

# Practice and Guidance note

## National Instruments for Freshwater Management - Resource Consents

### Guidance

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## Disclaimer

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# 1 Introduction

The Government is taking action to restore and protect the health of New Zealand's waterways. The "Essential Freshwater" package introduces new rules and regulations to:

- stop further degradation of New Zealand's freshwater resources and improve water quality within five years
- reverse past damage and bring New Zealand's freshwater resources, waterways and ecosystems to a healthy state within a generation.

There are now four main pieces of national direction that are used to manage New Zealand's freshwater. These are:

- [National Policy Statement for Freshwater Management 2020](#)
- [National Environmental Standards for Freshwater](#)
- [Resource Management \(Stock Exclusion\) Regulations 2020](#)
- [Resource Management \(Measurement and Reporting of Water Takes\) Amendment Regulations 2020](#)

This Practice and Guidance note ("PGN") provides operational guidance on how this new national direction affects resource consenting under the Auckland Unitary Plan (Operative in Part) ("AUP(OP)").

## 2 National Policy Statement for Freshwater Management 2020

The [National Policy Statement for Freshwater Management 2020](#) ("Freshwater NPS") provides local authorities with direction on how to manage freshwater under the Resource Management Act 1991.

The Freshwater NPS came into force on 3 September 2020. Relevant provisions of the Freshwater NPS must be had regard to from this date when determining resource consent applications.<sup>1</sup> For controlled and restricted discretionary activities, the objectives and policies must relate to matters over which control is reserved or discretion is restricted.

It is important that you familiarise yourself with the Freshwater NPS. The AUP(OP) provisions will in time be amended to give effect to the NPS.

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<sup>1</sup> Section 104(1)(b)(iii) of the RMA

## 2.1 Applications must include an assessment of the Freshwater NPS provisions

Resource consent applications involving activities that affect freshwater and freshwater ecosystems that are currently being processed need to include a robust consideration of the provisions of the Freshwater NPS. Relevant provisions in the NPSFM 2020 will include:

- the objective and policies (Part 2) which give effect to the fundamental concept of Te Mana o te Wai (Part 1.3) and the associated hierarchy of obligations; and
- some of the implementation provisions (Part 3) that apply to consenting of specific types of activities.<sup>2</sup>

In practice, applications should demonstrate how and why the applicant considers the proposed activity is consistent with the hierarchy of obligations, and with managing freshwater in accordance with the concept of Te Mana o te Wai (Policy 1). Council will continue to work with iwi to build our understanding of Te Mana o te Wai in the Auckland context.

## 2.2 Determining whether an application must be notified

Notification decisions must follow the 'steps' set out in s95A (public notification) and s95B (limited notification) of the RMA. While inconsistency with the provisions of an NPS (or regional plan etc.) is not a reason for notification, consideration of those provisions provides the context for an effects assessment and can inform when an adverse effect might mean notification on the basis of adverse effects (Step 3 of either s95A or s95B of the RMA) is appropriate.<sup>3</sup>

While in some cases there is alignment between the AUP(OP) and the Freshwater NPS, in other cases there is divergence in activity descriptions and conditions or standards which are relevant.

This means it is important to consider the provisions of both statutory documents when assessing whether the effects of an activity may trigger the need for notification.

In particular, the hierarchy of obligations in the Freshwater NPS Objective is relevant to considering the significance of adverse effects, even where the NPS environmental bottom lines have not been included in the AUP(OP), i.e. whether an application prioritises:

- Firstly, the health and well-being of water bodies and freshwater ecosystems;
- Secondly, the health needs of people (such as drinking water); and

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<sup>2</sup> For example, activities related to wetlands and rivers where the Freshwater NPS has detailed direction on when consents affecting wetlands and rivers can be granted, and what matters needed to be demonstrated (e.g. application of the effects management hierarchy defined in the Freshwater NPS).

<sup>3</sup> *Tastii Products Ltd v Auckland Council* [2016] NZHC 1673 at [82]; *Kawau Island Action Incorporated Society v Auckland Council* [2018] NZHC 3306 at [112].

- Thirdly, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

This may require consideration of how water quality and quantity limits were set (e.g. were they set to achieve environmental limits, or capped at current levels of activity/consented allocation), as well as whether those limits are achieving the hierarchy of obligations in practice (i.e. what is the current state of the receiving environment and how is it tracking).

Auckland Council will need to work on ways to make water quality and quantity limit data more easily available.

Some Iwi Management Plans may also be useful in determining how certain Freshwater NPS policies should be applied in any given situation, and the likelihood of any iwi being adversely affected persons.

### 2.3 Substantive decision-making

The requirement in s104 of the RMA to “have regard to” means to give genuine attention and thought to the subject (in this case the provisions of the Freshwater NPS). Case law has established that relevant provisions are not properly had regard to if they are simply considered for the purposes of putting them on one side. What is required is “a fair appraisal of the objectives and policies read as a whole.”<sup>4</sup> The Supreme Court decision in *Environmental Defence Society v New Zealand King Salmon* has highlighted that a decision-maker must identify those objectives and policies that are relevant, paying careful attention to the way in which they are expressed. Policies expressed in more directive terms will carry greater weight than those expressed in less directive terms e.g. 'avoid' is a stronger direction than 'take account of'.

The matters specified in s104 of the RMA, including the provisions of the Freshwater NPS can be given weight as the Council sees fit in the circumstances.

Where the AUP(OP) and the Freshwater NPS are fully aligned (e.g. around the integrated management approach, ki uta ki tai), it is unlikely that consideration of the NPS and our regional planning provisions will result in a different conclusion about whether an activity is appropriate. If there is inconsistency or conflict between our planning framework and the Freshwater NPS provisions however, the NPS given its status as national direction that post-dates our planning framework should be given greater weight than our current AUP(OP), which has not yet given effect to the NPS-FW 2020.

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<sup>4</sup> R J Davidson Family Trust v Marlborough District Council [2018] NZCA 316

In addition, given the NPS direction to engage with tangata whenua to determine what Te Mana o te Wai means locally, it may be appropriate that council planners turn their mind to the provisions of any relevant Iwi Management Plans.

Ultimately while regard must be had to all the matters in s104 (e.g. regional policy statements and plans, adverse and positive effects, “other relevant matters” (e.g. precedent effect, alternative locations and methods)), where a proposal will not or is unlikely to achieve the hierarchy of obligations, decision makers will likely need to consider refusing resource consent on that basis.

### 3 National Environmental Standards for Freshwater

The [Resource Management \(National Environmental Standards for Freshwater\) Regulations 2020](#) (“NES-FW”) regulates activities that pose risks to the health of freshwater and freshwater ecosystems. The NES-FW includes nationally consistent regulations relating to activity status and conditions for freshwater activities under the Resource Management Act 1991 (“RMA”).

The NES-FW commenced/came into force on 3 September 2020, however:

- subpart 3 of Part 2 (intensive winter grazing) comes into force on 1 May 2021
- regulations 12 to 14 (stockholding areas other than feedlots) and subpart 4 of Part 2 (application of synthetic nitrogen fertiliser to pastoral land) come into force on 1 July 2021.

The NES-FW contains regulations that deal with regional functions only, i.e. there are no district plan rules under s9(1)<sup>5</sup>. The regulations cover matters under s9(1), s13, s14 and s15 of the RMA.

The sections of this PGN that follow will provide guidance on:

- Transitional considerations, including the relationship between the NES-FW, existing resource consents, and other existing uses rights.
- Processing resource consents when required under the NES-FW.
- The other three instruments that make up the Essential Freshwater package, including high-level guidance on how the Freshwater NPS should be considered as part of determining notification for resource consents, and substantive decision-making.

Note that terms that are defined in Regulation 3 of the NES-FW or in specific regulations have been identified in italics in this PGN.

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<sup>5</sup> [Regulation 5](#) (Regulations deal with functions of regional councils)



### 3.1 What is a NES?

National environmental standards (NES) are regulations made under the RMA. They are binding on local authorities and a local authority must observe the NES (section 44A(7) of the RMA) and enforce the observation of the NES to the extent to which their powers enable them to do so (section 44A(8)).

### 3.2 What does the NES-FW do?

The NES-FW set requirements for carrying out certain activities that pose risks to freshwater and freshwater ecosystems. Anyone carrying out these activities will need to comply with the standards.

The standards are designed to:

- protect natural wetlands
- protect urban and rural streams from reclamation
- ensure connectivity of fish habitat (fish passage)
- set minimum requirements for feedlots and other stockholding areas
- improve poor practice intensive winter grazing of forage crops
- restrict further agricultural intensification until the end of 2024
- limit the discharge of synthetic nitrogen fertiliser to land and require reporting of fertiliser use.

In many cases, people will need to apply for a resource consent from the council to continue carrying out regulated activities.



### 3.3 Responsibility of local authorities to implement and enforce the NES-FW

Sections 44A(7) and (8) of the RMA state:

*(7) Every local authority and consent authority must observe national environmental standards.*

*(8) Every local authority and consent authority must enforce the observance of national environmental standards to the extent to which their powers enable them to do so.*

In the context of the NES-FW, this means that the council has a general obligation to:

- Understand the freshwater activities and effects regulated under the NES-FW, and where plan rules may continue to apply to these activities
- Receive notice of certain freshwater activities that are permitted and monitor these activities
- Fulfil our obligations when a resource consent is required under the NES-FW.

## 4 Relationship between the NES-FW, resource consents and existing use rights

The NES-FW applies when certain activities that pose risks to freshwater and freshwater ecosystems are undertaken. These activities can take place in rural and urban environments, and include:

- Farming activities
  - Feedlots and other stockholding areas
  - Agricultural intensification
    - Conversions of plantation forestry to pastoral land use
    - Conversions of land on farm to dairy farm land
    - Irrigation of dairy farm land
    - Use of land as dairy support land
  - Intensive winter grazing
  - Application of synthetic nitrogen fertiliser to pastoral land
- Freshwater
  - Natural wetlands
    - Restoration of natural wetlands
    - Scientific research
    - Construction of wetland utility structures



- Maintenance of wetland utility structures
- Construction of specified infrastructure
- Maintenance and operation of specified infrastructure and other infrastructure
- Sphagnum moss harvesting
- Arable and horticultural land use
- Natural hazard works
- Drainage of natural wetlands (either partially or fully)
- Other activities
- Reclamation of rivers
- Passage of fish affected by structures
  - Culverts
  - Weirs
  - Passive flap gates

Key terms associated with these activities are defined in [Regulation 3](#) (Interpretation).

At the time of commencement of the NES-FW, there were a range of existing farming activities operating under a range of different authorisations. Many farming activities in Auckland have been lawfully established and operate without the need to obtain a resource consent under the AUP(OP) or legacy plans. This may be because the establishment of the farming activity pre-dated the RMA or because the AUP(OP) provides for the land use as a permitted activity.

For freshwater activities pertaining to wetlands, streams and fish passage, the AUP(OP) includes rules and standards relating to these, as did the legacy Auckland Council Regional Plan: Air, Land and Water (the ALW Plan) before it. For these activities, there are likely to be many existing resource consents that authorise existing works, either completed or still being carried out.

At the commencement of the NES-FW, applicants and councils need to be aware of the relationship between the NES-FW and those activities that are either authorised by existing resource consents, or do not have resource consents but are able to be carried out as of right (e.g. as permitted activities or pursuant to existing use rights).

This section provides guidance on those relationships based on the relevant provisions in the RMA.



## 4.1 Relationship of the NES-FW with existing resource consents

### 4.1.1 Existing coastal, water or discharge permits, and regional land use consents

Section 43B of the RMA sets out the relationship between the NES-FW and resource consents.

Under section 43B(1) of the RMA, a resource consent that is more stringent than a NES prevails over the standard if the standard expressly says that a consent may be more stringent than it. Section 43B(2) provides that, for the purposes of subsection (1), a resource consent is more stringent than a standard if it imposes conditions on an activity that the standard does not impose or authorise.

Under section 43B(3), a resource consent that is more lenient than a NES prevails over the standard if the standard expressly says that a consent may be more lenient than it. For the purposes of subsection (3), a resource consent is more lenient than a standard if it permits or authorises an activity that the standard prohibits or restricts.

Regulation 6 of the NES-FW provides that a resource consent may be more stringent than the regulations. Regulation 6 also states that a resource consent may be more lenient than any of regulations 70 to 74 (culverts, weirs, and passive flap gates) if the rule is made, or the resource consent is granted, for the purpose of preventing the passage of fish in order to protect particular fish species, their life stages, or their habitats.

Sections 43B(6) and (6A) of the RMA set out the relationship between NES and the following types of existing resource consents:

- **Coastal, water and discharge permits** – these are resource consents to do something that would otherwise contravene sections 12 (restrictions on use of coastal marine area), 14 (restrictions relating to water) and 15 (discharges of contaminants) of the RMA.
- **Regional land use consents** – these are resource consents to do something that would otherwise contravene sections 9 (restrictions on the use of land) or 13 (restrictions on certain uses of beds of lakes and rivers) of the RMA. In relation to the NES-FW, these types of consents are most likely to relate to earthworks, or any works in relation to streams, wetlands including fish passage.

**The regional consents outlined above granted before the NES-FW was gazetted (3 August 2020) will prevail over the NES-FW.** This relationship applies until:

- A review of the conditions of the permit or consent under section 128(1)(ba)<sup>6</sup> of the RMA results in some or all of the NES-FW standards prevailing over the permit or consent; or
- The consent expires<sup>7</sup>

A consent holder can continue to rely on regional consents that will prevail over the NES-FW provided that the activity remains within the scope of the consent. For example, the NES-FW may apply once the authorised extent of works has been undertaken and the consent holder is proposing additional works outside the scope of the approved regional consent.

## 4.2 Relationship of the NES-FW with resource consent applications being processed

Some resource consents will have been granted after the NES-FW was gazetted (3 August 2020) and prior to the NES-FW coming into force (3 September 2020). The relationship between these resource consents and NES-FW is set out in section 43B(7) of the RMA. The effect of the NES-FW is determined by the date that the decision whether to notify the application (section 95-95G of the RMA) was made, namely:

- If the decision on notification of the application was made **prior to 3 August 2020** - the **resource consent prevails over the NES-FW, unless the NES-FW expressly provides otherwise**; or
- If the decision on notification of the application was made **after 3 August 2020** - the **NES-FW prevails over the resource consent**. In this case the activity will now need to be reconsidered under the NES-FW requirements. The consent

<sup>6</sup> Section 128(1)(ba) - *A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent, in the case of a coastal, water, or discharge permit, or a land use consent granted by a regional council, when relevant national environmental standards or national planning standards have been made.*

<sup>7</sup> Note that some resource consents (e.g. an earthworks consent granted under section 9 of the RMA) may have an unlimited duration (pursuant to section 123(b) of the RMA).

holder should seek independent advice on how the NES-FW may affect their ability to undertake the activities that they have resource consent for.

If an application involving freshwater is still being processed after 3 September 2020 (and the decision on notification has either not been made, or was made after 3 August 2020), the NES-FW is fully in force and will need to be considered as part of the council's decision making (see [Section 5](#) of this PGN for detailed guidance).

It should be noted that the NES-FW may result in a change to activity status. A more stringent activity status, including as a result of the definition and conditions that apply to an activity in the NES-FW, will prevail over a more lenient resource consent activity status (including through the standards that may apply) in the AUP(OP). One significant example is where a proposal involves partial or complete drainage of a natural wetland, which is now a prohibited activity under Regulation 53 (see [Section 5.11](#) of this PGN for further guidance regarding prohibited activities). We recommend that you speak with a Principal Specialist – Planning should you find yourself in a scenario where this occurs.

### **4.3 Relationship of the NES-FW with other lawfully established activities**

Existing use rights are provided for under the RMA through sections 10, 10A, 10B (for activities managed under a district plan) and section 20A (for activities managed under a regional plan). These rights apply to existing uses and activities that:

- Were lawfully established and were a permitted activity or could otherwise have been lawfully carried out without a resource consent; and
- Now require a resource consent as a result of a rule in a plan or proposed plan becoming operative or taking legal effect; and
- the effects of the use or activity are the same or similar in character, intensity, and scale to the effects which existed before the rule became operative or took legal effect.

Section 43B(9) of the RMA states that, where a NES requires a resource consent to be obtained for an activity, sections 10, 10A, 10B and 20A(2) apply to the activity as if the NES was a rule in a plan that had become operative. This guidance deals with existing use rights under regional plans only as the NES-FW only regulates activities that deal with the functions of regional councils.

#### **4.3.1 Existing use rights for activities under regional plans – section 20A**

Section 20A of the RMA addresses existing use rights for activities managed under a regional plan. Section 20A(2) of the RMA applies to certain existing lawful activities that require resource consent as a result of a regional rule becoming operative (i.e. resource consent is required due to a regional council regulation in the NES-FW).

Section 20A(2) enables these activities to continue provided the following requirements are met:

1. Prior to the NES-FW coming into force:
  - The existing activity was a permitted activity or otherwise could have been lawfully carried on without a resource consent
  - The existing activity was lawfully established
2. The effects of the activity are the ‘*same or similar in character, intensity, and scale to the effects that existed before the rule became operative*’; and
3. The person carrying out the activity has applied for a resource consent from the council within six months of the NES-FW coming into force, and the application has not been decided, or any appeals are still to be determined.

Section 20A(2) therefore provides a six-month window from 3 September to 1 March 2021 for consent holders to apply for any regional resource consents that are required as a result of the NES-FW coming into force, with the following exceptions:

- subpart 3 of Part 2 (intensive winter grazing) comes into force on 1 May 2021. For this activity, the six-month window is from 1 May to 1 November 2021; and
- regulations 12 to 14 (stockholding areas other than feedlots) and subpart 4 of Part 2 (application of synthetic nitrogen fertiliser to pastoral land) come into force on 1 July 2021. For these activities, the six-month window is from 1 July to 1 January 2022.

Resource consents do not need to be granted within the six-month timeframe. The application must be lodged prior to the date the relevant regulations came into force (3 September 2020 for most activities regulated, with the exceptions above) and the activity can then continue operating past the six-month timeframe while the application is being processed.

## 4.4 Certificates of compliance and existing use certificates

### 4.4.1 Section 139 – Certificates of compliance (“CoC”)

Section 139 of the RMA allows a person to request that a consent authority issue a certificate of compliance to confirm that an activity ‘*could be done lawfully in a particular location without a resource consent*’. Some consent holders may hold a CoC to confirm that the relevant freshwater activity was permitted at the time the activity commenced.

Once granted, a CoC is treated in the same manner as a resource consent under the RMA that contains the conditions specified in the applicable NES or plan (section 139(10) of the RMA). However, certificates of compliance issued prior to the NES-FW coming into force will not necessarily prevail over the NES-FW as they are subject to the standard existing use right provisions in the RMA under the following RMA provisions:

- Section 139(11) states that a CoC is to be treated as resource consent **subject to sections 10, 10A and 20A(2) of the RMA**. These sections determine the status of a lawfully established use of land or activity when a rule that has been notified or become operative requires a resource consent for that activity. [Section](#)



[4.3](#) of this PGN explains how this relationship works, depending on when the CoC was issued.

- Section 43B(9) states that if a NES require a resource consent to be obtained for an activity, **sections 10, 10A, 10B, and 20A(2)** apply to the activity as if the standard were a rule in a plan that had become operative.

The council may also receive and consider applications for CoC under section 139 of the RMA to provide written confirmation that the activity affecting freshwater can be undertaken lawfully without resource consent. Applicants may choose to do this to receive confirmation that the activity they are planning to undertake is permitted under the NES-FW.

#### **4.4.2 Section 139A – Existing use certificates**

Section 139A of the RMA allows the council to issue an existing use certificate to confirm that an activity was allowed by any of sections 10, 10A or 20A on the date the council issues the certificate. These certificates must specify the character, intensity and scale of the land use or activity, and in the context of the NES-FW which deals only with regional consents, must also describe the period the activity is allowed.

The purpose of these certificates (for the NES-FW) is to confirm that the activity was an existing lawful activity under section 20A of the RMA on the date that the council issues the certificate. [Section 4.3](#) of this PGN provides more information on the existing use rights provisions in the RMA and how these apply to freshwater activities.

#### **4.5 Relevance of the NES-FW to an application to change or cancel consent conditions under s127**

Existing consent holders may apply, under section 127 of the RMA, to change or cancel the conditions of resource consents they hold for activities that affect freshwater, which were granted prior to the commencement of the NES-FW. A section 127 application to change the condition of a consent that relates to activities that are regulated by the NES-FW will be processed in the same way as they were prior to the NES-FW coming into force, however the NES-FW will be a relevant matter to consider under section 104(1)(b)(i). The process to change or cancel the conditions of a resource consent can be summarised as follows:

- The activity status of the application will be discretionary under section 127(3)(a), regardless of the activity status of the consent or the activity status under the NES-FW (even if now a prohibited activity)
- The council (reporting planner and relevant specialist) will assess the effects of the change or cancellation of conditions in accordance with sections 88 to 121 of the RMA (section 127(3)(b))
- The council is required to have regard to the relevant provisions of the NES-FW under section 104(1)(b)(i) of the RMA.

For example, the NES-FW could be considered as part of the assessment of the 'permitted baseline' when considering a section 127 application that relates to an activity that affects freshwater.

Section 104(2) of the RMA enables the council as consent authority to disregard an adverse effect of the change or cancellation of conditions if the NES-FW permits the activity with that effect.

[Section 5.10](#) of this PGN provides more guidance on assessing resource consents under the NES-FW and the application of the 'permitted baseline'.



## 5 Processing resource consents under the NES-FW

The NES-FW enables a limited number of permitted activities where the relevant conditions are met. For activities affecting natural wetlands a number of general conditions apply (see Regulation 55) including for permitted activities where information must be provided to the council at least 10 working days before starting an activity. For permitted activities relating to fish passage, certain information must be provided to the council within 20 working days after the activity is finished.

The activity status for most activities regulated under the NES-FW will be subject to a number of 'general conditions'.



For a range of activities that can affect freshwater a resource consent will be required, including in the following circumstances:

- **Inherent risk to the health of freshwater and freshwater ecosystems** – the NES-FW introduces a consistent national approach to certain activities that are likely to affect the health of freshwater systems across New Zealand. For example, the partial or complete drainage of any natural wetland (as defined in the NPS-FW 2020) (including wetlands constructed to offset impacts on, or restore, an existing or former natural wetland) is now a prohibited activity, cognisant of the significant value these freshwater systems provide to the environment, and the cumulative loss that has occurred over time.
- **Non-compliance with a NES-FW permitted activity condition** – activities described as permitted in the NES-FW must comply with the relevant activity conditions for that activity and any general provisions applicable to that activity. If they do not, a resource consent will be required. There is an expectation that councils will monitor permitted activities to ensure compliance with the relevant conditions is achieved.
- **Non-compliance with district or regional plan rules that apply to the activity** – this will be when either:
  - There is a more stringent plan rule that applies to the activity and prevails over the NES-FW under [Regulation 6](#). For example, reclamation of the bed of rivers is a non-complying activity in the AUP(OP), which is more restrictive than the discretionary activity status for this activity in the NES-FW; or
  - The farming and/or activity which affects freshwater involves other activities that do not correspond to activities regulated by the NES-FW or that will result in effects that are not addressed in the NES-FW and are instead dealt with by the AUP(OP) or the Auckland Council District Plan: Hauraki Gulf Islands Section (“ACDP:HGI”).

This section of the PGN focuses on providing guidance on processing of resource consent applications that involve activities that engage with the NES-FW regulations.

## 5.1 Making a resource consent application

All resource consent applications must include:

*“an assessment of the activity against any relevant provisions of a document referred to in section 104(1)(b).”<sup>8</sup>*

Any application that involves freshwater in some way, whether in terms of an effect on freshwater (e.g. from a discharge, or land use) or in terms of a water permit, should include an assessment against the provisions of the NPS Freshwater (see [Section 2.1](#)) and NES-FW.

If this information is not provided with the application, the council may determine it to be incomplete, and if we do, it *must* be returned under s88(3A) of the RMA.

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<sup>8</sup> Schedule 4, clause 2(1)(g) of the RMA

The NES-FW does not contain objectives or policies but includes regulations equivalent to 'rules' permitting or requiring resource consent for specific activities. Applications need to identify whether any activities in their proposal are permitted (Schedule 4, clause (3)(a)) or require resource consent (Schedule 4, clause (2)(1)(e)) under the NES- FW, in addition to any AUP(OP) district or regional plan rules that apply.

## **5.2 Additional consent reasons**

If an application was lodged prior to 3 September 2020, it was unlikely to have considered either the NES-FW or the Freshwater NPS, as neither had come into force.

Irrespective of the time lodged, if a decision has not been made, it is a requirement of the RMA<sup>9</sup> to have regard to these statutory documents when making the substantive decisions on applications.

Where an additional consent requirement is identified under the NES-FW, the council can use section 91 to request that an application be lodged for this consent. This may require an applicant to prepare an addendum Assessment of Environmental Effects (AEE), along with payment of an additional application deposit fee. If additional consents are not required, the Council may still consider that it is appropriate to request an applicant to provide further information (section 92 of the RMA) relating to the application and the NES-FW, and to update the AEE (see section 4.1.2 below).

The use of Section 91 will place the current application 'on hold'<sup>10</sup> until the new application has been received.

Where the NES-FW application is not necessary to process a current application (i.e. it could be processed independently, see [Section 5.8](#) of this PGN for guidance around bundling), but will still be needed, the council should ask the applicant whether they would like to make the additional application required to by NES-FW provisions so that it can be considered at the same time. This is likely to be cheaper for the applicant (as the applications can be considered together in one report) but will require that the applicant agree to extend the timeframes of the current application (under s37 of the RMA) so the additional information can be provided and they can proceed together.

## **5.3 There is no activity status protection**

There is no activity status protection<sup>11</sup> for an application lodged before 5 August 2020 (the gazette date of the NES-FW) from a more stringent activity status applying from the NES-FW if the application was not the subject of a notification decision (or

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<sup>9</sup> Section 104(1)(b) of the RMA

<sup>10</sup> Section 88E(1) of the RMA

<sup>11</sup> Section 88A(1)(b)

granted) prior to 5 August 2020. This is because section 43B of the RMA establishes the relationship between an NES and resource consents (either granted or still being processed). This is explained in more detail in [Section 4](#) of this PGN.

## 5.4 Processing resource consents for restricted discretionary activities

Some activities in Part 2 subpart 3 and Part 3 of the NES-FW that relate to intensive winter grazing and wetlands respectively are assigned a restricted discretionary activity status. Applications for this class of activity are considered and determined in accordance with section 87A and 104-104C of the RMA. Consent can be granted or declined and council’s powers in considering the application and imposing any consent conditions are restricted to the matters over which discretion is restricted in the NES-FW (i.e. Regulation 56 matters to which discretion is restricted for Subpart 1 Natural wetlands).

### 5.4.1 Matters of discretion

The NES-FW specifies the matters over which discretion is restricted to when resource consent is required as a restricted discretionary activity. These matters of discretion ensure applicants and the council focus on the adverse environment effects likely to be generated by the activity due to non-compliance or site-specific risk factors. When councils process resource consent applications under the NES-FW, the assessment will focus on:

- **The matters of discretion that are relevant to the specific non-compliance** – the NES-FW provides a single list of matters of discretion for each restricted discretionary activity when resource consent is required (see Regulation 56). Not all matters will be relevant to all applications. The council will focus its assessment on relevant matters only.
- **The specific aspect of the wetland activity that is non-compliant with the permitted activity conditions, or the reason that resource consent is required** – for example, if vegetation clearance within, or within a 10m setback from, a natural wetland for the purpose of natural wetland restoration does not comply with either of the two conditions in Regulation 38, then the assessment should focus on the potential adverse environmental effects of that non-compliance, such as increased risk of sedimentation due to the proximity of the earthworks to the wetland (consistent with the matters discretion has been restricted to by Regulation 56).

Table 1 demonstrates the link between a restricted discretionary activity under Regulation 39(1), the matters discretion is restricted to under Regulation 56, and the potential resource consent conditions that could be suitable. The NES-FW also makes it mandatory to impose certain conditions on some resource consents.

Table 1: Link between matters for discretion and appropriate consent conditions

<b>Example activity</b>	<i>Vegetation clearance within, or within a 10 m setback from, a natural wetland for the purposes of natural wetland</i>
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	<p><i>restoration</i>. The <i>vegetation clearance</i> must not occur over more than 500m<sup>2</sup> or 10% of the area of the natural wetland, whichever is smaller. In this case, the <i>vegetation clearance</i> will occur over 600m<sup>2</sup>.</p>
<b>Non-compliance</b>	<p>Regulation 38(b), assuming that all other permitted activity conditions are complied with (including general conditions on natural wetland activities in Regulation 55).</p>
<b>Matters to which discretion is restricted</b>	<p>Regulation 56 – Discretion is restricted to (noting not all will be relevant to this activity):</p> <ul style="list-style-type: none"> <li>(a) the extent to which the nature, scale, timing, intensity, and location of the activity may have adverse effects on— <ul style="list-style-type: none"> <li>(i) the existing and potential values of the natural wetland, its catchment, and the coastal environment; and</li> <li>(ii) the extent of the natural wetland; and</li> <li>(iii) the seasonal and annual hydrological regime of the natural wetland; and</li> <li>(iv) the passage of fish in the natural wetland or another water body</li> </ul> </li> <li>(b) whether there are practicable alternatives to undertaking the activity that would avoid those adverse effects:</li> <li>(c) the extent to which those adverse effects will be managed to avoid the loss of the extent of the natural wetland and its values</li> <li>(d) other measures to minimise or remedy those adverse effects</li> <li>(e) how any of those adverse effects that are more than minor may be offset or compensated for if they cannot be avoided, minimised, or remedied</li> <li>(f) the risk of flooding upstream or downstream of the natural wetland, and the measures to avoid, minimise, or remedy that risk</li> <li>(g) the social, economic, environmental, and cultural benefits (if any) that are likely to result from the proposed activity (including the extent to which the activity may protect, maintain, or enhance ecosystems).</li> </ul>
<b>Conditions required</b>	<p>Regulation 39(6) requires that a resource consent granted for the restricted discretionary activity must impose a condition that requires compliance with the restoration plan.</p>
<b>Potentially suitable consent conditions</b>	<p>Any conditions that logically relate to the matters to which discretion is restricted. Standard conditions will be developed over time.</p>

### 5.4.2 Assessment criteria

There are no assessment criteria in the NES-FW.

### 5.4.3 Assessing objectives and policies

National environmental standards are regulations which have the effect of a rule in a plan – they do not contain objectives or policies.

Guidance from objectives and policies in the Freshwater NPS or other statutory documents<sup>12</sup> like the AUP(OP) will generally not be needed when resource consent is required only under the NES-FW for a restricted discretionary activity. This is because the matters of discretion in the NES-FW are focused and relatively discrete, and the council can only consider these matters when assessing the potential effects of the activity, determining the application, and imposing any consent conditions.<sup>13</sup> However guidance can be taken from relevant objectives and policies as necessary to clarify any of the outcomes that are being sought by the regulations.

The council will also still need to consider if there are any relevant objectives and policies in their plan as part of the section 104(1)(b) assessment. Potentially relevant objectives and policies to consider in the assessment of resource consent applications required under the NES-FW include (by way of example):

- Objectives and policies that relate to biodiversity, hydrological function, vegetation clearance and cultural benefits (if any) that are likely to arise from the proposed wetland activity. This would be relevant to the matters of discretion in the NES-FW relating to the positive cultural effects.
- Objectives and policies that relate to the management of environmental effects of activities on flooding and natural hazards. This would be relevant to the matters of discretion in the NES-FW relating to the risk of flooding.

## 5.5 Processing resource consents for discretionary and non-complying activities

Because the NES-FW is generally restrictive rather than enabling, there are a variety of discretionary and non-complying activities prescribed.

The council is able to consider all relevant matters for discretionary activities when making its section 104 assessments and may decline or grant resource consent applications with or without conditions (section 87A(4) of the RMA). For non-complying activity applications, the application must also be considered against the s104D 'gateway test' before it is eligible to be decided under s104B of the RMA.

The council will need to consider on a case-by-case application basis what objectives or policies are relevant to the application. In most cases, these will be

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<sup>12</sup> Being any relevant provisions of the documents listed under section 104(1)(b) of the RMA, which also includes other regulations, and the New Zealand Coastal Policy Statement.

<sup>13</sup> Section 87A(3)(a) for restricted discretionary activities.

objectives and policies in the Freshwater NPS (along with the provisions of the other planning documents under section 104(1)(b) of the RMA, such as the AUP(OP)).

## 5.6 Principles of appropriate resource consent conditions

When granting resource consents under the NES-FW, it is the responsibility of the council to determine whether resource consent conditions are required and, if so, set appropriate conditions in accordance with sections 108 and 108AA of the RMA. Appropriate resource consent conditions are important to ensure actual or potential adverse environmental effects are appropriately avoided, remedied or mitigated.

Any consent conditions imposed on resource consents granted under the NES-FW should be constructed with consideration of the site-specific risks and effects of the activity, rather than being generic.

This is with the exception of where the NES-FW sets out specific conditions that must be included in some instances, for example at Regulation 69(2) for maintenance and monitoring requirements.

There is a large body of guidance and case law on resource consent conditions. This has established that good consent conditions must be:<sup>14</sup>

- Within a council's powers under the RMA; and
- For a valid resource management purpose; and
- Clear, certain and self-contained; and
- Within the matters of control or discretion (where relevant);
- Fair, reasonable and practical; and
- Relevant to the subject matter of the consent.

Much of the above has now been enshrined in s108AA of the RMA (Requirements for conditions of resource consents), which was inserted into the RMA by the Resource Legislation Amendment Act 2017.

The last bullet point is particularly relevant under the NES-FW as it is divided into activity specific sub-parts and each farming or freshwater activity is treated separately. For example, the council should not use a resource consent for an activity such as reclamation of the bed of a river as an opportunity to impose consent conditions relating to a different activity (i.e. natural hazard works).

The Courts have confirmed that a resource consent condition may be invalid if:

- It is unreasonable<sup>15</sup>; or
- It involves a delegation of local authority duties; or

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<sup>14</sup> Refer to Quality Planning guidance on consent conditions: <https://www.qualityplanning.org.nz/node/913>

<sup>15</sup> Refer to *Banks v Waikato Regional Council PT Hamilton* A031/95, 20 April 1995 which held that a condition about replanting in the Tararua forest would not fairly and reasonably relate to the subject matter of the application to harvest existing trees; there would be an ulterior object of controlling a possible future activity on the same land.

- Is uncertain or unenforceable<sup>16</sup>; or
- It frustrates the grant of consent.<sup>17</sup>

The council will be carefully considering these principles when developing new or revised resource consent conditions relating to freshwater activities.

Remember that it is also part of our practice to discuss conditions with applicants prior to a resource consent decision being made. This helps to ensure that conditions are clear, achievable and relevant from the perspective of the consent holder. It will also reduce the likelihood of an objection to the consent conditions.

## 5.7 When resource consent is also required under the AUP(OP) or ACDP:HGI

An activity may comply with the permitted activity conditions in the NES-FW but there may be district or regional plan rules that apply to the activity. This will occur under two scenarios:

1. The AUP(OP) contains a more stringent rule that applies to the activity and this prevails over the NES-FW (per Regulation 6); or
2. The freshwater activity involves activities that do not correspond to activities regulated under the NES-FW or activities will result in effects that are not addressed in the NES-FW and are dealt with in the AUP(OP), or in the case of associated district plan activities, also the ACDP:HGI.

In these scenarios, the consent application will be processed in the same way as council currently processes resource consent applications. The resource consent decision and any conditions will be focused on those aspects of the activity that are not regulated under the NES-FW.

For example, if land disturbance is proposed within a significant ecological area adjacent to a wetland but is otherwise permitted because it is for natural wetland restoration, the resource consent decision and any conditions will focus on effects that relate to the significant ecological area only. The assessment should not extend to any other potential adverse effects of earthworks when the activity complies with the relevant permitted activity conditions in the NES-FW (which deal with these other potential adverse effects).

<sup>16</sup> For examples of unreasonable or inappropriate conditions, see *Reeves v Waitakere City Council* PT W068/95, 26 May 1995, *Fletcher Challenge Forests Ltd v Whakatane District Council* EnvC Auckland A093/99, 10 September 1999 or *Arrigato Investments Ltd v Rodney District Council* EnvC Auckland A145/02, 5 July 2002.

<sup>17</sup> *Palmerston North City Council v New Zealand Windfarms Ltd* [2015] NZEnvC 70, see also Salmon Environmental Law commentary – ‘Conditions should be enforceable, require specificity and clarity and accuracy of expression leading to a measure of certainty. Any guidelines imposed should not contain an undue measure of discretion, and techniques used should produce results that provide a reasonable guide for enforcing the condition’. Also refer *Wood v Selwyn DC* C035/94 citing *Bitumix v Mt Wellington BC* [1979] 2 NZLR 57, and *Ferguson v Far North DC* [1999] NZRMA 238 and *Cookie Muncher Charitable Trust v Christchurch City Council* NZEnvC W090/08.



## 5.8 Bundling of resource consents

In some situations, an applicant may apply for resource consents for a range of activities under the NES-FW at the same time which may be a mixture of restricted discretionary, discretionary and non-complying activities. These activities may also be different types of resource consents<sup>18</sup>, for example a discharge consent under s15, but also a streamworks permit under s13.

There is some discretion to 'bundle' activities in such circumstances and consider the proposal as one overall activity applying the most restrictive activity status. This is done when multiple elements of the same proposal require resource consent and, for processing and decision-making purposes, those consents are 'bundled' by the council as the consent authority and are considered together. This would mean that the varying resource consents are 'bundled' together and processed as one application for an overall activity, rather than as a number of separate activities, applying the most restrictive activity status.

However, case law has emphasised that the approach of 'bundling' applications with different activity statuses is not appropriate where:

- One of the consents sought is for a controlled activity (none in the NES-FW) or restricted discretionary activity and where the scope of the consent authority's discretion in respect of one or more of the consents is relatively restricted.
- The effects of exercising the two consents would not overlap or have consequential or flow on effects on matters to be considered on the other application.

It is possible that these situations could apply under the NES-FW for some natural wetland activities, as the matters of discretion are relatively confined and specific, and the effects of some types of these activities do not have much overlap.

For example, the effects of exercising a resource consent for *vegetation clearance* nearby a *natural wetland* for *scientific research* (not complying with a condition under Regulation 40(4)) and adding a *passive flap gate* to a stream elsewhere on a site for the purpose of managing *fish passage* may have limited overlap.

However, more often than not, the reasons for consent will be more closely linked, and 'bundling' the activity status may be more appropriate. The council will consider whether it is appropriate to bundle consents on a case-by-case basis with reference to the tests above.

## 5.9 Determining whether an application must be notified

The NES-FW does not preclude or require notification for any activity. Notification decisions must follow the 'steps' set out in s95A (public notification) and s95B (limited notification) of the RMA.

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<sup>18</sup> See section 87 of the RMA for a description of the types of resource consents

## 5.10 Permitted baseline

Permitted baseline is a concept provided for under sections 95D(b), 95E(2) and 104(2) of the RMA that allows a council to disregard adverse effects of an activity on the environment if a plan or a national environmental standard permits an activity with that effect.

Now that the NES-FW has come into force (with the exception of those parts referred to in [Section 3](#) of this PGN), it may form part of any permitted baseline. This means that the council can therefore exercise its discretion to apply the NES-FW when assessing the adverse environmental effects of an activity which may affect freshwater or freshwater ecosystems. This may be relevant to an assessment of the adverse effects of an activity for notification purposes (in terms of both public and limited notification) as well as when making the substantive decision on the resource consent application. The council will consider whether it is appropriate to exercise its discretion to apply the permitted baseline on a case-by-case basis.

## 5.11 Prohibited activities

Regulation 53 of the NES-FW states that any earthworks, or taking, use, damming, diversion or discharge of water within a natural wetland, that results or is likely to result in complete or partial drainage of all or part of the wetland is a prohibited activity (unless the activity has another activity status prescribed under Regulations 38 to 51).

Where an application involving the reclamation of a wetland has not yet been accepted by the council under section 88, and Regulation 53 applies, the council will return the application, as it is unable to process or decide it.<sup>19</sup>

Where an application has already been accepted for processing and Regulation 53 applies, an applicant may be able to amend the application provided that the changes proposed are within the scope of the original application. The council will advise applicants that there are two options available to address the situation in such circumstances. Applicants could request an application be put on hold under either section 91A or section 95D of the RMA (if applicable) if they wish to amend it to remove that aspect (provided any amendment is within scope of the original application). Alternatively, if the applicant needs to reassess their position, the council will suggest that the application is withdrawn and a fresh application is lodged.

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<sup>19</sup> Section 87A(6) of the RMA

## 6 Stock Exclusion Regulations

The [Resource Management \(Stock Exclusion\) Regulations 2020](#) (“Stock exclusion regulations”) prohibit the access of cattle, pigs and deer to wetlands, lakes, and rivers.

These regulations came into force from 3 September 2020 and must be complied with – there is no opportunity to apply for a resource consent to not meet the requirements under them.

These regulations apply to a person who owns or controls beef cattle, dairy cattle, dairy support cattle, deer or pigs (stock). The regulations require the person to exclude stock from specified wetlands, lakes, and rivers more than one metre wide.

- Dairy cattle, dairy support cattle, and pigs must be excluded from the water bodies regardless of the terrain.
- Beef cattle and deer must be excluded from the water bodies regardless of terrain if they are break-feeding or grazing annual forage crops or irrigated pasture. Otherwise, the requirements apply to beef cattle and deer only on mapped low slope land.
- Stock must be excluded from the beds of lakes, rivers and wetlands, and must not be on land closer than three metres to the bed of rivers and lakes. However, stock need not be excluded from land within three metres of the bed if there is a permanent fence in place on 3 September 2020.
- Stock, except deer, may only cross a river or lake by using a dedicated bridge or culvert, unless they cross no more than twice in any month. The regulation sets out specified circumstances when cattle and pigs can cross without a dedicated culvert or bridge. Deer are not subject to restrictions for crossing rivers and lakes.

The stock exclusion requirements will have effect in a staggered approach, following the dates set out in [Regulation 3](#).

The Ministry for the Environment (MfE) have prepared further supporting information on how low sloped land is mapped, and the purpose of the regulations, [on their website](#).

## 7 Water measurement and reporting regulations

The new package of national direction has included amendments to the [Resource Management \(Measurement and Reporting of Water Takes\) Regulations 2010](#).

The amendments introduce a staged timeline requiring holders of resource consents that allow the taking of between five and more than 20 litres of water a second to:

- measure their water use every 15 minutes,
- store their records, and
- electronically submit their records to their council every day.

This means that the regulations do not apply to:

- people who do not require a resource consent for their water take (permitted takes), including:
  - individual households or businesses that take water from a reticulated supply
  - takes that are specifically permitted in section 14 of the RMA including takes for an individual's domestic purposes, for animals' drinking water, or for firefighting
  - any takes which are permitted by a rule in the AUP(OP) or a national environmental standard
  - holders of permits for water takes that only allow water to be taken at a rate of less than 5 litres/second.

The regulations also do not apply to:

- holders of permits for non-consumptive takes (irrespective of the rate of that take), which are described in the regulations as takes where the same amount of water is returned to the same water body at or near the location from which it was taken; and there is no significant delay between the taking and returning of the water
- holders of permits for takes of coastal or geothermal water.

The MfE website [includes comprehensive supporting information](#) on these regulations that can be referred to by specialists and landowners alike.







## 8 Further Guidance

The [MfE website](#) includes an extensive set of freshwater guidance documents that are helpful to professionals and communities who are managing water quality, either through local government, or even landowners.

The guidance includes:

- Factsheets on policies and regulations in the Essential Freshwater package
  - Overview of Essential Freshwater package
  - Te Mana o te Wai
  - Wetlands
  - Rivers
  - Fish Passage
  - Agricultural intensification
  - Intensive winter grazing
  - Stockholding and feedlots
  - Stock exclusion
  - Interaction between the NES-FW and Freshwater NPS
  - Values and attributes
  - District plans and territorial authorities

- Webinars on implementing the Essential Freshwater programme
- Guide on the Freshwater NPS
- Australian and New Zealand Guidelines for Fresh and Marine Water Quality
- Microbiological water quality guidelines for recreational water - frequently asked questions
- Tools and guidelines for managing ecological health
- Irrigated land in New Zealand

## **9 Conclusion**

This PGN provides the council's current approach to applications that engage with provisions of the NES-FW, along with some high-level guidance on how the National Policy Statement for Freshwater Management, stock exclusion regulations and water measurement and reporting regulations, can influence notification determinations and substantive decision-making.

Implementation of the Essential Freshwater policy package is a rapidly evolving space, and some approaches may change, particularly as our understanding of Te Mana o te Wai matures through discussions with the iwi groups in the Auckland region, and with further guidance from Central Government.

MfE also continue to offer clarifications on their website as to how certain parts of the package interact and work together.

We will continue to provide as much guidance in this space as possible. We encourage council staff and applicants to engage with us to try and make the consent process as streamlined as possible.