Submission on *Managing our wetlands* – discussion document on proposed changes to the wetland regulations

To the Ministry for the Environment 27 October 2021

Submitter details

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The Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner has broad powers to investigate environmental concerns and make recommendations to improve environmental outcomes. The Commissioner is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Key Points

- The *Managing our wetlands* discussion document contains three broad proposals, two of which are concerning, as they risk leading to further wetland loss across New Zealand.
- The proposed changes to the definition of a 'natural wetland' will do little to make the definition simpler and interpretation less variable.
    - Broadening the definition to include "exotic species associated with pasture" opens the door for additional interpretation differences and inconsistencies of definitions.
    - Deleting 'at the commencement date' from the definition creates shifting goalposts as it removes the baseline for wetland assessments. Without some sort of baseline, a wetland could be allowed to degrade to the point where it no longer met the NPS definition of 'wetland', leading to perverse outcomes.
- Making restoration, maintenance and biosecurity activities easier, while providing for protection of 'natural wetlands', is a sensible proposal that I support.
- The proposals for additional consent pathways for quarrying, landfill, clean fill, mining, and urban development are most worrying, as they broaden the reasons to destroy wetlands to almost anything and would be a U-turn on avoiding any further loss or degradation of wetlands.
- The value of natural wetlands is wider than conservation. Crucially, they are also a natural defence in climate adaptation – they help mitigate flood risks and damage. As recent flash floods have demonstrated, our towns and cities are not well adapted to cope with intense rain events. The role wetlands play in climate adaptation is important and we should be much more cautious about believing we can simply engineer our way out of the problem.
- Wetlands are place-specific ecosystems that cannot realistically be 'relocated' or 're-built'. In the context of natural wetlands, offsetting and compensation do not work.

Introduction

Thank you for the opportunity to submit on the *Managing our wetlands* discussion document on proposed changes to the wetland regulations.

The discussion document proposes amendments to the definition of a 'natural wetland' and changes to the regulatory framework to enable wetland restoration as well as several development activities via consent pathways.

Overall, I am concerned that the proposals risk further wetland loss and in particular the capacity of wetlands to protect against adverse climatic events.

Change to the definition of a 'natural wetland'

The NPS-FM currently defines a 'natural wetland' as:

A wetland (as defined in the RMA) "that is not:

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

The discussion document is proposing to amend part (c) of the above definition as follows:

(c) any area of pasture that has more than 50 percent ground cover comprising exotic pasture species or exotic species associated with pasture.

The discussion document and the associated Regulatory Impact Statement state that "the current definition of a 'natural wetland' in the NPS-FM is problematic to apply…" and "… has multiple qualifiers leading to variable interpretations."[1]

The proposed technical changes to the definition will do little to make the definition simpler and interpretation less variable. The proposal to delete "improved" and "temporary rain derived pooling" should remove some ambiguity and improve the definition. However, other proposed changes are likely to increase uncertainty. The discussion document proposes to broaden the definition to include "exotic species associated with pasture" but does not include a list of these species or propose that such a list be developed. This opens the door for further interpretation differences and inconsistencies of definitions.

The primary problem of defining the margins of the wetlands remain, with "any area of pasture that has more than 50 percent ground cover" providing an incentive to make this area as small or as large as possible depending on whether you want it to be a wetland or not.

[1] See *Managing our wetlands* discussion document on p.6 and the *Regulatory Impact Statement: Changes to the wetland regulations* on p.9.

The threshold of 50% pasture (and pasture related species) already seems a rather low bar as it means up to the remaining 50% will be natural wetland species that could be destroyed without any consent. Depending on the size of the wetland this could be a rather large area.

The discussion document states that the current definition is problematic because it "captures some heavily modified, exotic pasture-dominated wetlands even though part (c) of the definition seeks to exclude these areas. This is having unintended consequences, such as restricting changes in land use and development in these areas".

This explanation assumes that if wetlands are already heavily modified, they are no longer providing environmental services of value or interest. Although not stated to be the case, such a view seems to be grounded in a perspective that wetlands only have value for biodiversity and if that has been significantly modified, the rationale for protection is lost. The consultation documents states that "even if they were once 'natural wetlands', [they] are now highly modified environments and should be able to continue their current use or be able to shift in land use".

While it may be less than ideal for water, soil and animal welfare reasons to have stock on very wet ground, I can understand that the Government may have decided to permit existing issues to continue notwithstanding. But it cannot be assumed that land use change and development is unobjectionable because the pasture is heavily modified. Poorly drained pasture will still slow the impact of heavy rain events. If development (perhaps for conversion to commercial or residential uses) makes much of the surface impermeable, water then has to be directed to costly drainage infrastructure. The effects of extreme precipitation events which are forecast to become more intense should be a warning against diminishing any natural existing protections like wetlands, even if they are significantly modified.

While the phrase 'at the commencement date' in the current definition creates some issues and complexity around back-casting, especially for intermittingly wet wetlands, deleting it from the definition would create other loopholes. Specifically, its deletion removes any baseline for wetland assessments. Instead of having a fixed date for wetland assessments (3 September 2020, the date when the NPS-FM 2020 and the NES-F 2020 came into force), these assessments will be allowed to be made at an unspecified time in the future.

Not having a baseline at all could lead to perverse incentives. People might abandon wetland management to allow a wetland to be over-run by exotic species including weeds, given that there is no longer a baseline for the wetland assessments. This in turn means that a wetland is no longer considered to be a 'natural wetland', enabling ongoing wetland degradation, and making development easier.

In summary, the proposed changes to the definition of a natural wetland will do little to make the definition simpler and interpretation less variable. More worryingly, proposed changes create loopholes that risk leading to further loss of any remaining wetlands and the climate adaptation and other environmental services they provide, even if they are significantly modified.

Change sought

- Further work by wetland experts is required around the definition, percentage of 'pasture species and species associated with pasture' and including a baseline before the definition is changed.

Change to better enable 'natural wetland' restoration, maintenance and biosecurity work

The second proposal in the discussion document aims to make restoration, maintenance and biosecurity activities easier, while providing for protection of natural wetlands. This is proposed to be done by making more restoration and biosecurity activities permitted activities. This is a sensible proposal that I support. With less council oversight because of permitted activity status, it is important to ensure associated guidelines and regulations are reviewed and updated to prevent unintended harm to flora and fauna as a result of the activities.

Proposals for additional consent pathways

Finally, the discussion document proposes to allow for additional consent pathways for quarrying, landfill, clean fill, mining, and urban development. These proposals are worrying. They look like a U-turn on the current rules in the NPS-FM 2020 and the NES-F 2020, which essentially require avoiding any further loss or degradation of wetlands and encourage their restoration.

> Policy 6 of the NPS-FM 2020 reads: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.
>
> Clause 52 of the NES-F 2020 makes earthwork activities near natural wetlands non-complying, while clause 53 makes earthworks within a natural wetland a prohibited activity.

Further, in its final advice released in May 2021, the Climate Change Commission recommended, among other things, "taking steps to … [prevent] further loss of carbon from organic soils, particularly due to the degradation of drained peatlands and the destruction of wetlands."[2]

The discussion document acknowledges that New Zealand's wetlands are at risk, and some 90 per cent of natural wetlands have been lost since human settlement. Further, the discussion document states that the "Government is committed to preserving wetlands". Yet the proposals seem to make the protection and preservation of wetlands more difficult. By creating additional consenting pathways, they allow for almost any development to take place: quarrying, landfill, clean fill, mining, and urban development. It is hard to see what activities are *not* precluded from destroying a wetland other than farming and some horticulture.

The key argument put forward in the discussion document is that quarrying, landfill, clean fill, mining, and urban developments are place-specific activities that require flexibility since they may coincide with wetlands. That argument itself is debatable.

The argument that urban development is "place-specific" runs contrary to any idea of spatial planning that is designed to both improve urban form and infrastructural deployment while taking full account of those underlying elements of the environment that are needed to support ecological process. As I have argued in my submission on the exposure draft of the Natural & Built Environments Bill, that at this stage of the nation's development we should be insisting that the environment is *prior* to the economy, not something that you endlessly trade-off. The euphemism of consenting pathways is little more than a license to disregard wetlands at the council's discretion.

[2] See Climate Change Commission, 2021, recommendation 25. 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

As the discussion document points out, while situating landfills, clean fills and managed fills at some distance from development sites "has substantial cost implications", natural wetlands are not the only places suitable for these fills and destroying the wetlands also has irreversible costs.

Further, while some aggregate and valuable rock maybe located underneath wetlands, it is highly unlikely that wetlands are the only places in a region with aggregate or rock suitable for quarrying.

It seems particularly specious to advance special pleading for mining on the basis that "some mined minerals may contribute to clean technologies as part of the transition to a low emissions economy". The same minerals could equally advance elements of the fossil economy while the maintenance of wetlands will certainly avoid carbon dioxide emissions caused by the oxidation of formerly wet soils.

Change sought

- Quarrying, landfill, clean fill, mining, and urban development should remain prohibited activities within natural wetlands; and non-complying nearby (within 100 m).

The sounder argument is that natural wetlands themselves are place-specific – very often more place-specific than the activities proposed for more flexible consenting. As the natural incumbents, wetlands have formed in the places they have for good reasons. They provide specialised environmental services that are highly place-specific and cannot be relocated.

The discussion document mentions **offsetting and compensation** as part of the effects management hierarchy. According to the discussion document:

> "Aquatic offset means a positive and measurable conservation outcome that results from actions intended to compensate for any more than minor negative effects and achieve no net loss of wetland area or ecological value.
>
> Aquatic compensation means a positive conservation outcome intended to compensate for any more than minor negative effects on a wetland, after all other appropriate steps in the 'effects management hierarchy' have been applied."[3]

From a biodiversity perspective, offsetting and compensation do not work. It is impossible to re-build a seep on a hill side. A lowland duck pond with flaxes won't replace it as completely different species live in seeps on hillsides versus in lowland ponds. Compensation is, by definition, not 'like for like'. In the context of natural wetlands, this can mean allowing the loss of wetlands to be compensated by gains in other vegetation types.

Furthermore, the environmental services provided by wetlands are much wider than 'conservation' and 'biodiversity'. As I have noted previously, they are also an essential line of defence in climate adaptation – they help mitigate against flood risk and damage. As recent flash floods have demonstrated (most recently in Auckland in August 2021), our towns and cities are not well adapted to cope with heavy rain events. Yet with climate change these events are only becoming more intense. Wetlands provide a natural solution for slowing water flow and minimising flood risks (and improving water quality). The location of the wetlands in the catchment is critical to their effectiveness in flood protection and other mitigation services.

[3] See *Managing our wetlands* discussion document on p.11.

The concept of 'water sensitive design' – i.e. designing wetlands as essential infrastructure for urban development is not new. But in an era of climate change this is a critical part of today's urban development. In short, wetlands are one of our most potent weapons in adapting to climate change. They should be restored, not drained or developed.

Change sought

- Offsetting and compensation proposals as outlined in the discussion document are not supported.