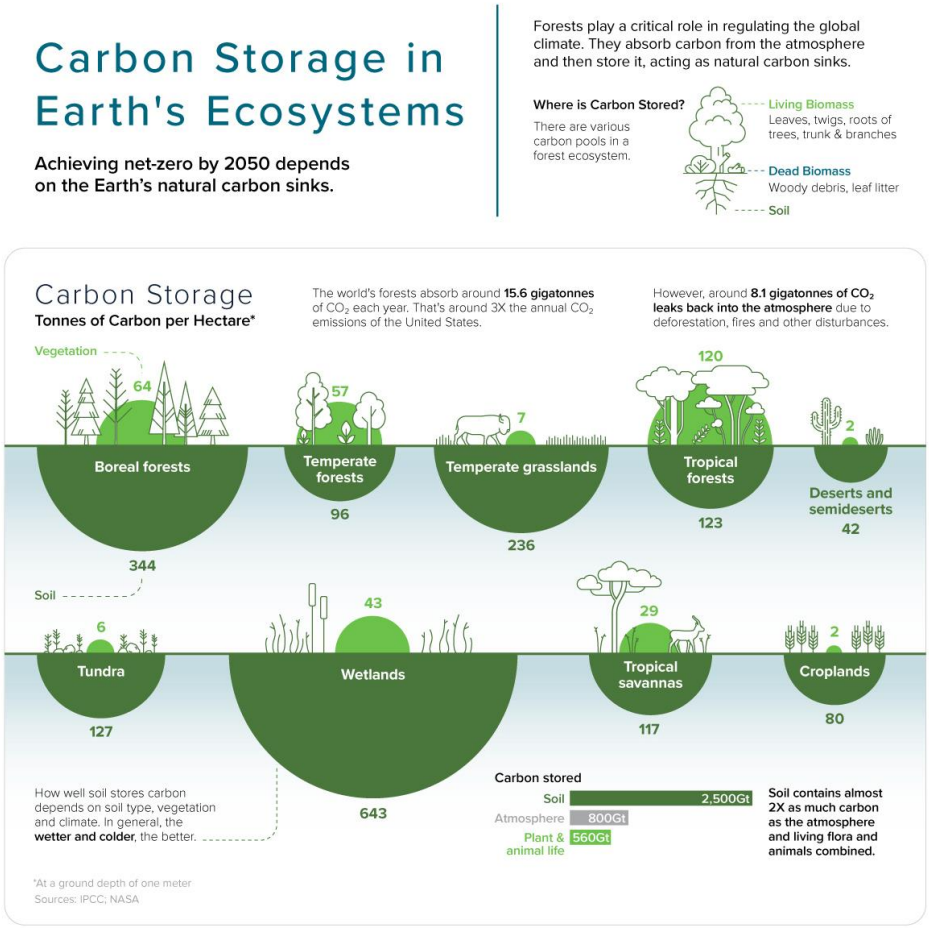
(6) increased susceptibility to weed encroachment (Zedler & Kerceher 2004); and

(7) loss of ecological sequences (Landry & Rochefort 2012).[23]

34. The effects of wetland destruction described in the literature have implications for Aotearoa's communities and our unique indigenous biodiversity.

35. Should the proposed changes proceed, there would be a significant decrease in protection for wetlands. This will inhibit the ability to maintain and build resilience in the face of the effects of climate change, because the protection provided by these missing wetlands against extreme weather events would be gone.

36. Additionally, research shows that wetlands provide a net sink benefit in terms of storage and release of greenhouse gases. There also sequester much more carbon than other ecosystem types (see figure below).[24] This is especially beneficial here in Aotearoa where the climate and soil types offer larger sink values than their wetland counterparts in the northern hemisphere.[25]



[23] Ibid
[24] UN Biodiversity, https://twitter.com/UNBiodiversity/status/1543567229257748487?s=20&t=4x_nxh9h02xYp4e7DXqbsQ
[25] Ibid. Ausseil, A. et al.

37. It is commonly understood that wetlands represent a complex natural ecosystem which are slow growing and in the case of peat wetlands, grow by only a few millimetres per year and have in many cases taken thousands of years to develop.[26, 27]

AOTEAROA'S WETLAND COMMITMENTS UNDER THE RAMSAR CONVENTION

38. Forest & Bird has, for many years, assisted New Zealand Government in its commitment to implementing the Ramsar Convention. We are one of two National CEPA[28] Focal Points for New Zealand, assigned to help coordinate national implementation and act as a 'local' contact point. The Convention's mission provides for "the conservation and wise use of all wetlands through local and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world."

39. A definition of the "wise use" concept was adopted by COP3 (1987) and an updated definition was adopted in 2005 by COP9.23, whereby "wise use" of wetlands is "the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development" where "ecological character" is "the combination of the ecosystem components, processes and benefits/services that characterise the wetland at a given point in time."[29]

40. The Convention stated the importance of National Wetland Policies as far back as 1999, recommending that all Contracting Parties (i.e. member countries) "should have comprehensive national wetland policies, [which] should as far as possible address all problems and activities related to wetlands within a national context."[30]

41. The Ramsar Convention has gone as far as developing a handbook which provides guidance in developing National Wetland Policies, stating in its guidance that:

> ***The seriousness of the continuing loss of wetlands demands a new approach to wetland management****. A major portion of the wetland area in settled areas has been converted from its natural state to support alternative land uses including agriculture, urbanisation, industry, and recreational pursuits. Wetlands have also been degraded by land use practices that have resulted in vegetation destruction, nutrient and toxin loading, sedimentation, turbidity, and altered flow regimes.* (Emphasis added)

42. The guidance warns that:

> *The disruption of wetland functions has a high cost — economically, socially and ecologically. [...] The disruption of valuable wetlands must cease, the diversity of remaining wetlands must be retained, and where possible rehabilitation, restoration and re-creation of wetlands must be attempted.*

[26] 3. FORMATION OF PEATS (fao.org) https://www.fao.org/3/x5872e/x5872e05.htm

[27] McGlone MS (2009) Postglacial history of New Zealand wetlands and implications for their conservation. New Zealand Journal of Ecology 33:1–23.

[28] The Convention on Wetlands' Programme on communication, capacity building, education, participation and awareness (CEPA).

[29] Ramsar Secretariat Ramsar Resolution IX.1 (2005), Annex A.

[30] hbk4-02.pdf (ramsar.org)

43. Forest & Bird still doubts that the Ministry for the Environment has done due diligence in considering the country's commitment to the Ramsar Convention. The proposed changes to the NPS and NES are, overall, a significant downgrade in the protection of wetlands, which is directly contrary to the spirit of the International Agreement.

AOTEAROA'S DOMESTIC COMMITMENTS TO WETLANDS

44. In 2020, the Government released the 'Essential Freshwater' package of legislative reform. This set out to:[31]

    - stop further degradation of our freshwater
    - start making immediate improvements so water quality improves within five years
    - reverse past damage to bring our waterways and ecosystems to a healthy state within a generation.

45. Commitments to wetland protection and restoration have also been made in the Te Mana O Te Taiao Aotearoa New Zealand Biodiversity Strategy, and its Implementation Plan. These include:[32]

    (a) [By 2030] 10.3.2 There has been no loss of the extent or condition of indigenous land, wetland or freshwater ecosystems which have been identified as having high biodiversity value
    (b) [By 2050] 10.3.3 An interconnected series of indigenous land, wetland and freshwater ecosystems have been restored to a 'healthy functioning' state and are connected to marine and coastal ecosystem
    (c) [By 2025] 13.1.1 The potential for carbon storage from the restoration of indigenous ecosystems, including wetlands, forests, and coastal and marine ecosystems (blue carbon), to contribute to our net emissions targets is understood
    (d) [By 2030] 13.1.2 Carbon storage from the restoration of indigenous ecosystems, including wetlands, forests, and coastal and marine ecosystems (blue carbon), contributes to our net emissions targets
    (e) [By 2050] 13.1.3 Carbon storage from the restoration of indigenous ecosystems, including wetlands, forests, and coastal and marine ecosystems (blue carbon), is a key contributor to achieving net-zero emissions for Aotearoa New Zealand

46. The Government has also made commitments to slow climate change and adapt to its impacts, through the Climate Change Response Act, the draft national adaptation plan, the Emissions Reduction Plan, and the establishment of the Climate Commission. Prime Minister Jacinda Ardern referred to climate change as her generation's "nuclear-free moment".

47. Making progress under these commitments and regulations will require the protection and restoration of wetlands, as these are nature-based solutions that offer substantial carbon sequestration potential and can mitigate the impacts of climate change such as flooding and storm surges. They also provide areas of habitat that are resident to some of the highest densities of native species in Aotearoa. Progress will be directly contradicted by making changes to the NES and NPS, which will result in more wetlands being degraded or

[31] https://environment.govt.nz/assets/Publications/Files/essential-freshwater-overview-factsheet.pdf
[32] Te Mana o Te Taiao – Aotearoa New Zealand Biodiversity Strategy, https://www.doc.govt.nz/globalassets/documents/conservation/biodiversity/anzbs-2020.pdf

destroyed. The commitments the Government has made to environmental protection and restoration are significant and explicit, and must be matched by Government action.

DEFINITION OF NATURAL WETLAND – Amendment 1

An alternative approach for pasture wetlands

48. Forest & Bird submits that providing for the use of wetlands in pasture by way of an exclusion in the definition of natural wetland is inappropriate in terms of NPSFM policy 6, RMA ss6 and 31, as well as case law. It also goes well beyond the intent of the exclusion, and strips wetlands in pasture of any of the protections of the NPSFM and NES.

49. The stated intent for the exemption in paragraph (d) is:

> 'The intent, however, is to enable existing pastoral land use to continue and not be compromised by the strong protection of the NES-F regulations.'[33]

50. Further, that the exclusion is only meant to provide for existing pastoral use:

> 'We disagree with the submissions that suggested 'pasture' be broadened to include other grassed areas, such as playing fields. The intent of the exclusion is only to provide for existing pastoral land use to continue. No other type of land use is covered under the exclusion.'[34]

51. However, the effect of excluding wetlands from even qualifying as natural wetlands, is that the exemption meant to only allow for pasture use, in fact opens the door for any use. That is because the NES rules cannot apply to a wetland that is excluded because of the pasture exemption. None of the protections of the NES will apply.

52. This approach ignores the values that pasture wetlands can still retain, including carbon storage and ecosystem services, as well as having potential for restoration. Importantly, it also ignores that an exotic-dominated wetland in pasture may also still have values that require protection under s6(c), and may contain other indigenous biodiversity that must be maintained under s31. It also means that policy 6 NPSFM can never apply to those wetlands, even when a new or intensified use is contemplated in that wetland.

53. MfE will no doubt answer that Councils still have an obligation under the RMA to recognise and provide for wetlands that do not meet the NPSFM natural wetland definition.[35] In our view, that approach is naïve – Councils are extremely unlikely to enact rules restricting activities in another class of wetland not covered by national direction specifically written to protect wetlands. There is nothing in the NPSFM to give that direction to councils, and in our view a council would face very strong opposition if it tried to enact rules covering a wider class of wetlands than were captured in the national direction specifically designed for wetlands.

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[33] Ministry for the Environment. 2022. *Essential Freshwater Amendments: Report recommendations and summary of submissions: Managing our wetlands: Proposed changes to the wetlands regulations*. Wellington: Ministry for the Environment. Pg 13. ('**Report**')

[34] Ibid, pg 14.

[35] As noted for example in Ministry for the Environment. 2021. *Defining 'natural wetlands' and 'natural inland wetlands'.* Wellington: Ministry for the Environment, pgs 6 and 9.

54. While we can understand the policy rationale for providing for existing pastoral use of these wetlands, there is no policy basis for completely removing the consenting requirements where a change of use is contemplated. Why should these wetlands not be subject to the same rules as any other wetlands when, for example, a proposal is made to develop the farm for housing? The existing pastoral use has ceased, so a consent requirement should apply so that the values of the wetland can be considered, and the effects on that wetland can be managed appropriately.

55. The approach taken in the NPSFM is to provide for an activity by way of the definition, rather than defining natural wetlands in a factual way, and dealing with pastoral use via rules. This approach is contrary to various Courts' findings that activities should not be managed by way of definitions, but by way of rules.

56. In *Director-General of Conservation v Invercargill City Council* [2018] NZEnvC 84, the Environment Court found that the definition of indigenous vegetation should not include management considerations, such as a dominance threshold of a certain type of plant, or whether s6(c) might apply. Stating definitions was a first step under the RMA, which should come before the provisions that dealt with managing the resource, including rules. The Court found that 'standards or thresholds are better left for rules rather than included in definitions.'[36]

57. Similarly, the Court of Appeal in *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24 confirmed that management considerations (in respect of outstanding landscapes) are not relevant when considering what to classify as an outstanding landscape in a plan. The classification of an outstanding landscape is a factual assessment, prior to the policy decision of how to manage that landscape (via the policies and rules). In other words, the resource must be defined factually first, and then the place for reflecting management considerations for that resource is in the policies and rules.

58. Dealing with effects management via a definition, as the current NPSFM does, is also contrary to MfE's guidance on the National Planning Standards, which states that definitions should not include *de facto* rules.[37]

59. **We therefore seek an alternative approach: to remove the pasture exemption from the 'natural wetland' definition completely, and instead provide for that use by way of the NES rules**.

60. Existing pastoral use of pasture wetlands could be provided for by way of a permitted activity. A consent requirement would apply where the permitted activity standards were not met. The permitted activity standards would be the same as the pasture exemption in the natural wetland definition, with some amendments (discussed more fully in the following section of this submission). An additional standard would ensure that effects did not intensify the effects on the wetlands.

61. The pastoral use would be permitted if:

    a. The wetland is in pasture;

    b. The activity is an existing pastoral use;

[36] [2018] NZEnvC 84. See the whole judgement but particularly [43], [49]-[50], [61] and [63].
[37] National Planning Standards: Definitions (2017) MFE Discussion Paper G, pg 10

c. The adverse effects on the wetland are no greater in intensity, scale, or character than those associated with the existing use;

d. The wetland has ground cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species (see clause 1.8));

e. The wetland does not contain any threatened or at risk species; and

f. The wetland is not an ephemeral wetland.

62. A consent requirement would apply if those standards were not met.

63. The benefit of moving the exclusion out of the definition and into a rule framework, is that it would *only* provide for existing pastoral land use. The current exclusion however, allows for intensification, drainage, conversion etc, because those wetlands are not considered 'natural wetlands' for the NES, so none of the other protections apply. That complete exclusion goes beyond the intent to provide for existing pastoral use.

64. We recognise that changing the definition in this way would extend the mapping requirement under cl. 3.23. Consideration could be given to amending 3.23 so that the mapping requirement did not apply to wetlands in pasture where existing pastoral use was permitted according to the standard.

65. Similarly, the requirement to exclude stock from natural wetlands under the Stock Exclusion Regulations may need an exemption, so that stock did not have to be excluded from wetlands where existing pastoral use was permitted under the NES. The effect in terms of the Stock Exclusion Regulations would be the same as the current situation for existing uses, namely, that stock would not need to be excluded from those wetlands. The benefit for the wetland however, would be that any intensification in use would be discouraged, because in that situation the permitted activity would not apply, and the wetland would need to be fenced.

66. Providing for existing uses is not a foreign concept to the NES rules. Arable and horticultural land use already has permitted activity exemptions in the NES. Under r 50, vegetation clearance and earthworks are allowed outside of, but within 10m of wetlands, if they were an existing arable or horticulture land use and comply with r55 (except 55(2)).

67. While the permitted activity approach would still potentially allow for wetlands with s6(c) values to be degraded by pastoral land use, at least it would not provide for degradation over and above that which is already occurring. The significant benefit is that if land use were to change, including pasture use with greater adverse effects on the wetland, that change would be able to be considered under the NES wetland rules. Currently, pasture wetlands are completely exempt from those rules.

68. This approach would also be more in line with the way that the Proposed NPSIB deals with existing uses in significant natural areas (SNAs). Rather than exclude areas that have existing uses on them from being defined as SNAs, the NPSIB defines as SNAs any areas that have significant values (in accordance with the relevant criteria). There is then provision for managing existing uses in those SNAs, to allow for current uses to continue, in a way that doesn't intensify the adverse effects on the SNA. In our view this is a more appropriate approach, which is more in line with case law, and which appropriately still recognises that the SNA areas have values present. Our alternative approach would similarly recognise that wetlands, while being used for pasture, still retain values. Those values need to be considered if land use change is proposed.

Relationship with the NPSIB

69. Forest & Bird understands MfE's intention is that the NPSIB will not apply in wetlands, and that the NPSFM and NESF will instead. However, this is not clearly expressed in the NPSIB. Clause 1.3 states that the NPSIB applies to indigenous biodiversity throughout Aotearoa New Zealand, other than indigenous biodiversity in the coastal marine area and 'aquatic indigenous biodiversity'.

70. The term 'aquatic indigenous biodiversity' does not appear to be defined in either the NPSIB or the NPSFM. The NPSIB does define 'terrestrial environment', which excludes land covered by water, water bodies and freshwater ecosystems, 'as those terms are used in the NPSFM 2019'. It is unclear whether that is intended to limit wetlands to only those that meet the 'natural wetland' definition. In any case, 'terrestrial environment' isn't used elsewhere in the NPSIB in a way that clearly elucidates the intended application of the document. Given the specific mention of the restoration of wetlands in NPSIB clause 1.(2)(c), it is presumed that wetlands are otherwise excluded from the NPSIB. (The precise exclusion would depend on how aquatic indigenous biodiversity is defined however.)

71. This creates a real risk for species that might be considered 'aquatic' but that spend some of their life cycle on land. They will not be covered by the NPSIB as proposed, but, when on land, will also not be protected by the NPSFM. We will deal with this more fully in our submission on the NPSIB, but in brief, Forest & Bird submits that the application of the NPSIB should be described in terms of physical area, rather than in terms of aquatic biodiversity. The NPSFM will continue to apply to freshwater, and the NPSIB would apply to terrestrial environments.

72. The effect of the split between the two pieces of national direction is that an SNA that comprises part wetland and part land will be governed partly by the NPSFM/NESF provisions, and partly by the NPSIB SNA provisions. Two different regimes will apply to any consenting decisions; this is discussed further in relation to the proposed consenting pathways.

73. As discussed, the current NPSFM approach excludes pasture wetlands from the natural wetlands definition. So, wetlands in pasture, even where they were surrounded by an SNA, would not be able to be considered in a consent application to, for example, develop the whole area for housing.

74. That is because if a wetland in pasture met the exclusions in the NPSFM definition, it would not count as a natural wetland, so none of the rules of the NES would apply. However, it also wouldn't benefit from any of the provisions under the NPSIB, because of the 'aquatic indigenous biodiversity' exclusion. So, a wetland in pasture that had significant biodiversity values would be shut out from the national direction under the NPSFM/NESF and also the national direction on indigenous biodiversity. This cannot be an outcome that supports the purpose of the Act.

75. In terms of pasture use, as discussed, the NPSIB envisages that there will be SNA areas that are also used for pasture (cl. 3.17). Existing uses are provided for in that circumstance, within parameters that protect the SNA. Under Forest & Bird's approach, a similar approach would apply to the wetland part of the area. Then, if land use change was contemplated for

an area that was part 'terrestrial SNA' and part pasture wetland, the values of the whole area would be able to be considered as part of a consent application.

76. It is crucial that, when a new or intensified activity is considered (such as an activity being provided for under the new or existing consenting pathways), the values of the entire area are able to be considered – whether they are wetland values, or terrestrial SNA values. Forest & Bird's approach will allow this to occur, while still providing for existing pastoral use of wetlands to continue.

77. We discuss the broader issue of which policy framework should apply when considering consent for activities in a wetland surrounded by a terrestrial SNA below, in the discussion of the consenting pathways.

78. **We therefore seek the removal of the pasture exemption from the definition of 'natural wetland', and the insertion of a permitted activity and discretionary consent requirement as described above.**

DEFINITION OF NATURAL WETLAND – MfE's proposed changes

79. The proposed amendments to the definition of 'natural wetland' are discussed in this section. As above, **Forest & Bird submits that pasture use should be dealt with by way of the rules, rather than the natural wetland definition**.

80. **However, if the Minister is determined to retain the current approach, Forest & Bird submits that the amendments discussed below need to be made.**

81. We also note that the permitted activity standard set out above is based on the pasture exclusion in the natural wetland definition; our comments below explain the permitted activity standards sought above.

Amendment 1A – replacing 'improved pasture' with 'pasture'

82. Forest & Bird previously submitted against the deletion of 'improved pasture.' In our view, the definition of 'improved pasture' was clear, and did not require additional layers of interpretation. We were also concerned to ensure that the exemption only applied to areas that were deliberately being used for pasture. Forest & Bird, and others, were concerned that wetland areas colonised by pasture species would now be excluded from the definition. We remain of the view that, in the context of managing this activity by way of a definition, the improved pasture requirement was an important part of ensuring that only pasture that was being actively used was provided for.

83. MfE answered this concern by saying that the requirement to be in 'pasture' will mean that areas of wetland that have been invaded by pasture species won't be unnecessarily caught by the exemption.[38] MfE also stated that there is no need to define 'pasture', 'as this will be achieved by incorporating by reference a list of pasture species into the NPS-FM'.[39]

84. This reasoning does not work. On the one hand, MfE has said that the requirement to be in pasture is a limit on the possible use of the exemption, in that only areas in pasture will be caught (and not other wetland areas that have been invaded by pasture species). On the other hand, MfE have said that pasture will be defined by reference to the exotic pasture

[38] Report, pg 13, and repeated at pg 22.
[39] Report, pg 15.

species list. This interpretation means that any area, including areas not currently being used for pasture, but that have 50% dominance of the listed species, will be excluded from the natural wetland definition.

85. Despite our misgivings about the reasoning behind this change, **we accept the deletion of improved pasture only if the pasture species list remains appropriate, specifically, that it does not include any pasture species that have wetland indicator ratings of FAW or OBL, and that it does not include pasture weeds that have little forage value.**

86. However, if the species list is to change, we submit that the improved pasture definition will need to be reinserted.

87. We also note that the 'improved pasture' definition is now proposed to apply in respect of providing for existing pasture use in SNAs under the NPSIB. Careful consideration will need to be given as to the relationship between those two documents.

Amendment 1B – delete 'at the commencement date'

88. Forest & Bird submitted against this proposal, principally because of enforcement concerns. We note that the National Wetland Trust supported the removal of 'at the commencement date' if an alternate baseline was given. MfE agrees that the 'baseline can and should be at any time prior to the activity'.[40] However, MfE goes on to state that they 'do not recommend defining this to allow councils to apply their own discretion and tools to assess previous wetland state on a case by case basis.'

89. We see a very real risk that the clause will be interpreted as applying at the time the enforcement action is taken – by which time the wetland may have been degraded to the point where it no longer meets the definition of natural wetland, and therefore none of the rules can apply.

90. Even if it were interpreted to apply as at some point before the activity, it is still very uncertain as to when the definition would 'bite.' What would the outcome be if there was evidence that a wetland met the definition at one point in time, but didn't at another? The definition is not clear as to what the outcome should be. Without some kind of time reference in the definition, this would create a new layer of uncertainty.

91. We also note that in response to submissions that removal of the commencement date would incentivise degradation, MfE states that the NES rules make it very hard to wetland degradation to occur. This does not make sense – the rules will not apply if a wetland is exempted by way of the definition. Again, this shows a worrying misunderstanding of how the NPSFM and NES provisions work.

92. National direction should clarify questions like this, not simply leave councils to figure it out on a region by region basis. This inevitably will mean that uncertainty will prevail until the Environment Court decides the matter eventually. This is inappropriate.

93. Given the problems highlighted by MfE with backcasting, **we accept the deletion, but submit that further work needs to be done on ensuring that this clause is still enforceable without the 'commencement date' reference.**

[40] Report, pg 16.

Amendment 1C – replace 'is dominated by …' with 'has ground cover comprising more than 50% pasture species' and incorporate by reference into the NPSFM a national list of exotic pasture species

94. As set out in our previous submission, and previous communications with the Minister, Forest & Bird remains concerned that the exclusion of wetlands from any protections simply because they are dominated by exotic pasture species could be contrary to s6(c) RMA. That is because the exotic-dominated wetland could still contain significant biodiversity values, which are required to be protected. That concern would be dealt with, at least for new or intensified activities, by providing for pasture use by way of the rules (as described above) rather than the exclusion to the definition.

95. In that regard, we highlight here another misunderstanding evident in the 'Report recommendations', of how the exclusion works. In answer to a concern that ecologically significant wetlands outside pasture could be excluded from the definition because of the proposed reference to 50% dominance of exotic species, MfE states:

> 'We also note that for those cases where ecologically significant wetlands exist, clause 3.23 of the NPS-FM requires these to be mapped. These can then be protected through more stringent rules in regional plans.'[41]

96. If wetlands are excluded by operation of the pasture exemption, they will not be mapped, nor will they be subject to any of the NES rules. That is simply because they will not qualify as 'natural wetlands'. As discussed above, that is a significant problem with the definition approach rather than managing the activity via rules – it excludes wetlands in order to provide for an existing use (i.e. pasture use), but in doing so it removes the NES protections from any other uses.

97. The report goes on to note that some ephemeral wetlands will be excluded, and that 'this is unavoidable in the context of continuing use of pasture for grazing'.[42] We strongly disagree that this is unavoidable. Further, the exclusion of ephemeral wetlands from the natural wetland definition goes much further than simply providing for existing pastoral use. It removes all of the protections of the NES and the Stock Exclusion Regulations from those wetlands. This would be improved by adopting the alternative approach set out above.

98. That said, **Forest and Bird supports this change, with the proviso that the species list remains appropriate.** It will reduce a lot of ambiguity with applying the definition.

99. The integrity of the list of exotic pasture species is crucial to ensure the definition captures the most appropriate areas. In that regard, we strongly support the current contents of the exotic pasture species list.

100. **That the list does not contain pasture species with wetland indicator ratings of FACW or OBL is critical**. Not only does this give greater assurance that the areas excluded from the definition are more 'wet pasture' than 'wetland, it also ensures that the definition does not contradict the vegetation tests in the delineation tool. **It is also crucial that the list does not include pasture weeds that have little forage value.** As such, we support the list.

[41] Report, pg 22.
[42] Report, pg 22.

101. However, we submit that the list would be improved if **lotus and Chewings fescue were removed** from the list. These are not common components of pasture but are indicative of more productive wetland classes such as swamps, marshes and seepages.

102. We also **strongly support the clarification that the standard is 50% of ground cover**. This is ecologically more appropriate and will remove ambiguity.

Amendment 1D – remove 'and is subject to temporary rain-derived water pooling'

103. Forest & Bird **supports the removal** of this requirement. It will remove the contradiction between the pasture exclusion in the definition and the hydrology wetland delineation tool, identified by the Environment Court in *GWRC v Adams*.[43]

104. However, we have some questions about how the delineation protocols will apply. MfE has said that the phrase 'temporary rain derived pooling' is no longer necessary, given that the wetland delineation protocols now include a hydrology component. It also appears that MfE assumes that the delineation tools will also be available in the context of enforcement action:

> **Reduced ability to take compliance action against wetland loss**
>
> We note that the absence of a commencement date does not prevent regional councils from using best available information to prove illegal activity has taken place to destroy or damage a wetland. In the absence of a commencement date, all sources of information can be used (as above). The Wetland Delineation Protocols can be used to establish the spatial extent of a wetland area when vegetation is no longer visible via the soil and/or hydrology tools.[44]

105. This appears to assume that the wetland delineation protocols will apply as a quasi-part of the definition. However, that is not how the provisions of the NPSFM work.

106. According to the NPSFM provisions, the wetland delineation protocols will only apply when the regional council is undertaking mapping. That is because the delineation protocols are only mentioned in clause 3.23, which is headed 'Mapping and monitoring natural inland wetlands'. The first 5 subclauses in 3.23 deal with mapping, and the final one deals with monitoring. The plain interpretation of this clause is that it will apply when the regional council is undertaking the mapping exercise required by 3.23(1). As part of that mapping exercise, a council must only 'have regard' to the protocols in case of uncertainty or dispute. This is not a mandatory standard.

107. According to these provisions, a consent applicant, or a decision maker in a consent application, would arguably not be required to have regard to the protocols (let alone apply them mandatorily).

108. If MfE's intent is to have the wetland protocols apply in all cases of uncertainty or dispute (and not only when that arises in the course of a council's mapping exercise), that should be made clear in the NPSFM. Possible solutions include amending cl. 3.23(3) to make it clear that the delineation tools apply in all cases of uncertainty, whether that arises in the course of the council's mapping, or in the course of consenting and enforcement matters. Given that cl. 3.23 deals with the mapping exercise, it may be clearer to include a new

[43] [2022] NZEnvC 25 at [135].
[44] Report, pg 17.

provision outside of cl. 3.23 to cover the non-mapping uses of the protocols. Consideration should also be given as to the relevant standard for the protocols – should they be 'had regard to', or applied in a more directive way?

109. We have received ecological advice that other aspects of the delineation tools may conflict with the pasture exemption (i.e. in addition to the Court's comments in respect of hydrology in *GWRC v Adams*). The relationship between the definition of natural wetland and the delineation tools would be clearer if the definition did not include the pasture exemption, and existing pasture use was instead dealt with by way of a permitted activity, as discussed above.

Amendment 1F – provide for the protection of threatened species by disapplying part (d) where threatened species are known to be present

110. Forest & Bird submitted that the pasture exemption itself needed an exemption, where the area had values required to be protected under s6(c). We also submitted, more narrowly, that such an exemption was required at least for threatened species (a subset of s6(c)), to bring the definition into line with other provisions of the NPSFM, and also the Stock Exclusion Regulations.

111. As such, while we maintain that a wider exclusion for s6(c) values is more appropriate, we **support the proposed change to disapply (d)** where there are threatened species present, and submit that **this should be extended to (at least) At Risk species**.

112. We do have concerns about how this would be effectively applied and enforced. The standard is that the wetland is 'not known to' contain threatened species. It is unclear who has to 'know' – if a farmer doesn't know that a threatened species is present, and undertakes works in the wetland without the required consent under the NES, what enforcement issues arise?

113. We wish to stress however, given the importance under the RMA of ensuring that appropriate protections are in place for indigenous biodiversity (and the coherence issues as set out in our previous submission, it is crucial that this exemption is not abandoned because of enforcement issues with the current drafting. We therefore submit that the clause should contain the simpler standard of **'does not contain threatened or risk species'**. This would at least reduce the uncertainty where a council wanted to undertake an enforcement action.

114. The initial problem of whether a landowner knows a threatened or at risk species is present could at least partially be improved by making it clear that a landowner could access free advice from the regional council, to help ascertain whether this exclusion applies.

Ephemeral wetlands

115. Forest & Bird previously wrote to the Minister about the problems of the pasture exclusion and the likelihood that important ephemeral wetlands would be missed from the definition. That risk remains. The inclusion of the threatened species provision will help to capture ephemeral wetlands, but only those with threatened species in them. Ephemeral wetlands will continue to be poorly served by the definition. As such, if the pasture

exemption is to remain in the natural wetland definition, **we seek a further exemption from it for ephemeral wetlands:**

> (d) a wetland that
> …
> <u>(iv) is not an ephemeral wetland</u>

116. Ephemeral wetlands are a wetland class described by Johnson & Gerbeaux (2004), which could be referred to if any explanation is required.

Other amendments to the 'natural wetland' definition

Amendment 1E – clarify what is a 'wetland constructed by artificial means'.

117. We support the intent to include as natural wetlands, wetlands that have been constructed to offset impacts on, or restore, existing or former wetlands.

118. However, the reference in (a) to the 'effects management hierarchy' is too narrow. Wetlands that have been created or restored as part of an offset or other effects management tool prior to the effects management hierarchy coming into force should be captured by the definition. Because 'effects management hierarchy' is a defined term, the way that the clause currently works is that anything created for the same reasons, but before 2020, will not have NPSFM/NES protection. The difference in protection is not justifiable.

119. As such, **clause (a) needs to be amended** as follows:

> a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland ~~as part of giving effect to the effects management hierarchy~~

120. In respect of (b), we had understood that it was the intent to ensure that induced wetlands were included as natural wetlands, given the many values that they often have. Clause (b) will operate to exclude many induced wetlands from the definition. As such, we question whether it is appropriate at all, and may need to be deleted. If it is to remain, it needs amendment to lessen the likelihood that significant wetlands are not excluded.

121. Forest & Bird acknowledges that it may not be appropriate to capture small wetlands that can occur on the margins of constructed farm ponds, water races, and watercourses. These are often dominated by exotic vegetation, but can commonly include indigenous sedges and rushes. However, more extensive indigenous-dominant wetlands have developed on the margins of lakes constructed for hydroelectricity generation, for example in relation to the hydro-lakes along the Waikato River, and provide habitat for diverse and abundant populations of indigenous plants, fish, waterfowl, and invertebrates, and the revised clause (b) would also exempt these from having natural wetland status. These larger wetlands should not be exempt, and a further revision is warranted to ensure that these wetlands are classed as 'natural wetlands'.

122. Wetlands commonly develop on the margins of large reservoirs that have relatively stable water levels. In contrast, wetlands do not develop on the margins of reservoirs with strongly fluctuating water levels.

123. **Clause (b) should therefore be amended** to take account of this issue by adding a water body size criterion. A 0.5 hectare size threshold would exempt most farm ponds, but capture wetlands on the margins of larger reservoirs. A revised clause (b) could read:

> A wetland that has developed in or around a deliberately constructed water body that is less than 0.5 hectares in size, since the construction of that water body, or

AMENDMENTS SOUGHT – wetland pasture use, and 'natural wetland' definition

124. Forest & Bird therefore seeks the following changes to the definition of 'natural wetland' in the NPSFM:

> **natural wetland** means a wetland (as defined in the Act) that is not:
>
> (a) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland ~~as part of giving effects to the effects management hierarchy;~~ or
> (b) a wetland that has developed in or around a deliberately constructed water body that is less than 0.5 hectares in size, since the construction of that water body; or
> ~~(c)~~ a geothermal wetland;~~ or~~
> ~~(d) a wetland that:~~
> ~~(i) is within an area of pasture; and~~
> ~~(ii) has ground cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species (see clause 1.8)); and~~
> ~~(iii) is not known to contain threatened species~~

125. Then insert a new **permitted activity standard for pastoral use in natural wetlands** into the NES:

> (a) The wetland is in pasture;
>
> (b) The activity is an existing pastoral use;
>
> (c) The adverse effects on the wetland are no greater in intensity, scale, or character than those associated with the existing use;
>
> (d) The wetland, has ground cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species (see clause 1.8));
>
> (e) The wetland does not contain any threatened or at risk species;
>
> (f) The wetland is not an ephemeral wetland.

126. And an accompanying **discretionary or restricted discretionary activity rule** for pastoral use that does not comply with the permitted activity standard.

127. An **amendment to the mapping requirement in cl. 3.23** would be appropriate to remove the obligation to map any wetlands in which pastoral use was permitted under the NES.

128. An amendment to the **Stock Exclusion Regulations to exempt any wetlands in which pastoral use was permitted under the NES.**

Changes to definition only

129. However, if the Minister is determined to continue the approach of managing pasture use via the definition, and therefore removing all protections from wetlands in pasture, we seek the following changes:

> **natural wetland** means a wetland (as defined in the Act) that is not:
>
> (a) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural wetland ~~as part of giving effects to the effects management hierarchy;~~ or
>
> (b) a wetland that has developed in or around a deliberately constructed water body <u>that is less than 0.5 hectares in size</u>, since the construction of that water body; or
>
> ~~(c)~~ a geothermal wetland;~~ or~~
>
> (d) a wetland that:
>
> (i) is within an area of pasture; and
>
> (ii) has ground cover comprising more than 50% exotic pasture species (as identified in the *National List of Exotic Pasture Species* (see clause 1.8)); and
>
> (iii) ~~is not known~~ <u>does not</u> contain threatened or <u>at risk</u> species; <u>and</u>
>
> (iv) <u>is not an ephemeral wetland</u>

CONSENTING PATHWAYS – Amendments 2 - 7

130. Forest & Bird remains strongly opposed to the provision of more consenting pathways for activities in wetlands. Providing for the pathways amounts to a decision by the Government to lose more of Aotearoa's remaining 10% of wetlands.

131. All of the submission points made previously by Forest & Bird remain valid. Wetlands are one of most degraded and diminished ecosystems, and providing for their further demise for these activities is hard to fathom. We do not agree that providing for these activities and wetland protection can be achieved simultaneously. The provisions of the NPSFM mean that further wetlands will inevitably be lost.

132. The 'gateway tests' offer no assurance that wetland loss will be avoided. The effects management hierarchy can easily be stepped through. The way that offsetting is used in the proposed NPSFM provisions (discussed below), all but guarantees that loss – this is despite the heavy reliance MfE places on offsetting for justifying the changes. The buck stops with compensation – however compensation, in particular without a no net loss requirement, is directly contrary to policy 6, and has no place in wetland management.

133. The proposed pathways, and the policy framework surrounding them, are contrary to RMA s6(a) and (c), as well as s31(b)(iii).

134. They are contrary to the overarching objective and higher order policies of the NPSFM. Te Mana o te Wai applies as a fundamental obligation, and is reflected in the hierarchy of obligations in the sole Objective. That hierarchy prioritises wetland protection. These proposals instead reflect an intent to provide for the third priority first.

135. The proposals are directly contrary to NPSFM policy 6, as well as policies 1, 4 and 9. As noted in our submission, the failings of the effects management hierarchy in terms of the conflict with policy 6 are pre-existing. As set out elsewhere in this submission, amendments must be made to address that to the extent possible. Extending the effects management hierarchy to a far broader range of activities further exacerbates the inconsistency between policy 3.21 and policy 6.

136. It is also simply bad law to make environmental limits, and then change them whenever they actually have an impact. That is the point of limits. They should drive behaviour change, and be a clear line in the sand beyond which further damage is not acceptable. This is supported by the environmental law principle of non-regression: that once made, environmental laws should not be weakened. So much development is now provided with an exemption, it is hard to think of many situations where the original NES rules will still apply.

137. The approach of making limits and then removing them whenever asked gives Forest & Bird little faith in the Government's intention to improve our resource management system, by way of the replacement of the RMA. A central part of that reform is the introduction of environmental limits. If this is how limits are going to be treated, we question whether the reforms are going to be an improvement at all, or simply the business as usual approach that has led to the current biodiversity crisis.

138. Our primary position therefore is that no new pathways should be provided for, and that the effects management hierarchy and offsetting provisions should be improved so that wetlands impacted by infrastructure are protected as far as possible. Further, the definition

of natural wetland needs to be amended so that the NES rules will apply if a change in land use from pastoral use is contemplated.

139. However, we presume that the Government is going to push on with removing the wetland limits for these activities. As such, where appropriate we have suggested amendments below.

140. We also note that there is a disconnect between the policy framework for the NPSIB and the NPSFM. In some instances, the policies that will apply to activities in wetlands are more lenient – this is hard to understand, given the perilous state of wetlands. Where a more stringent policy applies in the NPSIB, that same standard should apply in the NPSFM.

The 'gateway tests' are not real tests, and provide little assurance

141. As submitted previously, the gateway tests (parts of which are proposed to apply to each new pathway) give little assurance that wetlands will be appropriately protected.

Necessary

142. In terms of the 'necessary' test, again we note that this is more in the nature of an information requirement for the consent applicant. It is not a true test in that it will be almost impossible for a submitter to refute, and it is unlikely in our experience that a regional council will have the resources to delve into this issue in any depth.

National or regional benefits

143. In terms of the 'significant national or regional benefits' test that applies to mining and quarrying – again, this will be easy to meet. Most large scale development is likely to be able to claim some kind of regional benefit.

144. There is also no guidance on how to assess these benefits. Does this mean benefits in terms of direct public benefit, or could it extend to the much more indirect benefit to a private company in the hope that economic benefits will flow to the nation/region? The NPSIB contains a much more appropriate standard, that of significant public benefit'. That more clearly sets out the situations in which wetland damage or destruction might possibly be justified.

145. We make further submissions about this test in respect of both mining and quarrying below.

Functional need

146. The functional need test will apply to mining and quarrying. Functional need is defined in the NPSFM as 'the need for a proposal or activity to traverse, locate or operated on a particular environment because the activity can only occur in that environment'. For mining and quarrying in particular, the test provides very little assurance that the activity an appropriate trade off for wetland damage or destruction. A prospective quarry or mine operator would not apply for consent to mine or quarry in a wetland area that didn't contain aggregate or minerals.

147. Functional need and operational need were discussed in the Report:

> Current guidance issued by councils states that these assessments have been based on analysis of whether the location in which the specified infrastructure is proposed is necessary to its function, or whether that infrastructure could be located elsewhere and retain its

> function. Broader rationales for the activity to occur in the location (eg, financial considerations, private ownership), are considered to constitute operational need.[45]

148. In the Mt Messenger case, the Environment Court found that the 'functional need' test in NPSFM cl 3.22 was met in the following way:

> There is a functional need for it to occur in this location identified after consideration of options in the route designation process and adverse effects of the activity have been managed through the effects management hierarchy as we have previously identified.[46]

149. This appears to broaden the functional need test from one of strict need, to include consideration of effects management and alternative options. Again, the functional need test is almost impossible for a submitter to refute (or a council), and is even more so if broader considerations are interpreted to be part of that test.

150. We strongly support MfE's decision not to include the 'operational need' requirement for any of the consenting pathways.

151. However, we note that the 'functional need' test may be being applied more broadly than MfE anticipates. This adds to our view that the functional need 'test' is not a true test, it is more in the nature of an information requirement on consent applicants. In the case of quarries and mines, it is hard to see how it would ever *not* be met.

No practicable alternative location for the activity, or every other practicable location would have equal or greater adverse effects on a natural inland wetland

152. The test proposed to be applied to urban development and landfills/cleanfills is:

> there is either no practicable alternative location for the activity, or every other practicable location would have equal or greater adverse effects on a natural inland wetland; and

153. The High Court in *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 referred to a Supreme Court judgment that found that 'practicable' must take its meaning from the context.[47] In this context, the test is being put forward as an alternative to the 'functional need' test, because MfE is of the view that the functional need test would be too difficult to pass for urban development and landfills. Therefore, something more lenient than functional need is envisaged.

154. The High Court in *Tauranga* confirmed that cost is a factor in assessing 'practicability'.

155. MfE states:

> In our view, operational need is a considerably broader test than functional need. While making the test operational need would provide a solution to the interpretation issues with functional need, it would also significantly weaken the test. We consider that technical and operational characteristics can be interpreted too broadly and may compromise the policy

[45] Report, pg 34.
[46] *Waka Kotahi New Zealand Transport Agency v Manawatū-Whanganui Regional Council* [2020] NZEnvC 192 at [314].
[47] *Wellington International Airport Ltd v New Zealand Air Line Pilots Assoc IUOW Inc* [2017] NZSC 199, [2018] 1 NZLR 780

> intent by enabling an activity due to financial considerations or convenience, rather than providing for the activity only as absolutely required.[48]

156. We support MfE's intent to limit the policy to a more narrow range of considerations than operational need. However, by bringing in a standard of 'practicable', at least cost has been imported into this test. In our view, it isn't clear that there is a significant difference between the 'operational need' and 'practicable' tests.

157. Further, in our experience, for a submitter or decision maker to effectively engage on matters of relative cost to a consent applicant is extremely difficult, if not impossible. Essentially what this test requires submitters and decision makers to prove that there is another alternative that would be less costly (among other considerations). Submitters typically don't have access to the kinds of information that this investigation requires. Because this is so difficult, this is another so-called gateway test that will do little to prevent wetland destruction.

158. We support the intent to avoid causing equal or greater adverse effects on a wetland elsewhere. Again, however, this will be a difficult test for a submitter or decision maker to effectively engage with. It will require in depth knowledge of the relative values of other potential locations for the activity – including the values of any wetlands present, the likely effects relative to the effects in the proposed location, and also the already mentioned cost (and likely other) considerations.

159. This test appears to be moving back towards an overall balancing approach. This is out of step with case law (following *King Salmon*), and is inappropriate in this context. This operates as an exemption to an environmental limit, and as such, should be as tightly constrained as possible.

160. In our view therefore, this test should instead be one of 'possible'. This would mean that if another alternative is technically possible, without consideration of cost, then the gateway test would not be met. That would better reflect MfE's intent to provide for the activity 'only as absolutely required'. As such, **the test should read:**

> there is either no ~~practicable~~ possible alternative location for the activity, or every other possible ~~practicable~~ location would have equal or greater adverse effects on a natural inland wetland; and

Conclusion

161. Given the likely ease with which the so-called gateway tests in pol. 3.21 will be passed, the key provision in determining whether wetland loss can occur will be the application of the effects management hierarchy, as defined in the NPSFM.

162. We have made submissions previously, and also below, about the need to improve the effects management hierarchy if it is to provide any sort of effective protection for wetlands. **Given the ease with which the gateway tests will be passed, it is imperative that the effects management hierarchy is amended, so that it can provide more appropriate protection to wetlands. This includes the deletion of compensation.**

163. The above comments on the gateway tests apply to each of the consenting pathways discussed below.

[48] Report, pg 34.

Relationship between the NPSIB and NPSFM/NES

164. As discussed above, it appears to be the intention that within a wetland, the NPSFM/NES will apply, but outside a wetland, the NPSIB will apply.

165. That means that where an SNA includes terrestrial areas and a wetland, different regimes will apply. If a proposed development affected the whole area, consent will be needed under both the NES and the eventual SNA rules. While that is a natural consequence of the NES rules having been enacted, what is hard to understand is the more lenient approach taken to wetland damage than terrestrial SNA damage.

166. Both the proposed changes to the NPSFM/NES, and the proposed NPSIB, include exemptions to the standard regulatory framework for certain activities. As will be set out in more detail below, some of the exemptions in the NPSFM/NES are more lenient than those in the NPSIB. This difference is unjustifiable, particularly where a natural wetland has significant biodiversity values. A terrestrial area with significant biodiversity values may be better protected from destruction than a wetland area with similar values. Even where a wetland does not quite meet the 'significance' test, given that a mere 10% of Aotearoa's wetlands remain, it is very hard to understand the rationale for making it easier to destroy a wetland than a terrestrial environment.

167. Forest & Bird submits that if the consenting pathways are to proceed, they must be as tightly defined as possible. The policy framework in the NPSIB contains some more appropriate tests for the careful consideration of the biodiversity. These are discussed below for each pathway.

168. We also submit that where a wetland forms part of an area covered by a terrestrial SNA, the policy framework of the NPSIB may be more appropriate to apply. The NES rules would still apply, but the relevant policies that would need to be considered by the decision maker would be those under the NPSIB, not the NPSFM. This would provide a more coherent and integrated approach to managing biodiversity. It would also be the same as the approach to wetlands in the coastal marine area: while the NES rules apply, the relevant national policy that applies is the NZCPS.

Amendment 3 – quarrying

169. Forest & Bird previously submitted that we could accept a consenting pathway for quarrying, provided that the natural wetland definition was improved, and the effects management hierarchy was improved to remove compensation and make robust offsetting principles mandatory. Our primary position was that no new pathways should be provided for. That remains our position.

NPSIB test should be adopted

170. We note that the NPSIB has a slightly different test for its quarrying exemption (in cl. 3.11):

> aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved domestically;

171. We submit that this additional consideration is appropriate to apply in the NPSFM. There is no clear policy rationale for applying a more lenient standard to potential wetland clearance as compared to damage to terrestrial SNAs.

172. We note the more lenient standard in the NPSIB of 'operational need'. We would not support that standard being brought into the NPSFM, for the reasons discussed above in relation to operational need. This would bring a wide range of considerations into the consenting decision, and would be more likely to lead to wetland loss.

Exemption must be more tightly defined

173. We also note the discussion in both the Report and the policy document around ensuring that *only* quarrying itself is provided for, and not also ancillary activities. We strongly support the intent evident in those documents to limit the pathway to the quarrying activity that is locationally constrained. Any exemptions to the protections afforded by the NES rules should be as tightly constrained as possible, while still allowing for the possibility for the aggregate to be removed (noting our primary position that the NES rules should continue to apply).

174. We note the explanation that this will be achieved by the functional need test. We therefore support the limitation in 3.21(1)(d)(iii) to 'the extraction of the aggregate'. However, in our view there is a real risk that that level of nuance will not be applied in the course of consenting. We think it is at least possible, if not likely, that the quarry will be considered as a whole, rather than in the segmented way envisaged by MfE.

175. That is exacerbated by the ambiguity in (i), which refers to expanding or developing a quarry. There is room in (d)(i) to interpret this to provide for activities ancillary to the extraction itself. The provision is aimed at the quarry, rather than precisely at the extraction itself. 'Expanding or developing a quarry' encompasses a much wider range of activities than simply the extraction of aggregate.

176. Clause (d)(i) therefore needs to be made clear that it only applies to extraction. It is much clearer to state in the policy exactly what is provided for, rather than hope that the functional need test might do that job instead.

Relief sought

177. As such, Forest & Bird **seeks the following amendments to 3.22(1)(d)**:

> (d) the regional council is satisfied that:
>
> (i) the activity is for the purpose <u>of</u> <u>extraction of aggregate only, whether this is in a new or expanded quarry</u> ~~of expanding an existing, or developing a new, quarry for the extraction of aggregate~~; and
>
> (ii) extraction of the aggregate will provide significant national or regional <u>public</u> benefits <u>that could not otherwise be achieved domestically</u>; and
>
> (iii) there is a functional need for the extraction to be done in that location; and
>
> (iv) the effects of the activity are managed through applying the effects management hierarchy; or

Amendment 4 – landfills and cleanfills

178. Forest & Bird **strongly opposes the provision of an exemption for landfills and cleanfills**. The reasons for this were set out in our previous submission, and are repeated here.

179. Landfills are known for leaking toxic leachate and particulates from polystyrenes and plastics into nearby streams to levels sometime deadly to fish life, they are also known for the excess methane that they emit through the decomposition of organic amongst inorganic waste.[49]

180. According to advice from the Climate Change Commission, the direction of travel for New Zealand is to "reduce the amount of waste generated" as this is a "key part of the circular economy" as this will be crucial in meeting climate targets as excessive methane is emitted from landfills. [50]

181. The Climate Change Commission has advised the current and future Governments that the next three budgets must "[d]ivert organic waste from landfill [and i]mprove and extend landfill gas capture, [such that t]otal organic waste to landfills is almost halved by 2035 alongside major expansion of landfill gas capture."[51]

182. The Climate Change Commission has also advised the Government to "provid[e] consistent signalling across investment, policy statements, direction to officials, internal policies and directives to ensure that all regulatory and policy frameworks and decisions are aligned with low emissions and climate resilience objectives." (Rec 9)

183. The recommended changes to the NES to allow for a pathway for new landfill creation is contrary to the Commission's advice and will inhibit the country's ability to meet its agreement on reducing greenhouse gas emissions, as well as become a detriment to the indigenous flora and fauna that are found in or frequent the catchment.

184. The Report noted that non complying status was considered for this activity, which would better align with the Waste Minimisation Act. It is also more appropriate to signal that our remaining wetlands should not be destroyed or damaged without an extremely good reason**. If this pathway proceeds, we strongly support this activity being non-complying.**

185. We again note a worrying misunderstanding of the NES rules, evident in the policy document, which states that because of where landfills etc are usually located, they:

> are effectively prohibited due to the lack of a consent pathway, and due to regulation 53 of the NES-F (which provides a prohibited activity status for activities which do not have another status under the NES-F).[52]

186. This is incorrect. Activities which are not otherwise provided for in the regulations are governed by reg. 54, which is non-complying rule. They can be consented if they meet the appropriate tests. Again, as noted above, works in the margins of wetlands are also able to be consented under the non-complying rule in reg. 52. The only activity that is prohibited is work *within* a wetland. These errors give little assurance that a robust analysis has actually been undertaken before simply providing these extra consent pathways.

187. We support that the NPSIB does not provide an exemption for fills, and submit that it makes no sense to provide for the destruction of wetlands in this way.

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[49] https://www.stuff.co.nz/environment/92132386/whats-polluting-our-urban-harbours-and-streams
[50] https://ccc-production-media.s3.ap-southeast-2.amazonaws.com/public/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa.pdf
[51] ibid
[52] Policy document, pg 16.

Relief sought

188. We therefore **seek that the pathway for fills is deleted.**

189. However, if the Government is intent on providing this pathway, we **alternatively seek the following amendments to 3.21(1):**

> (f) the regional council is satisfied that:
>
> (i) the activity is necessary for the purpose of expanding an existing, or developing a new, landfill or cleanfill; and
>
> (ii) the new or expanded landfill or cleanfill will provide significant national or regional public benefits; and
>
> (iii) there is either no possible ~~practicable~~ alternative location, or every other possible ~~practicable~~ alternative location would have equal or greater adverse effects on a natural inland wetland; and
>
> (iv) the effects of the activity will be managed through applying the effects management hierarchy.

190. The activity **should be a non-complying activity.**

Amendment 5 – mining

191. **Forest & Bird strongly opposes a consenting pathway for mining**. It is inconceivable that the Government wants to provide for wetland destruction for the purpose of mining in the current climate crisis.

192. Again, it will almost always easily pass the 'gateway test', as mining can only happen where the minerals are found, and 'regional benefits' will be commonly accepted.

Destroying wetlands to provide for mining in a climate crisis is extremely irresponsible

193. Mineral mining is infamous for the devastation that it leaves in situ and downstream from excavation sites including but not limited to "land subsidence, damage to the water environment, mining waste disposal and air pollution" and this does not include the potential accidents which result in more severe environmental damage.[53]

194. It is well understood that climate destabilisation is due to an excess of greenhouse gases such as carbon dioxide, biogenic methane and nitrous oxide in the atmosphere. It is also well understood that these excess gasses are linked to the human induced activities, namely the burning of fossil fuels, the worst culprit being coal. Climate change commitments by international governments will see a transition away from dependence on fossil fuels in general, starting with coal.[54]

195. The New Zealand Climate Change Commission has provided advice to the current and future Governments that the next two budgets need to focus on replacing coal with biomass and electricity, and has made the specific recommendations that in order to meet the climate targets set internationally, New Zealand would need to "[e]liminat[e] coal use in

[53] Zhengfu, B. et al. Environmental issues from coal mining and their solutions. (2010). HYPERLINK "https://www.sciencedirect.com/science/article/abs/pii/S1674526409601873"https://www.sciencedirect.com/science/article/abs/pii/S1674526409601873

[54] https://www.theguardian.com/environment/2021/may/21/richest-nations-agree-to-end-support-for-coal-production-overseas

commercial and public buildings by 2030, and for food processing before 2040."[55] Even Fonterra has accepted the direction of travel indicated by the Commission's recommendations by committing to end its reliance on coal by 2037.[56]

196. The proposal to allow for a pathway for mining of minerals such as coal to destroy wetlands is baffling given that the best available advice both domestically and internationally are supporting an end to coal.

197. Further to this, we direct the Ministers and ministerial staff to look at Ramsar Briefing Note 10 which outlines from the world's top wetland scientists the carbon storage potential of wetlands in 10 easy to read pages. The top take away is that a wetland in the ground provides carbon storage, the drainage or damage to a wetland or wetland complex contributes to the release of greenhouse gases, as well as the removal of future opportunity to store carbon.[57]

Effects management hierarchy will not adequately manage wetland loss

198. A rationale given in the policy document for providing for mining, is that:

> … mined areas can be rehabilitated or used for other commercial or community activities. As per the other consent pathways, offsets of the lost wetland extent and values would be required under the effects management hierarchy.[58]

199. This is not correct. The effects management hierarchy currently finishes in compensation. **Compensation does not require rehabilitation of the mined area, nor does it require offset of the lost wetland extent**.

200. As long as compensation forms part of the effects management hierarchy, it is disingenuous and simply incorrect for the Government to rely on the effects management hierarchy as providing anything close to an appropriate response to wetland loss. As stated above, **compensation must be deleted from the NPSFM.**

NPSIB provides a more appropriate standard

201. Again we note that the NPSIB includes a test that provides better protection for terrestrial SNAs than is provided for wetlands under the NPSFM. If this pathway it to proceed, it is imperative that this check also applies to wetland destruction for the purpose of mining.

202. MfE agrees with submitters that the NES/NPSFM is not the place to ban mining. Forest & Bird says that it *is* the appropriate place to protect wetlands. The NES rules did that. Departing from those rules needs an overwhelming reason. 'Regional benefits' simply aren't good enough. 'Significant national public benefit that could not otherwise be achieved domestically' is a higher bar, and more appropriate as a justification for wetland destruction. It still provides the possibility for the activity to occur, but within more appropriate boundaries.

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[55] Ibid

[56] https://www.stuff.co.nz/business/farming/126389330/fonterra-reduces-emissions-from-coal-by-11-in-the-last-year#:~:text=Fonterra%20says%20it%20has%20reduced,to%20using%20renewable%20wood%20pellets.

[57] https://www.ramsar.org/sites/default/files/documents/library/bn10_restoration_climate_change_e.pdf

[58] Policy document, pg 19.

The exemption must be limited to extraction

203. We also note that the exemption should be as tightly defined as possible. It should only apply to the extraction of minerals, and not be left open to any possible interpretation that other ancillary activities are provided for. As such, (e)(iii) needs amending to be specific to the extraction only.

204. Again, it is better to be clear rather than hope that the functional need test operates in the way hoped by MfE. In our experience, there is a real risk that the nuance intended by MfE will not be picked up in consenting processes.

Cut-off of 2030 for thermal coal must apply to mining itself, not ability to get consent

205. We note the intent evident in both the Report and the policy document to provide for thermal coal mining only until 2030. While we do not support any provision for coal mining, if it is to be provided for, we support this limit being put on it. This is in line with the Government's 2030 renewable energy goal.

206. However, the wording of NES r.45D(6) does not reflect this intent, as it provides for *consent to be obtained* until 2030. That means the activity of mining itself may continue for decades past 2030.

Relief sought

207. **We therefore seek that this pathway is deleted.**

208. If the Government is determined to proceed however, **we seek the following changes to 3.21(1)(e):**

> (e) the regional council is satisfied that:
>
> (i) the activity is for the purpose of extracting any mineral in its natural state from the land; and
>
> (ii) extraction of the mineral will provide significant national public ~~or regional~~ benefits that could not otherwise be achieved domestically; and
>
> (iii) there is a functional need for the extraction ~~activity~~ to be done in that location; and
>
> (iv) the effects of the activity are managed through applying the effects management hierarchy; or

209. We **seek the following amendment to NES r.45D(6):**

> On and from 1 January 2030, mining for coal, other than coking coal, may not occur. Any consents granted before that date must not have a term that exceeds 1 January 2030. ~~is excluded from the purposes for which consent may be obtained under this regulation.~~

210. If mining is to proceed, **it should be a non-complying activity.**

Amendment 6 – urban development

211. It is hard to imagine what wouldn't be allowed under the idea of 'necessary for the purpose of urban development that contributes to a well-functioning urban environment.' Again, it is not in the nature of a test - it is more akin to an information requirement to be provided by a consent applicant. It will be almost impossible for submitters on that consent

to refute. As such, it provides no assurance that wetlands will not be unnecessarily degraded or destroyed.

212. Urban development does not appear to be defined, other than in relation to a 'well-functioning urban environment'. That term is defined in policy 1 of the NPSUD:

> urban environments that, as a minimum:
>
> (a) have or enable a variety of homes that:
>
> (i) meet the needs, in terms of type, price, and location, of different households; and
>
> (ii) enable Māori to express their cultural traditions and norms; and
>
> (b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and
>
> (c) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and
>
> (d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and
>
> (e) support reductions in greenhouse gas emissions; and
>
> (f) are resilient to the likely current and future effects of climate change.

213. Applying that definition would therefore provide a pathway for wetland destruction for not only housing, but also commercial uses of land, and roads (and possibly a much broader group of activities, depending on how paragraph (c) is applied).

214. In fact, providing for development in wetlands is directly contrary to clauses (e) and (f) of that definition. A well-functioning environment would *retain* its wetlands, for the many biodiversity and ecosystem services they provide. Removing the protections of the NES rules for urban development shows that the Government is not interested in encouraging new ways of development that protect our diminishing natural heritage – instead it is simply providing for the continuation of methods that have led to the loss of 90% of our wetlands. In our view, such a broad consenting pathway is not required in order for the NPSFM to complement the NPSUD.

The effects management hierarchy will not ensure no net loss of wetlands values or extent

215. The policy document once again erroneously justifies wetland destruction on the basis that it will be made up for by offsetting:

> We expect that the NPS-UD, the NPS-FM and the NES-F can work together to incentivise water-sensitive urban design – including avoiding wetlands and increasing density in other areas to ensure similar housing unit yield.
>
> However, we accept that wetland loss may be unavoidable in some circumstances. Offsetting in line with the 'effects management hierarchy' would be required to ensure no net loss of wetland extent or values.[59]

216. This is incorrect. **The effects management hierarchy,** as explained in this submission and previously**, does not require no net loss of wetland extent or values.** That is because

[59] Policy document, pg 23.

the final step in the hierarchy, compensation (as drafted) does not require no net loss. It just requires 'something' – not even related to a wetland.

217. As such, providing for this consenting pathway is a decision to lose more of our wetlands. This is not acceptable.

Urban development can already occur under the NES rules

218. We reiterate here that urban development is an excellent example of development that can work around wetlands. We agree that urban development is clearly necessary in Aotearoa New Zealand, but we disagree that it should proceed on the same basis as it always has. Providing for the urban development exemption means it will be a 'business as usual' approach, whereas this Government has the chance to provide for urban development while still actually protecting our previous wetlands.

219. A concern noted in the MfE Policy document, is that there will be 'hectares lost' from potential urban development because of the NES wetland rules.[60] Given the apparent misunderstanding of MfE of how the rules work (noted in our previous submission), it is very concerning that MfE has proposed removing the NES protections on the basis of this concern. 'Hectares lost' is likely to be a gross exaggeration, when the impact of the rules is actually understood.

220. Again, we repeat that there already is a consenting pathway for activities outside of, but in the margins of, wetlands. What this means is that while wetlands themselves wouldn't be able to be cleared for urban development, works in their margins could already be managed by the existing consent pathway. There is *already a consenting pathway* for:

a. earthworks outside of, but within 100m of, a wetland, and

b. water uses outside of, but within 100m of, a wetland,

under regulation 54. Consent can be sought with a non-complying status. Currently the regulations only prohibit earthworks and water uses *within* a wetland that is likely to result in the complete or partial draining of the wetland (reg. 53).

221. Urban development can and should be designed in a way that retains wetlands. Necessary works near wetlands are already able to be managed by consent conditions, by way of regulation 54. Using the existing NES rules will mean some developments have to redesigned to avoid wetlands – in our view that is an entirely reasonable approach. Providing for wetland loss via these consenting pathways, simply means the continuing unnecessary loss of wetlands.

District plans don't generally consider wetlands

222. We reiterate that zoning for district plans does not generally consider issues or resources that generally are managed by a regional council/plan. As regional councils generally manage 'all things water', a district plan generally will not have considered the implications of various zoning classifications on wetlands. Therefore, relying on district plan zoning provides no additional protection to wetlands. Providing for a consenting pathway on

[60] Policy document, pg 22.

that basis incorrectly creates the impression that wetland destruction is somehow more legitimate than in other areas.

Relief sought

223. As such, we **oppose the consenting pathway for urban development.**

224. If the Government pushes on with this pathway, we submit that it should be much more tightly constrained. In our view, **the pathway should be limited to residential housing only, where it would otherwise be impossible to provide housing on that site.**

225. Our previous submissions about the practicable vs possible alternatives apply if similar drafting is retained as was proposed.

226. We also note the additional requirement regarding long term management of any offsets or compensation. While we don't oppose that concept, in our view it is already captured by principle 7 in each appendix.

Additional amendment sought – 3.22(1)(b)

227. As discussed above, the NPSIB provides helpful clarification about the type of benefit that must be provided by the activities for which a specific consenting pathway is provided. In our view, the requirement of a 'public' benefit should not only apply to the new pathways, but should also be inserted into the existing test for specified infrastructure.

228. As such, **Forest & Bird seeks the following amendment to 3.22(1)(b):**

> (ii) the specified infrastructure will provide significant national or regional <u>public</u> benefits; and

Amendment 7 – water storage as 'specified infrastructure'

229. **Forest & Bird strongly opposes this amendment.**

230. MfE notes that an amendment is needed because water storage facilities tend to be in valleys where there are natural wetlands.[61] Once again, the rationale that an amendment is needed simply because the NES rules might have an effect, is strongly opposed.

231. Adding water storage has not been consulted on previously. The Report includes three brief paragraphs on this issue, and lacks any assessment of whether this is truly necessary. Again, it erroneously relies on the effects management hierarchy to ensure no net loss. The effects management hierarchy will not achieve no net loss. The distinct impression gained from the Report is that the only reason the change is recommended is that the rules *might* have an effect, and submitters asked for a change.

232. The policy document expands *somewhat* on this proposal. Essentially it states that water storage is important for a number of purposes. Forest & Bird does not dispute that. However, there are numerous infrastructure activities that are important – that is why they already have a consenting pathway as part of specified infrastructure.

[61] Policy document, pg 24.

233. MfE has not given any reason why water storage should be treated differently to any other infrastructure. Water storage can go through the regional planning process, as other infrastructure has to do. That planning process allows communities to have a say on what is (and isn't) classed as regionally significant infrastructure. It is unjustifiable to allow for all water storage (including e.g. farm dams) to have this exemption.

234. This pathway lacks any analysis that justifies its inclusion. The activity can already be consented via the specified infrastructure and regional planning process. **Forest & Bird therefore strongly opposes this addition, and seeks its deletion.**

OFFSETTING AND COMPENSATION – Amendment 8

Compensation should be deleted

235. MfE places heavy reliance in the explanatory policy document on offsetting as a justification for allowing wetland destruction. This ignores that offsetting wetlands is an inherently uncertain approach, as set out in our previous submission.

236. It also crucially ignores that the final step in the NPSFM effects management hierarchy is actually *compensation*. Forest & Bird submitted that compensation is a completely inappropriate method to managing wetland values, because it allows the destruction of a wetland in exchange for doing 'something else' – not necessarily even related to a wetland.

237. Forest & Bird remains of the firm view that compensation should not be available as an approach to dealing with potential adverse effects in, or complete loss of, wetlands. It is contrary to the clear requirement to avoid these effects under Policy 6 NPSFM – whether a net or individual approach to that Policy is taken.

238. We therefore still **seek the deletion of aquatic compensation from the effects management hierarchy.**

Principles must be mandatory to be effective

239. We also submitted that if offsetting was to remain under the NPSFM, it needed mandatory principles applied to it, contained in the NPSFM rather than guidance. The same applies if the Minister decides to retain compensation. Ensuring that best practice offsetting (and compensation) principles are applied as a mandatory part of the effects management hierarchy gives some level of assurance that a positive outcome might be achieved. The addition of offsetting and compensation principles to the NPSFM could therefore in theory be seen as an improvement.

240. However, the vague and non-binding way that these principles have been incorporated into the NPSFM seriously undermines any benefit that they bring. This is despite the apparent intention to make the principles mandatory:

> They are based on those in the proposed National Policy Statement for Indigenous Biodiversity (NPSIB). This ensures alignment between the NPSIB and NPS-FM. The principles

> are a mandatory set of best practices specific to aquatic offsets and therefore include biodiversity but also hydrological functioning etc[62]
>
> (underlining added)

241. The principles are also not linked to the effects management hierarchy, again, despite an apparent intention to do so:

> However, we agree with Forest and Bird that there is a need for offsetting principles to be included within the NPS-FM (rather than in guidance). We recommend including, in an appendix to the NPS-FM, principles for both offsets and compensation and linking these to the effects management hierarchy.[63]
>
> (underlining added)

242. This is in contrast with how offsetting and compensation principles are dealt with under the NPSIB. Forest & Bird submits that the current NPSFM drafting around the offset and compensation principles is vague, potentially conflicting, and renders the principles of very little use at all.

243. Mandatory language for offsetting (and compensation) principles is crucial. Without a clear requirement to meet each criterion, the principles lose their potential to shape good outcomes for waterbodies. They become a vague list of things to consider. As each principle will require some effort and likely expense from an applicant, there is a strong incentive to not comply with any of the principles unless absolutely necessary.

244. Requiring adherence to offsetting principles is best practice. The proposed NPSIB requires adherence to the principles. Other recent RMA plans that have been through extensive stakeholder processes take a similar approach: the West Coast RPS, the Otago RPS, the Horizons One Plan (all referred to below). The vague approach evident in the NPSFM is poor planning, and is out of step with recent regional plans.

245. The Government's Guidance on Good Practice Biodiversity Offsetting 2014 document talks about principles in this way:

> Although these three important components are contained in the definition, the BBOP [Business and biodiversity offsets program] has developed ten principles that underpin offset design and implementation and need to be met for a project to be considered a biodiversity offset.[1] (emphasis added)

246. The West Coast Regional Policy Statement uses an approach similar to the proposed NPSIB – namely, it sets out effects that are unacceptable and must be avoided (policy 7.2), and then provides for offsetting in accordance with a set of mandatory principles (policy 7.4). Compensation may then be available if offsetting principles cannot be met (policy 7.5):[4]

> 7.4 Provided that Policy 2 is met, and the adverse effects on a SNA cannot be avoided, remedied or mitigated, in accordance with Policy 3, then consider biodiversity offsetting if the following criteria are met:
> a) Irreplaceable or significant indigenous biological diversity is maintained; and
> b) There must be a high degree of certainty that the offset can be successfully delivered; and

[62] Ministry for the Environment. 2022. *Essential Freshwater Amendments: Report recommendations and summary of submissions: Managing our wetlands: Proposed changes to the wetlands regulations*. Wellington: Ministry for the Environment, pg 36.
[63] Ibid.

c) The offset must be shown to be in accordance with the six key principles of:

….

d) The offset maintains the values of the SNA.

(*underlining added*)

247. The Otago RPS also requires mandatory application of offsetting and compensation principles:

> Biodiversity offsetting is available if the following criteria are met:[64]

248. Similarly, the Horizons One Plan takes a mandatory approach to its offsetting principles:

> An offset assessed in accordance with b(iii) or (c)(iv), must:[5]

Definitions do not refer to the Appendices

249. The principles have not been incorporated into the respective definitions of 'aquatic offset' and 'aquatic offset', so the definitions will prevail in decision making under the effects management hierarchy.

250. The NPSFM definition of 'aquatic offset' makes no reference to the appendix containing the principles:

> **aquatic offset** means a measurable conservation outcome resulting from actions that are intended to:
>
> (a) redress any more than minor residual adverse effects on a wetland or river bed after all appropriate avoidance, minimisation, and remediation, measures have been sequentially applied; and
>
> (b) achieve no net loss, and preferably a net gain, in the extent and values of the wetland or river bed, where:
>
> (i) no net loss means that the measurable positive effects of actions match any loss of extent or values over space and time, taking into account the type and location of the wetland or river bed; and
>
> (ii) net gain means that the measurable positive effects of actions exceed the point of no net loss.

251. In contrast, the NPSIB defines biodiversity offset as:

> **biodiversity offset** means a measurable conservation outcome that complies with the principles in Appendix 3 and results from actions that:
>
> (a) redress any more than minor residual adverse effects on indigenous biodiversity after all appropriate avoidance, minimisation, and remediation measures have been sequentially applied; and
>
> (b) achieve a measurable net gain in type, amount, and condition (structure and quality) of indigenous biodiversity compared to that lost
>
> (underlining added)

252. The two definitions are similar, but the crucial difference is that the NPSIB definition requires adherence to the principles in the appendix. The NPSFM definition is silent on the

[64] Otago Regional Policy Statement, Appendix 3. The same approach applies to compensation in Appendix 4.

appendix, and touches on a small part of the type of detail that should be comprehensively addressed in offsetting principles. This creates a potential conflict between the definition and the principles.

253. Similarly, compensation is defined differently in the NPSIB and NPSFM. In the NPSFM, the definition lacks a reference to the appendix:

> **aquatic compensation** means a measurable conservation outcome resulting from actions that are intended to compensate for any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, remediation, and aquatic offset measures have been sequentially applied

254. Whereas the NPSIB makes clear that the appendix applies:

> **biodiversity compensation** means a conservation outcome that complies with the principles in Appendix 4 and results from actions that are intended to compensate for any more than minor residual adverse effects on indigenous biodiversity after all appropriate avoidance, minimisation, remediation, and biodiversity offset measures have been sequentially applied
>
> (underlining added)

255. The mandatory requirement to apply to principles in the NPSIB gives some level of comfort that the offset action is likely to provide an appropriate trade-off for the values that are lost. It is hard to understand why a different approach has been applied to wetlands.

256. The mandatory references in the NPSIB definitions are also supported in the NPSIB effects management hierarchy, which states:

> The terms 'biodiversity offset' and 'biodiversity compensation' are defined in clause 1.6, and the principles for their application are in Appendices 3 and 4.

257. The NPSFM effects management hierarchy is silent on the appendices.

258. Forest & Bird made comprehensive submissions about the significant issues with the definitions of both aquatic offsetting and aquatic compensation. The definition of aquatic compensation in particular is incredibly loose, and will allow for destruction of a wetland in exchange for 'something else'. Including offsetting and compensation principles in the NPSFM, and not referring to those principles in the relevant definitions makes no sense, and is simply poor drafting. It will create confusion about which standard is to be applied, and will mean the appendices have little to no weight.

259. As such, we submit that **the definitions of aquatic offset (and aquatic compensation if that is to remain) must be amended to refer to the offsetting (and compensation) principles:**

> **aquatic offset** means a measurable conservation outcome that complies with clause (f) of the effects management hierarchy and the principles in Appendix 6 resulting from actions that are intended to:
>
> (a) redress any more than minor residual adverse effects on a wetland or river bed after all appropriate avoidance, minimisation, and remediation, measures have been sequentially applied; and
>
> (b) achieve no net loss, and preferably a net gain, in the extent and values of the wetland or river bed, where:

(i) no net loss means that the measurable positive effects of actions match any loss of extent or values over space and time, taking into account the type and location of the wetland or river bed; and

(ii) net gain means that the measurable positive effects of actions exceed the point of no net loss.

aquatic compensation means a measurable conservation outcome that complies with clause (f) of the effects management hierarchy and the principles in Appendix 7 resulting from actions that are intended to compensate for any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, remediation, and aquatic offset measures have been sequentially applied

Effects management hierarchy needs to effectively incorporate the principles

260. The effects management hierarchy should itself refer to the appendices. This is in accordance with the approach taken in the Otago RPS, policy ECO-P6. This will bring more clarity as to how offsetting (and compensation) works under the NPSFM.

261. The **reference to 'appropriate' in respect of compensation should be deleted.** It begs the question of how that will be judged, and brings in a subjective element. That subjective element contradicts the whole purpose of the compensation principles. It suggests that compensation might be able to be 'appropriate' even though it does not meet the principles. The standard should simply be, whether or not compensation can be provided in accordance with the principles.

262. We also note that **the reference to 'minimise' is out of step with the body of law under the RMA** that is based on a hierarchy of 'avoid, remedy, mitigate'. As such, we submit the more standard approach should be used.

263. Further, **the limits to offsetting must be brought into the effects management hierarchy itself.**

264. In appendix 6 and 7, the limits to offsetting principle is called 'When aquatic offsetting/compensation is not appropriate'. This is an absolutely crucial principle, that sets the parameters for what kinds of effects must be avoided when contemplating offsetting (or compensation). There are two key points about this principle. First: it needs redrafting to operate effectively, and secondly, it should be specifically captured in NPSFM policy, and not left only to the Appendix.

265. The current drafting of this criterion includes a confusing standard of appropriateness and a test of whether values can be offset. In fact what the 'limits to offsetting' principle is intended to do is operate as a simple limit, if certain features are present. Incorporating a test of whether those features can be offset defeats the purpose of the principle, which is to set out situations where offsetting simply won't be available. The reason this principle exists is to safeguard against some of the worst outcomes that can be associated with offsetting – because offsetting is an uncertain management approach, the limits to offsetting principle puts a line in the sand, and says that some things are too precious to apply this approach to. It 'bites' as a prior step, before an offset can even be considered.

266. The amended wording below avoids an argument that a value can still be offset, despite its irreplaceable or vulnerable status. In our experience, this is an argument that consent applicants will use when the wording of the 'limits to offsetting' principle is drafted along the lines of the Exposure Draft. The principle needs to simply state that an offset in that situation is not appropriate.

267. This is in line with the West Coast RPS (policy 7.2 onwards), which sets out the effects that must be avoided as a prior step. Only if those effects are avoided, can consideration of offsetting or compensation be undertaken.

268. We have noted a trend in regional plans/policy statements (e.g. the above provision) towards being more specific for the limits to offsetting principle. Consideration could be given as to how this could work under the NPSFM, noting however that these principles may apply more broadly than only to species.

269. The second point is that it is important to bring the requirement to adhere to these limits up into the policy of the NPSFM itself. This is because of our experience that even where the limits to offsetting principle is clearly expressed as part of a set of offsetting principles, an applicant may still argue that because the principle doesn't apply as a real limit – because the policy provisions don't specifically refer to the limits concept, it has been argued that a limit in an appendix could not prevent a development from proceeding, even where those limits were not met.

270. Two amendments are therefore required. Firstly**, the limits to offsetting need to be incorporated into the effects management hierarchy,** and secondly**, the wording needs to change to become clearer and effective**.

271. If the limits to offsetting are included as part of the effects management hierarchy in the way set out above, then the 'when aquatic offsetting/compensation is not appropriate' principle it can be deleted from the appendices.

272. As such, the following **changes should be made to 3.21:**

> **effects management hierarchy**, in relation to natural inland wetlands and rivers beds, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river bed (including cumulative effects and loss of potential value) that requires that:
>
> (a) adverse effects are avoided where practicable; and
>
> (b) where adverse effects cannot be <u>demonstrably</u> avoided, they are ~~minimised~~ <u>remedied</u> where practicable; and
>
> (c) where adverse effects cannot be <u>demonstrably</u> ~~minimised~~ <u>remedied</u>, they are ~~remedied~~ <u>mitigated</u> where practicable; and
>
> (d) where more than minor residual adverse effects cannot be <u>demonstrably</u> avoided, ~~minimised, or~~ remedied, <u>or mitigated</u> biodiversity offsetting is provided <u>for more than minor residual adverse effects where it is</u> possible; and
>
> (e) where biodiversity offsetting of more than minor residual adverse effects is not demonstrably possible, biodiversity compensation is provided <u>for more than minor residual adverse effects</u>; and
>
> (f) ~~if~~ <u>biodiversity offsetting and</u> biodiversity compensation~~,~~ <u>cannot be used, and</u> the activity itself ~~is~~ <u>must be</u> avoided, <u>where:</u>

(i) the affected part of the natural inland wetland or river bed, or it values, including species, are irreplaceable or vulnerable; or

(ii) the effects on the extent of values are uncertain, unknown, or little understood but the potential effects are significantly adverse; or

(iii) there are no technically feasible options by which to secure no net loss or preferably a net gain within an acceptable timeframe.

(g) Where biodiversity offsetting and biodiversity compensation can be used in accordance with (f), an action must meet the definition of biodiversity offset in clause 3.21 and the principles in Appendix 6, or the definition of biodiversity compensation in clause 3.21 and the principles Appendix 7. If it does not then the action does not qualify as a biodiversity offset or biodiversity compensation and the activity must be avoided

Appendices not required to be applied by either consent applicants or regional councils

273. Under the NPSFM, the principles have very little weight at all. Not only are the definitions of offset and compensation, as well as the effects management hierarchy, silent on the principles, there is also no policy direction for a consent authority to apply them.

274. The only time Appendices 6 and 7 are mentioned in the NPSFM is in 3.22(3)(b). This provision merely requires that a regional council change its plan to ensure that consent is not granted unless '*the applicant has had regard to the principles in Appendix 6 or 7'*.

275. In terms of a consent applicant, all that is required is for the applicant to have had regard to the principles – not even to have applied them.

276. Further, the regional council (or Environment Court on appeal) is not required to apply the principles. Rather, it will be bound to apply the concepts as they are defined in the NPSFM. That means the definitions, with all their vagueness and lack of rigour, will prevail.

277. That is an incredibly weak approach, and does nothing to give assurance around the use of offsetting (or compensation) in respect of wetlands. As such, **clause 3.22(3)(b) must be deleted and replaced with**:

(b) The council is satisfied that, if aquatic offsetting or aquatic compensation is proposed:

(i) clause (f) of the effects management hierarchy; and

(ii) the principles in Appendix 6 and 7;

are met.

Appendices do not use mandatory language

278. The situation gets worse when the pōtai to the respective principles are considered. Under the NPSIB, it is clear that both the offsetting and compensation principles constitute a mandatory framework:

> The following sets out a framework of principles for the use of biodiversity offsets. These principles represent a standard for biodiversity offsetting and must be complied with for an action to qualify as a biodiversity offset.
>
> (underlining added)

279. The NPSFM however, merely states:

> These principles apply to the use of aquatic offsets for the loss of extent or values of wetlands and river beds.

280. Leaving aside that the principles don't in fact generally apply (all that has to happen is that a council is satisfied that an applicant has had regard to them), this is not a clear mandatory standard.

281. This is also contrary to Appendix 1 in MfE's 'Report recommendations and summary of submissions' paper on the NPSFM changes, which stated:

> The following sets out a framework of principles for the use of aquatic offsets. These principles represent a standard for aquatic offsetting and must be complied with for an action to qualify as an aquatic offset under the effects management hierarchy as set out in the NPS-FM.

282. There is no apparent rationale behind the significant differences in approach as between the exposure draft and the 'Report recommendations'. The fact that there is a difference at all (noting that the two documents were released at the same time) suggests a deliberate intent to change the provisions. Forest & Bird cannot find any explanation for this change.

283. **The pōtai to both appendices needs amending in line with the Report.**

Assessment of the offset principles

284. Provided that the offset principles are made mandatory, Forest & Bird supports them, with the amendments discussed below. We do not support compensation as an appropriate approach to wetland loss, particularly in the context of Policy 6. However, if the Minister is determined to include compensation, then Forest & Bird supports there being mandatory principles applied to its use. These must include a no net loss requirement. Where no comment is made on a principle, it is generally supported.

285. We also note that there are some unexplained differences between the principles in the NPSFM and the NPSIB.

286. As mentioned above, the pōtai needs amendment to make clear that the principles are mandatory.

When aquatic offsetting is not appropriate

287. This crucial principle is discussed above with respect to the effects management hierarchy. As stated above, it should form part of the effects management hierarchy, rather than being left to an appendix. Secondly, it needs redrafting to operate effectively – this applies whether our submission on the effects management hierarchy is accepted, or if the principle remains in the appendices. The reasons for this are given above.

288. If the 'limits to offsetting' principle is included as part of the effects management hierarchy in the way set out above, then it can be deleted from the appendices.

289. However, if the limits to offsetting principle is to remain in the appendices, it **needs to be replaced** in both the offsetting and compensation principles with the following:

> Aquatic offsetting/compensation is not available where:

(a) the affected part of the natural inland wetland or river bed, or its values, including species, are irreplaceable or vulnerable; or

(b) effects on the extent or values are uncertain, unknown, or little understood, but potential effects are significantly adverse; or

(c) there are no technically feasible options by which to secure proposed no net loss and preferably a net gain outcome within an acceptable timeframe.

Additionality

290. The wording of this suggests that the relevant gains are limited only to those that are additional to what a consent applicant has undertaken in accordance with previous steps in the effects management hierarchy. In fact, additionality requires that the offset is additional to *any* other gains – whether undertaken by the applicant or any other party (e.g. the Department of Conservation as part of work unrelated to the proposal). **The principle therefore needs to read:**

> **Additionality**: Aquatic compensation achieves gains in extent or values above and beyond gains that would have occurred in the absence of the compensation, <u>including that</u> ~~such as~~ gains ~~that~~ are additional to any minimisation and remediation or offsetting undertaken in relation to the adverse effects of the activity.

Time lags

291. We support this principle, but submit it needs amendment to be effective. The goal with this principle should be that the offset is achieved in the shortest time period required to achieve the best outcome. The way the Exposure Draft principle is drafted will not achieve that. The principle as drafted gives a time limit of the consent period, or a longer period up to 35 years. It does not clearly require the time period to be the shortest appropriate. The use of the word 'minimised' in the principle is not effective to achieve this either. The 'minimised' appears to relate to a choice between the consent period or the longer period up to 35 years. Both are potentially too long.

292. The term of the consent (or 35 years) will sometimes be too long a period to be an effective incentive to achieve the outcome in the shortest time appropriate. For example, if a water permit was granted for 35 years, but no net loss could technically be achieved in a shorter timeframe, this principle does nothing to avoid an inappropriate delay in achieving no net loss.

293. The Otago RPS deals with this issue by first requiring no net loss to be achieved in the shortest time possible to achieve the best outcome, and has as a backstop, the term of consent:

> g. the time delay between the loss of biodiversity and the realisation of the offset is the least necessary to achieve the best possible outcome,
>
> h. the outcome of the offset is achieved within the duration of the resource consent, and

294. Further, these offsetting principles will be able to be applied to activities that could be considered land use activities (e.g. vegetation clearance and earthworks outside of a wetland but within a 10 m setback, rules 45, 47 NESFM), consent for which may be granted

for an unlimited period. In that case, the requirement to ensure no net loss (under the current wording) would never actually engage.

295. The following amendments address those issues, and **this drafting should replace** that in the Exposure Draft:

> **Time lags:** The delay between loss of extent or value at the impact site and the realisation of the offset is the least necessary, and must not exceed the consent period or 35 years, whichever is earlier.

Assessment of the compensation principles

296. If compensation remains in the NPSFM, the above comments, and **amendments sought**, also apply to the aquatic compensation criteria of:

a. When aquatic compensation is not appropriate

b. Additionality

c. Time lags.

Scale of aquatic compensation

297. The principle currently reads:

> The extent or values to be lost through the activity to which the aquatic compensation applies are addressed by positive effects that outweigh the adverse effects.

298. The vagueness of this standard is the crux of why allowing compensation in return for destruction of wetlands does not comply with Policy 6. It suffers from the same problem that the definition of aquatic offset does – namely, it allows that basically any 'positive effects' can be traded for the destruction of, or loss of values in, wetlands. The positive effects don't even need to relate to wetlands (or rivers). The definition simply calls for a 'measurable conservation outcome' – again without reference even to a wetland (or rivers). The problems with this approach were set out in our submission, and they persist even with the addition of these principles.

299. While the other compensation principles put useful parameters around compensation, none of them address the core issue: what is the substance of the outcome that compensation must deliver?

300. At a fundamental level, **an effects management approach that provides for wetland loss, but does not require no net loss of wetland values and extent is contrary to Policy 6.** (This is even on the assumption that any 'net' approach to wetland loss under policy 6 is accepted, which Forest & Bird does not.) This was addressed in our previous submission, and the problem remains. Providing for compensation as the last step in the management of wetland damage or loss, without a requirement for no net loss, means the Government is clearly deciding to contradict its own policy guidance on wetland protection in Aotearoa.

301. We previously submitted that the only circumstance in which compensation could be appropriate is if it included a no net loss requirement. The Government has instead decided to facilitate wetland loss, contrary to policy 6, by way of this vague requirement to 'do something' that will somehow outweigh the loss of value of extent caused.

302. We acknowledge that the common approach to compensation does not require 'no net loss', but instead applies a standard of the compensation being 'at least proportionate to the adverse effect'.[65] However, that approach does not work in the context of clear policy direction to avoid the loss of wetland extent and values.

303. As submitted above, the facilitation of wetland destruction is the reason that Forest & Birds remains of the strong view that compensation should be deleted from the effects management hierarchy in the NPSFM. If the Minister persists in the view that compensation has a place in managing our last remaining 10% of wetlands however, then this **principle needs to be amended**:

> **Scale of aquatic compensation:** The values and/or extent to be lost through the activity to which the compensation applies must be addressed by positive effects <u>that result in no net loss, and preferably a net gain, of impacted values and/or extent. No net loss and net gain are measured by the type, amount and condition, using an explicit loss and gain calculation.</u>

304. **If this change is not made, compensation cannot be used in the NPSFM, and must be deleted.**

Trading up

305. Although this principle is no longer in common usage, we do not oppose its inclusion.

306. We strongly support the intent to avoid any losses to Threatened or At Risk species or to species considered vulnerable or irreplaceable.

Financial contributions

307. Providing for financial contributions undermines any value that compensation may have as a means to addressing effects on or loss of extent and values. Simply paying someone an amount of money does nothing to actually address the residual effects caused by the activity. To Forest & Bird's knowledge, this principle is no longer used (and does not feature in the recent West Coast RPS, Otago RPS or Horizons One Plan.)

308. Aquatic compensation is to be applied as part of the effects management hierarchy, which will be applied at the time consent is sought. Ideally (if the changes Forest & Bird seeks are made) it will be applied in a mandatory framework, by the regional council when making that consent decision. If consent is granted, it will subject to conditions that apply the effects management hierarchy (clause 3.22(3)(i)). Where compensation is applied, that would translate to detailed conditions on the consent holder to undertake the actions set out in the aquatic compensation proposal. The point of those consent conditions is to ensure that the compensation happens, and if it doesn't, remedies exist under the RMA to address the non-compliance.

309. However, we cannot see how the compensation proposal would be enforced if an applicant is merely paying someone. Who would the contribution be paid to? And how would the provisions of the NPSFM apply to that person? The consent granted to the original applicant could not bind a third party.

[65] West Coast RPS, policy 7.5(b).

310. Would there need to be a separate consent that applied only to the person who was undertaking to provide the compensation? And how would that be factored into the original consent decision – would they need to be applied for and decided contemporaneously, so that the decision maker could actually be sure that the principles would be met?

311. This provision has so much uncertainty inherent in it. This is unacceptable in the context of what is being traded off – the loss of wetland values and extent. Compensation is already a very risky approach for wetlands – all this does is increase that risk even more. **This provision should be deleted.**

Uncertainty as to how offsetting and compensation work for broader values

312. In our view there is still uncertainty as to the role of offsetting and compensation in respect of broader values. Policies 6 and 7 are aimed at preventing loss of extent and protection of values. The effects management hierarchy in NPSFM pol. 3.21 applies to adverse effects of activities on the extent or values of rivers or wetlands.

313. 'Loss of value' is defined in NPSFM pol. 3.21 as:

> **loss of value**, in relation to a natural inland wetland or river bed, means the wetland or river bed is less able to provide for the following existing or potential values:
>
> (a) any value identified for it under the NOF process; or
>
> (b) any of the following, whether or not they are identified under the NOF process:
>
> (i) ecosystem health
>
> (ii) indigenous biodiversity
>
> (iii) hydrological functioning
>
> (iv) Māori freshwater values
>
> (v) amenity

314. The requirement to address adverse effects on values is much broader than a 'natural value' focus, that has traditionally been the subject of offsetting and compensation approaches. Under the NPSFM, if an activity has an adverse effect on that value in an FMU, that adverse effect will need to be dealt with by applying the effects management hierarchy, including potentially offsetting or compensating for the effect.

315. The concept of offsetting and compensation comes from biodiversity management. However, by way of the effects management hierarchy, it appears to be intended to apply to a much broader set of values. It is not clear whether an offsetting/compensation approach will necessarily work for other values, whether they are identified in the NOF process, or under paragraph (b) of the above definition. We struggle to see how a loss of Māori freshwater values, for example, could be adequately dealt with by and offset or compensation approach.

316. Further, even if the effects management hierarchy steps of offset and compensate can somehow work with those other values, it is even less clear how the principles in Appendix 6 and 7 will work with them.

317. As such, these principles will probably need to be linked to particular values that 'fit' under the offset principles. In terms of which values would be amenable to offsetting, our

sense is that both extent, and the 'indigenous biodiversity' value, would work. 'Hydrological function' value may be part of 'extent', because the principles require no net loss to be provided as measured by type, amount and condition, and also the requirement that the extent and values being offset are the same as those lost.

318. We do not have a suggestion for how to manage offsetting and compensation in terms of other values.

AMENDMENTS SOUGHT for offsetting and compensation

319. In order to reflect the appropriate intention to make the compensation and offset principles mandatory, and linked to the effects management hierarchy, the following amendments are needed:

a. **Aquatic compensation should be deleted from the effects management hierarchy.** The accompanying definition, and any consequential references to it, should be deleted from the NPSFM.

b. The definition of **aquatic offset** needs amendment:

> **aquatic offset** means a measurable conservation outcome that complies with clause (f) of the effects management hierarchy and the principles in Appendix 6 and result~~ing~~ from actions that are intended to:
>
> (a) redress any more than minor residual adverse effects on a wetland or river bed after all appropriate avoidance, minimisation, and remediation, measures have been sequentially applied; and
>
> (b) achieve no net loss, and preferably a net gain, in the extent and values of the wetland or river bed, where:
>
> > (i) no net loss means that the measurable positive effects of actions match any loss of extent or values over space and time, taking into account the type and location of the wetland or river bed; and
> >
> > (ii) net gain means that the measurable positive effects of actions exceed the point of no net loss.

c. If compensation remains, the definition of **aquatic compensation** needs amendment:

> **aquatic compensation** means a measurable conservation outcome that complies with clause (f) of the effects management hierarchy and the principles in Appendix 7 and result~~s ing~~ from actions that are intended to compensate for any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, remediation, and aquatic offset measures have been sequentially applied

d. The **effects management hierarchy** needs amendment. Our primary submission is that the effects management hierarchy should not include compensation, which is shown in the first effects management hierarchy. The second version should be adopted if compensation remains

> **Without compensation:**

effects management hierarchy, in relation to natural inland wetlands and rivers beds, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river bed (including cumulative effects and loss of potential value) that requires that:

(a) adverse effects are avoided where practicable; and

(b) where adverse effects cannot be demonstrably avoided, they are ~~minimised~~ remedied where practicable; and

(c) where adverse effects cannot be demonstrably ~~minimised~~ remedied, they are ~~remedied~~ mitigated where practicable; and

(d) where more than minor residual adverse effects cannot be demonstrably avoided, ~~minimised, or~~ remedied, or mitigated biodiversity offsetting is provided for more than minor residual adverse effects where it is possible; and

(f) ~~if~~ biodiversity offsetting cannot be used, and the activity itself ~~is~~ must be avoided, where:

(i) the affected part of the natural inland wetland or river bed, or it values, including species, are irreplaceable or vulnerable; or

(ii) the effects on the extent of values are uncertain, unknown, or little understood but the potential effects are significantly adverse; or

(iii)there are no technically feasible options by which to secure no net loss or preferably a net gain within an acceptable timeframe.

(g) Where biodiversity offsetting can be used in accordance with (f), an action must meet the definition of biodiversity offset in clause 1.6 and the principles in Appendix 6. If it does not then the action does not qualify as a biodiversity offset and the activity must be avoided

With compensation:

effects management hierarchy, in relation to natural inland wetlands and rivers beds, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river bed (including cumulative effects and loss of potential value) that requires that:

(a) adverse effects are avoided where practicable; and

(b) where adverse effects cannot be demonstrably avoided, they are ~~minimised~~ remedied where practicable; and

(c) where adverse effects cannot be demonstrably ~~minimised~~ remedied, they are ~~remedied~~ mitigated where practicable; and

(d) where more than minor residual adverse effects cannot be demonstrably avoided, ~~minimised, or~~ remedied, or mitigated biodiversity offsetting is provided for more than minor residual adverse effects where it is possible; and

(e) where biodiversity offsetting of more than minor residual adverse effects is not demonstrably possible, biodiversity compensation is provided for more than minor residual adverse effects; and

(f) ~~if~~ biodiversity offsetting and biodiversity compensation~~,~~ cannot be used, and the activity itself ~~is~~ must be avoided, where:

(i) the affected part of the natural inland wetland or river bed, or it values, including species, are irreplaceable or vulnerable; or

(ii) the effects on the extent of values are uncertain, unknown, or little understood but the potential effects are significantly adverse; or

(iii)there are no technically feasible options by which to secure no net loss or preferably a net gain within an acceptable timeframe.

(g) Where biodiversity offsetting and biodiversity compensation can be used in accordance with (f), an action must meet the definition of biodiversity offset in clause 1.6 and the principles in Appendix 6, or the definition of biodiversity compensation in clause 1.6 and the principles Appendix 7. If it does not then the action does not qualify as a biodiversity offset or biodiversity compensation and the activity must be avoided

e. **Clause 3.22(3)(b)** is deleted and replaced with:

(b) The council is satisfied that, if aquatic offsetting or aquatic compensation is proposed:

(i) clause (f) of the effects management hierarchy; and

(ii) the principles in Appendix 6 and 7;

are met.

f. The **pōtai to both the appendices need to be replaced** with the following:

The following sets out a framework of principles for the use of aquatic offsets. These principles represent a standard for aquatic offsetting and must be complied with for an action to qualify as an aquatic offset under the effects management hierarchy as set out in the NPS-FM.

If compensation remains:

The following sets out a framework of principles for the use of aquatic compensation. These principles represent a standard for aquatic compensation and must be complied with for an action to qualify as an aquatic compensation under the effects management hierarchy as set out in the NPS-FM.

320. The following **offsetting principles in Appendix 6** need amendment:

a. When aquatic offsetting is not appropriate (should be in the effects management hierarchy, but if not, as follows)

Aquatic offsetting is not available where:
(a) the affected part of the natural inland wetland or river bed, or its values, including species, are irreplaceable or vulnerable; or
(b) effects on the extent or values are uncertain, unknown, or little understood, but potential effects are significantly adverse; or
(c) there are no technically feasible options by which to secure proposed no net loss and preferably a net gain outcome within an acceptable timeframe.

b. Additionality

Additionality: Aquatic offsetting achieves gains in extent or values above and beyond gains that would have occurred in the absence of the offset, including that

~~such as~~ gains ~~that~~ are additional to any ~~minimisation~~ ~~and~~ remediation or mitigation undertaken in relation to the adverse effects of the activity.

c. Time lags

Time lags: The delay between loss of extent or value at the impact site and the realisation of the offset is the least necessary, and must not exceed the consent period or 35 years, whichever is earlier.

321. If compensation remains, the following **compensation principles in Appendix 7** need amendment:

a. When aquatic offsetting is not appropriate (should be in the effects management hierarchy, but if not, as follows):

Aquatic compensation is not available where:
(a) the affected part of the natural inland wetland or river bed, or its values, including species, are irreplaceable or vulnerable; or
(b) effects on the extent or values are uncertain, unknown, or little understood, but potential effects are significantly adverse; or
(c) there are no technically feasible options by which to secure proposed no net loss and preferably a net gain outcome within an acceptable timeframe.

b. Additionality

Additionality: Aquatic compensation achieves gains in extent or values above and beyond gains that would have occurred in the absence of the compensation, including that ~~such as~~ gains ~~that~~ are additional to any ~~minimisation,~~ ~~and~~ remediation, mitigation or offsetting undertaken in relation to the adverse effects of the activity.

c. Time lags

Time lags: The delay between loss of extent or value at the impact site and the realisation of the offset is the least necessary, and must not exceed the consent period or 35 years, whichever is earlier.

d. Scale of compensation

Scale of aquatic compensation: The values and/or extent to be lost through the activity to which the compensation applies must be addressed by positive effects that result in no net loss, and preferably a net gain, of impacted values and/or extent. No net loss and net gain are measured by the type, amount and condition, using an explicit loss and gain calculation.

e. Financial contributions – delete.

RESTORATION PROVISIONS - Amendment 9

322. Forest & Bird previously submitted that the term 'restoration' was already wide enough to capture maintenance and biosecurity work and new definitions did not need to be added. However, we appreciate these changes could clarify the intention of the regulations and encourage maintenance and biosecurity work. Therefore, we accept the

changes proposed to increase the scope to include 'wetland maintenance' and 'biosecurity' could be useful.

323. However, there are circumstances where restoration, maintenance, or biosecurity work could have a significant impact on a wetland ecosystem, indigenous plants, and/or indigenous fauna.

324. For example, exotic species can provide significant habitat for indigenous fauna and exotic fauna can be an important part of the overall ecological functioning of a wetland. Removal of exotic vegetation can also have adverse effects, often unintended, on the remaining native vegetation.

325. Further, Forest & Bird's experience in Canterbury is that large areas of significant biodiversity have been inappropriately destroyed (by land managers or contractors) under the guise of 'biosecurity' and compliance with a regional pest management plan. Similar problems could easily arise in respect of wetland. There have also been times where inappropriate vegetation clearance has been undertaken under the guise of 'maintenance'.

326. In terms of the proposal to remove the application of the area limits in r.38(4)(b) for certain activities, we are concerned that this authorises potentially very large scale works in wetlands. In the supporting documentation, MfE states that the general conditions (r.55) will be an important check and balance on any unintended consequences of removing vegetation. The requirement to meet the conditions in r.55 is supported, including to give prior notice to the council. However, given that this is a permitted activity, the council will not have the ability to consider whether the effects of the works are appropriate, and inappropriate works with the potential to adversely affect wetland values could therefore go ahead. The council can only apply the conditions in the regulations. We also question how the standard of 'demonstrably necessary' is going to be applied.

327. To account for these risks, **we submit that regulation 55(2) should be amended to include a requirement for the person/organisation undertaking the restoration, maintenance, or biosecurity activity to provide an ecological assessment from a suitably qualified person that demonstrates the activity is appropriate.** This would provide more certainty that the activity being proposed is appropriate as a permitted activity and that the permitted activity standards can be met, rather than just accepting an individual's or a conservation group's argument that the activity is ok. This is particularly important in the context of the proposed changes to the area limits in r.38.

328. We note the intent to use the definitions of 'pest' and 'unwanted organism' from the Biosecurity Act 1993. We support that intent, as this clarifies the scope of the activities provided for in the name of biosecurity. However**, reference should be made in the new definition of 'biosecurity' in cl. 3.21 to those definitions in the Biosecurity Act 1993**. Without that reference, it is not clear that these are defined elsewhere.

329. We are also concerned that the definition of 'maintenance' could be more accurately defined, so that it does not inadvertently provide for the clearance of mangroves. Mangroves occur in coastal wetlands that are covered by the NES rules. While they are indigenous vegetation, there is an opinion among some parts of the community that removing them is a form of maintaining (or even restoring) the area. As such, their removal under the NES regulations (e.g. r.38) would arguably be permitted, because the removal would be '*intended* to prevent the deterioration of a wetland's condition' (emphasis added).

The point here is that 'condition' is not specific enough and may mean different things depending on the reader's viewpoint.

330. We therefore submit that **the 'maintenance' definition should refer to the same factors as the restoration definition:**

> **wetland maintenance** means activities, such as weed control, intended to prevent the deterioration of a wetland's ~~condition~~ ecosystem health, indigenous biodiversity, or hydrological functioning.

331. In addition, the use of aerial spraying, heavy machinery, or power-tools in a wetland could have a substantial impact even where the longer-term intent is to restore the wetland. In these circumstances, resource consent should be required to ensure that the effects of the activity can be managed appropriately (e.g. works should be undertaken in a certain way, or at a certain time of year, etc.). We appreciate there are conditions in r.55 for the use of machinery in wetlands, however we do not consider them sufficient to ensure any vulnerable indigenous species are protected. We therefore repeat our submission that **any works requiring chemical sprays or mechanized tools in wetlands should need consent.**

332. We note that MfE is of the view that habitats of threatened species will be known to regional councils, who can notify and caution applicants when they receive notification of intention to undertake the activity (as required under regulation 55). In our view, this is totally inappropriate. If threatened species are present, simply stating that a regional council can 'caution' the person undertaking the chemical use fails to provide for the protection of those threatened species (including under RMA s6). If this is to be a permitted activity, **a consent requirement is necessary at least where threatened species are present**, so that the council has some effective oversight and control over how the activity is undertaken.

Amendment 10 – clarify water provisions

333. We support the intent to continue to regulate discharges that may have an adverse effect on a wetland. That intent gives effect to Policy 6, among others.

334. We do have some concerns about how it would apply, as the activity status depends on an assessment of effects. That is not generally how rules should be drafted. Consideration may need to be given to another robust method of ensuring the same outcome.

Amendment 12 – flood control and drainage works

335. We appreciate that flood control, flood protection, or drainage works will often need to be undertaken urgently, and in those situations some of the permitted activity standards will be difficult to comply with.

336. However, we suggest that this should be limited to urgent works only. The definition of specified infrastructure refers to flood control, protection and works undertaken for the

purposes set out in s133 of the Soil Conservation and Rivers Control Act 1941. That provision authorises a broad range of works – in both urgent and non-urgent situations.

337. Similarly, the Drainage Act authorises a wide range of activities in waterbodies. Section 2A of that Act states that nothing in that Act shall derogate from the RMA 1991. That includes the requirement to protect wetlands under s6.

338. The rationale provided by MfE for the changes is that these activities may need to happen quickly in the event of flooding. We accept that, but the proposed changes appear to go beyond providing for urgent works only. The permitted activity standards are designed to protect wetlands in the context of infrastructure operation and maintenance. There is a risk that the standards will not be applied in situations where they could in fact be applied.

339. **We therefore seek that MfE reconsider whether the exclusions could be narrowed to only apply in urgent situations.**

Amendment 13 – sphagnum moss harvesting and refilling

340. In terms of the change to the refiling requirement, it is not clear whether MfE has undertaken its own analysis of the requested change.

341. We **support** the decision not to provide for new harvesting as a permitted activity.

AMENDMENTS TO OTHER PROVISIONS

Clause 1.6 Best information

342. Forest & Bird support this change. We agree the clause requiring the use of the best information should apply to all direction under the NPS-FM and this clarifies that requirement.

Clause 3.6 Transparent decision-making

343. Forest & Bird support this change. We agree the clause requiring transparent decision making should apply to all decisions made under the NPS-FM.

344. We consider it would be useful to add a reference to clause 3.4(3) in this clause, since it is being deleted from 3.6(1)(a):

> (3) In this clause, **decision** includes a decision not to decide on, or to postpone deciding, any substantive issue and, in relation to decisions about mechanisms to involve tangata whenua in freshwater management **(such as under clause 3.4(3))**, includes a decision to use or not use a mechanism.

Clause 3.13 Special provisions for attributes affected by nutrients

345. Forest & Bird generally support this change. We consider the clause will be much clearer than before (if not yet entirely clear) and it will be much easier for regional councils to implement. The revised wording will ensure appropriate DIN and DRP target attribute states are set which are consistent with Te Mana o te Wai and provide for ecosystem health, and which give effect to the original policy intention of the NPS.

346. However, it is unclear what the 'nutrient attributes' in 3.13(1) are. We assume these are total nitrogen, total phosphorus, ammonia (toxicity), nitrate (toxicity), and dissolved reactive phosphorus (Appendix 2A and 2B) but this is not explicit.

347. It is also unclear whether DIN and DRP attribute states set under clause 3.13 are then subject to the entirety of clause 3.10 and 3.11 (i.e., do they become attribute states under clause 3.10 and 3.11?). This is complicated by the fact that dissolved reactive phosphorus (DRP) targets must be set under clause 3.13 but also under clause 3.10 and 3.11 (because DRP is an attribute under Appendix 2B). For example, do sites used for the measurement of DIN need to be determined (as per 3.11(1)(b))? Do targets for DIN need to be set above baseline states (as per 3.11(2))? We assume this is not the case for DIN, but is the case for DRP (because DRP is included in Appendix 2B and covered by clauses 3.10 and 3.11 but DIN is not). This is extremely confusing and we suspect is a result of separating DIN and DRP from other target attributes – resulting in something of a policy 'circle' between clauses 3.10, 3.11, and 3.13.

348. We note that while the supporting documentation states "Once DIN and DRP outcomes are derived under clause 3.13, they are simply treated as target attribute states in their own right and regional councils are required to set limits on resource use under clause 3.12(1)" the NPS does not explicitly state they are subject to clause 3.10 and 3.11. In our view, as the NPS amendments are worded, DRP is already subject to clauses 3.10 and 3.11 (because it is in Appendix 2A) but DIN is not.

349. We consider amendments are required to address these two issues. This could be achieved by:

a. Inserting a new 3.13(5) (after 3.13(4)) that reads:

> **(5) 'Nutrient attributes' are total nitrogen (Appendix 2A, Table 3), total phosphorus (Appendix 2A, Table 4), ammonia (toxicity) (Appendix 2A, Table 5), nitrate (toxicity) (Appendix 2A, Table 6), and dissolved reactive phosphorus (Appendix 2B, Table 20).**

b. Making amendments to the NPS (such as to clause 3.13) to **explicitly state** that target attribute states for **DIN and DRP** are subject to all of the same requirements as other target attributes (i.e., baselines must be set, monitoring sites are required, targets can't be set below baselines, etc.).

350. This would (1) resolve the inconsistencies between the direction to manage DRP as an Appendix 2B attribute but to potentially manage DIN differently and (2) make it clear that baseline states, target states, monitoring sites, etc. must be set for **DIN and DRP**.

Clause 3.12(1), 3.12(2), and 3.13 Distinctions between limit-setting and action-planning attributes

351. Forest & Bird **support this change** and agree with the policy rationale in the supporting documents.

Distinctions between periphyton and other attributes

352. Forest & Bird **support this change**. It is much clearer than before and outlines a much simpler process.

Policy 5

353. We agree that freshwater will be managed using mechanisms beyond just the NOF and that Policy 5 could be amended to reflect that. However, the proposed wording suggests that the NOF could be *one* way to manage freshwater, but might not be the requirement for managing freshwater. We suggest alternative drafting using the words "at least" that would still widen the scope of the policy (to clarify there are other mechanisms) while remaining explicit that using the NOF process is compulsory:

> **Policy 5:** Freshwater is managed **(at least** through a National Objectives Framework**)** to ensure that the health and well-being…

Estuaries

354. We are concerned there is an issue in the NPS with how estuaries and other water bodies in the coastal marine area are to be managed.

355. For example, clause 3.13 (as proposed in the exposure draft) requires the setting of DIN and DRP targets "to achieve the environmental outcomes sought for the nutrient-sensitive downstream receiving environments."

356. The definition of 'receiving environment' is:

> **Receiving environment** includes, but is not limited to, any water body (such as a river, lake, wetland, or aquifer) and the coastal marine area (including estuaries)

357. Therefore, DIN and DRP targets should be set to achieve environmental outcomes for estuaries. However, it is not clear from the NPS that outcomes for estuaries or water bodies in the coastal marine area will actually be set, because the definition of environmental outcomes and section 3.9 (Identifying values and setting environmental outcomes as objectives) only refer to FMUs, and the definition of FMU does not explicitly refer to estuaries:

> **environmental outcome** means, in relation to a value that applies to an FMU or part of an FMU, a desired outcome that a regional council identifies and then includes as an objective in its regional plan (see clause 3.9)
>
> **freshwater management unit**, or FMU, means all or any part of a water body or water bodies, and their related catchments, that a regional council determines under clause 3.8 is an appropriate unit for freshwater management and accounting purposes; and part of an FMU means any part of an FMU including, but not limited to, a specific site, river reach, water body, or part of a water body

358. Section 3.8 on setting FMUs also only states that "every water body in the region must be located within at least one FMU". We consider this potentially excludes estuaries because the RMA definition of a water body excludes the coastal marine area:

> **water body** means fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, **that is not located within the coastal marine area** (emphasis added)

359. Therefore, estuaries are potentially going to 'fall through the cracks' between the intention of the NPS and the actual wording.

360. We consider this could be corrected by

a. Amending section 3.8(2) to state that **FMUs must include receiving environments in the coastal marine area**

b. Amending the definition of freshwater management unit to explicitly include estuaries:

> **freshwater management unit**, or FMU, means all or any part of a water body or water bodies **– including downstream receiving environments and the coastal marine area**, and their related catchments, that a regional council determines under clause 3.8 is an appropriate unit for freshwater management and accounting purposes; and part of an FMU means any part of an FMU including, but not limited to, a specific site, river reach, water body, or part of a water body, **or the coastal marine area.**

361. We also note there is no definition for what makes a receiving environment "nutrient-sensitive" and suggest clarification could be provided. Alternatively we suggest it be deleted as the addition of "nutrient-sensitive" is not required – the direction to achieve environmental outcomes is already clear enough and nutrient targets should already be set under the NOF process.

Policy 7 - 'River' extent vs 'river bed' extent

362. Forest & Bird are not convinced the proposed change to Policy 7 is necessary. While we acknowledge there could be a benefit to this change, there is also a significant risk of unintended consequences. MfE has not provided any justification for this change in the supporting documents and we are therefore extremely concerned that MfE has not considered the implications of the change fully. Further work needs to be done to explore the implications before the change is made.

363. To our knowledge, there is no evidence (including case law) that (1) the existing drafting is a problem, (2) that is has been misintepreted in any case, or (3) that there were any unintended consequences of the original/existing drafting.

364. In addition, we could not find any evidence to suggest the original intention of those drafting the NPS (2020) was to provide policy direction only to protect river 'bed' extent. We have reviewed the reports justifying the inclusion of Policy 7 in the NPS when it was proposed/gazetted and these largely focus on protecting 'rivers' as per the RMA definition of rivers – not just river 'beds'. In fact, the original reports refer to the RMA definition of rivers as being useful in that it includes rivers and streams (i.e., the authors didn't seem to want it to refer to river beds, or they presumably would have said so). Where there is a reference just to river beds in the supporting documents for the NPS (2020) it seems to be quite intentional, such as in the NES rule (r.57) where Policy 7 is partially given effect to. In our opinion, it is clear from the reports that the drafters were aware of the difference in terminology, and it therefore seems reasonable to conclude they intentionally used the term 'river extent'. We consider the proposed change to Policy 7 therefore narrows the scope of what the NPS original policy intent was.

365. In terms of the potential effects of the proposed change (noting we have not been able to assess these fully), we are concerned that the change:

a. will reduce the overarching policy support for the rest of the NPS, including the NOF framework and process. In particular, it removes a large part of the basis for the inclusion of "the **physical form, structure, and extent** of the water body, its bed, **banks and margins; its riparian vegetation; and its connections to the floodplain** and to groundwater" in the 'habitat' component of the Ecosystem Health value (Appendix 1A – Compulsory Values) (emphasis added). This is a critical part of the NOF framework that was recommended by the Science and Technical Advisory Group.

b. will reduce the scope for regional councils to protect parts of rivers that might not fall strictly within the definition of a 'river bed'. For example, the High Court recently ruled[66] that the 'braidplain' of a braided river is not part of the river 'bed', despite it being so from an ecological/geomorphological perspective. It could be argued that braidplains are not 'habitat of indigenous freshwater species' under Policy 9 (because they are not always wet), so there is a risk that there is now no specific direction for the protection of braidplains under the NPS, as there are no other specific directions about the physical components/character of rivers. We note that Canterbury is not the only place with braided rivers – Hawke's Bay, Horizons, and Southland, among others, also have braided rivers – and this change potentially has wide-ranging implications. While we are primarily considering the implications of this change on braidplains, we note it could also have significant implications for the riparian areas alongside rivers, which might not fit into the definition of the 'river bed'.

c. will remove direction that would have been helpful in directing councils decision-making on activities involving stream-depleting water takes and 'targeted stream augmentation' (where water is discharged into streams to offset an impact elsewhere). For example, where a consent application to take groundwater might have a significant stream-depleting effect, reducing the 'extent' of the river (but not the 'river bed'), Policy 7 provides direction to decisions makers that the impact should be avoided, where practicable. Changing the policy to refer only to 'river beds' removes that direction, and leaves a policy 'void' (policy 11 on allocation is not as directive or as explicit in protecting ecosystem health).

366. As noted above, there are probably many other implications, which we have not been able to consider in full (and we consider MfE has not done so either).

367. **We therefore consider this change to Policy 7 should not be progressed at this time.**

[66] In Dewhirst vs Environment Canterbury.