

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

[2021] NZEnvC 006

IN THE MATTER OF

an appeal under clause 14 of Schedule 1
of the Resource Management Act 1991,
and of a Declaration pursuant to section
310 of the Act, and of NES-F 2020 and
jurisdiction on appeals before this Court
on Topics 7, 9 and 15

BETWEEN

BAY OF ISLANDS MARITIME
PARK INCORPORATED

(ENV-2019-AKL-117)

CEP SERVICES MATAUWHI
LIMITED

(ENV-2019-AKL-111)

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED

(ENV-2019-AKL-127)

MANGAWHAI HARBOUR
RESTORATION SOCIETY
INCORPORATED

(ENV-2019-AKL-110)

FEDERATED FARMERS OF NEW
ZEALAND INCORPORATED

(ENV-2019-AKL-114)

MINISTER OF CONSERVATION

(ENV-2019-AKL-122)

Appellants

AND

NORTHLAND REGIONAL
COUNCIL

Respondent

BAY OF ISLANDS MARITIME PARK INC v NORTHLAND REGIONAL COUNCIL



Court: Environment Judge J A Smith
Environment Commissioner R M Bartlett

Hearing: At Whangarei on 9 and 10 December 2020
Last case event: Memorandum of Mr Doesburg, dated 27 January 2021

Appearances: S Gepp for Bay of Islands Maritime Park Incorporated
(BOIMP)
P D Anderson for Royal Forest and Bird Protection Society of
NZ Inc **(Forest & Bird)**
M Downing for Minister of Conservation **(MoC)**
S Shaw for Patuharakeke Te Iwi Trust Board **(the Trust)**
A Riddell for CEP Services Matauwhi Ltd **(CEP)**
R Gardner for Federated Farmers of New Zealand Limited
(Federated Farmers)
K Littlejohn for Mangawhai Harbour Restoration Society
Incorporated **(MHRS)**
M Doesburg for Northland Regional Council **(the Council)**

Date of Decision: 10 February 2021
Date of Issue: 10 February 2021

DECLARATION OF THE ENVIRONMENT COURT

- A: The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F / Regulations**) apply to the coastal marine area (**CMA**) only to the extent that they cover the area of CMA upstream of the “river mouth” as defined in the Resource Management Act 1991. In particular, they do not apply to the general CMA, open oceans, estuaries, bays and other areas not falling within the definition of “river or connected area”.
- B: The Court is empowered to consider the Regional Plan provisions affecting those parts of the CMA not encompassed within that definition in terms of the New Zealand Coastal Policy Statement (**NZCPS**) and other documents, without considering any constraints imposed by virtue of the said NES-F.
- C: For those areas of the CMA that are covered within the definition of “rivers or connected areas” where the Regulations do apply, the NES-F will need to be

considered in forming a view as to the most appropriate provisions for those areas.

Directions

D: The Court issues Directions as follows:

The Council has provided a draft list of provisions that could be affected by the NES-F if:

- (i) The list should be modified and circulated to the parties and Court as a consequence of the declarations by **26 February 2021**;
- (ii) By **5 March 2021**, the Council is to file a memorandum with a draft timetable to rehearing, and identifying steps necessary; and
- (iii) The Court will hold a further pre-hearing conference as soon as possible after 5 March to consider the conduct of the final hearing in respect of the CMA areas not covered by the NES-F and an approach to be adopted for those freshwater areas (Topics 9 and 7) and any areas that maybe covered in terms of any appeals that are within the rivers or connected areas.

E: A copy of this declaration is to be provided to the Minister of Conservation as to the inter-relationship of the Coastal Marine Area and the NES-F-2020.

F: Costs applications are not encouraged but reserved to the conclusion of the substantive issues.

REASONS

Introduction

Background to the Declaration

[1] During the course of a hearing on Topic 15 relating to mangroves, the potential for the NES-F to cover areas of the CMA was raised by Ms Gepp for the Bay of Islands Maritime Park Incorporated.

[2] It was clear to the Court and to all counsel before it that the potential for this to occur had not been anticipated by the parties, although a number of them had been involved in earlier consultation over the NES-F. The issues are clearly important and may also affect Topics 9 and 7 in relation to set-backs from wetlands.

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

[4] No party had a full opportunity to consider the matter prior to the hearing and it was then adjourned for consideration. It was agreed that the matter would proceed to a hearing. In our view this has two aspects:

- (1) a declaration as to the meaning of the NES-F as it applies to wetlands;
- (2) a jurisdictional determination as to whether or not the meaning of those words affects the jurisdiction of this Court to proceed.

Scope of this Hearing

[5] This hearing was held on 9 and 10 December 2020. Initially the Court had anticipated that the reconvened hearing would move on the consideration of the implications of any declaration on the substantive hearing (in its Direction of 23 October 2020). However, it was agreed in the Memorandum of 9 November 2020 between all Counsel that the hearing would be as to jurisdiction only.

[6] In particular, the declaration was to answer the following question:

- (i) Do the Resource Management (National Environmental Standards for Freshwater) Regulation 2020 apply to wetlands in the Coastal Marine Area?

[7] We conclude that the ancillary points should also be considered:

- What are "natural wetlands" in the CMA?
- Does the NES-F include wetlands outside the CMA but within saltwater or brackish water?
- Does the natural wetland include freshwater, brackish water and saltwater within the CMA?
- Do our conclusions affect the jurisdiction of the Court to proceed?

[8] In accordance with directions, an Affidavit had been filed by Dr Phillippe Gerbeaux, a recognised expert on wetlands both in New Zealand and internationally. No party disputed the contents of his Affidavit and this was accepted by the Court on the basis that no party or the Court had any question of Dr Gerbeaux. Those factual matters underly our analysis and discussion.

[9] Essentially, Dr Gerbeaux adopted a position accepted by all parties that "natural wetlands" include those in freshwater, those in freshwater areas subject to varying degrees of saline intrusion and those within the CMA itself. In terms of the RMA, this would cover the definition of "freshwater" and "coastal waters". In case there is any further remaining dispute, Dr Gerbeaux made it clear that essentially any area supporting vegetation that can be fully or partially covered by water is a wetland. He left open the question as to whether areas in the CMA that are permanently under water or often under water, such as (eel grass/*Zostera* beds) in most New Zealand harbours, also constitute wetlands.

[10] More problematic was the question as to whether deeper waters in the open CMA (such as those up to 6 m deep that support kelp beds) may constitute wetlands. All parties agreed that it was not necessary for the Court to determine this matter for the purposes of this hearing.

Background to the Freshwater Regulations – NES-F 2020

[11] The Regulations are intended to be part of a package described by some as a freshwater initiative constituting a new National Policy Statement on Freshwater Management 2020 and the new Regulations which constitute a National Environmental Standard in terms of the Resource Management Act.

[12] The process adopted for the Regulations and Policy Statement was a consultative one by the Government but did not involve any separate hearings or evaluation of evidence. Nevertheless, it appears there was relatively wide consultation including with some of the parties before this Court.

[13] The Regulations have their genesis in s 43 of the RMA, which gives the Governor-General, by Order in Council, broad power to make regulations known as environmental standards *inter alia* “in respect of water quality, level or flow (s 43(1)(a)(ii))”.

[14] There was no dispute the regulations under s 43 could cover water generally, being both freshwater and saltwater. Additionally, Section 43A allows that the regulations may also prohibit activities or make them non-complying, discretionary restricted, discretionary, permitted or controlled; and for discretionary or controlled activities may state matters of control. This is made most explicit in sub-paragraph 43A (6) which allows the regulations to state matters over which control is reserved or discretion restricted.

[15] Section 43B addresses certain consequences of such standards including that a rule or resource consent that is more stringent than a national environmental standard prevails over the standard (ss 43B (1) & (2)). However, a rule or resource consent will only prevail over a standard that is more lenient if the standard expressly says that such a rule or consent may be made 43B (3). For our purposes no one suggested that this applied to the current circumstances.

[16] Certain permits and consents prevail over an environmental standard, those being a coastal, water or discharge permit or a land use consent granted in relation to

a regional rule 43B (6). Section 43B (6A) establishes exceptions in relation to existing permits and consents.

The process for Environmental Regulations

[17] Section 44 specifies the requirements for regulations and 46A provides two alternative processes:

(a) Under ss 47-51 of the RMA which might be called the “Board of Inquiry” approach. That was not used for these regulations.

(b) The process adopted is described under s 46A(3)(b). If the Minister proposes to issue a national direction the Minister must either:

(a) ...;or

(b) establish and follow a process that includes the steps described in subsection (4).

(4) The steps required in the process established under subsection (3)(b) must include the following:

(a) the public and iwi authorities must be given notice of –

(i) the proposed national direction; and

(ii) why the Minister considers that the proposed national direction is consistent with the purpose of the Act;

(b) those notified must be given adequate time and opportunity to make a submission on the subject matter of the proposed national direction; and

(c) a report and recommendations must be made to the Minister on the submissions and the subject matter of the national direction; and

(d) the matters listed in s 51(1) must be considered as if the references in that provision of a board of iniquity were references to the person who prepares the report and recommendations

[18] Again, there is no dispute that the Minister followed the process described above. Section 51 sets out the various matters to be considered in the process adopted by the Minister:

51 Matters to be considered and board of inquiry's report

- (1) The board of inquiry must consider the following matters:
- (a) the matters in Part (2);
 - (b) the proposed national direction; and
 - (c) any submissions received on the proposed national direction; and
 - (ca) if applicable, any additional material provided by the Ministry under 47A(1)(b); and
 - (d) any evidence received; and
 - (e) any other relevant matter.

[19] It is important in this regard to note that the Government, during the same time, amended the RMA on 1 July 2020, in particular subpart 4 of s 80A, to establish a specific process for freshwater planning. That process itself is not vital for the current appeals or this declaration, as at this stage it has not yet been implemented in Northland. However, it is important to note that a proposed regional plan anticipated in terms of s 80A relating to freshwater does not include a proposed regional coastal plan or a change or variation to that plan.

[20] "Freshwater" is defined in the Act as "all water except coastal water and geothermal water". "Coastal water" is defined to mean:

Sea water within the outer limits of the territorial and sea and includes –

- (a) Seawater with a substantial freshwater component; and
- (b) Seawater in estuaries, fiords, inlets, harbours or embayments.

[21] It is in this context that the NPS-FM 2020 and the NES-F 2020 were promulgated. For current purposes it was acknowledged by the parties that the NPS-FM deals only with "natural inland wetlands" in relation to its policies. However, it includes definition of both "natural wetlands" and "natural inland wetlands" in Subpart 3 Specific Requirements (3.21(1)):

natural wetland means a wetland (as defined in the Act) 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.

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

[22] Accordingly, from these definitions and that of “wetland” within the RMA we are able to ascertain:

- (a) That a wetland includes permanently or intermittently wet areas, shallow water and land -water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions. There is no reference to or any requirement for the condition of the water to be examined for this definition (that is, whether it is saline).
- (b) That a natural inland wetland consists of one of these wetlands that is not subject to the three constraints identified and is not in the coastal marine area. It is common ground that NPS-FM deals only with freshwater and does not deal with water in the CMA.

[23] The relevant part of the NES-F is when the standards begin to deal with natural wetlands. This occurs at Part 3 “Standards for other activities that relate to freshwater, Subpart 1 - Natural Wetlands”. Part 3 contains an additional exemption that the subpart does not apply to customary harvest of food or resources undertaken in accordance with Tikanga Maori.

[24] The NES-F provisions in Part 3, from its commencement at s 37 onwards, discuss natural wetlands and make no reference there to natural inland wetlands. In relation to any change in intent between the NPS-FM and the NES-F, the only significant indicator immediately available is the reference solely to natural wetlands rather than to natural inland wetlands. It is this which is at the heart of the interpretive issue and the reason for this declaration.

Wetlands under the NPS-FM 2020

[25] It acknowledged by all parties that both documents were the product of output from the Government's Essential Freshwater Work Programme. The intent is that the consent requirements under the NES-F are to be assessed against the provisions of the NPS-FM 2020. There is no specific discussion of a cross-over between the NZCPS and the NPS-FM within NPS-FM itself. Clause 3.5(1) of the NPS-FM relevantly provides:

- (1) Adopting an integrated approach, ki uta ki tai, as required by Te Mana o te Wai requires that local authorities must:
 - (a) recognise the interconnectedness of the whole environment from the mountains and lakes, down the rivers and hāpua (lagoons), wahapū (estuaries) and to the sea; and
 - (b) recognise interactions between freshwater, land, water bodies, ecosystems and receiving environments; and
 - (c) manage freshwater and land use and development in catchments in an integrated and sustainable way to avoid remedy or mitigate adverse effects including cumulative effects on the health and wellbeing of water bodies, freshwater ecosystems and receiving environments; and
 - (d) encourage the co-ordination and sequencing of regional or urban growth.

[26] While recognising the integrated nature of our environment, "management" under the NPS-FM focusses on potential effects on receiving environments - which ultimately lead to the sea. The wording of clause c) is not such that we can recognise a focus on managing effects other than those that arise on land, that is, in freshwater, and we are unable to come to the conclusion from those words alone that the NPS-FM applies to all coastal marine environments. If this were the case, it would be difficult to reconcile the NPS-FM with the freshwater provisions in s 80A which treat freshwater issues as separate from land use and CMA issues.

[27] Nevertheless some wording in the NPS-FM, which might be considered relevant, as follows:

- (a) This NPS-FM applies to "all freshwater including ground water, and, to the extent they are affected by freshwater, to receiving environments (which

may include estuaries and the wider coastal marine area)".¹ We conclude that this is an important guide to understanding the context of the NES-F. It recognises that receiving environments can be affected by freshwater;

- (b) "Receiving environment" is not defined, but Part 2 Policy 3 notes:

Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole of catchment basis including the effects on receiving environments.

This appears, on the face of it, to qualify impacts on the receiving environments to only those that result from freshwater. There is also no express discussion of effects of the land or sea on freshwater. This in itself indicates that controls or standards may be imposed on freshwater and also on matters that might affect that freshwater, to protect the values of receiving environments.

[28] We have concluded that the relevant wording does not indicate that all receiving environments are part of or covered by the NPS-FM. We again recognise the integrated management discussion in 3.5 which

- (a) recognises "the interconnectedness of the whole environment from mountains and lakes, down the rivers to hapuā (lagoons), wahapū (estuaries) and to the sea"; and
- (b) the interactions of those between freshwater, land, waterbodies, ecosystems and receiving environments; and
- (c) manages freshwater and land use and development in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects, including cumulative effects, "on the health and well-being of water bodies, freshwater ecosystems, and receiving environments"; and
- (d) [not relevant here].

[29] Again, this clearly shows that the purpose of the integration and interconnection

¹ NPS-FM s 1.5,

is to recognise the impacts that might occur on receiving environments from freshwater issues (be they water quality, hydrology, or other).

[30] We have concluded that there is nothing in the NPS-FM that militates for or requires there to be controls over the wider receiving environment. Overall, it might be said that the regulations are focused on ensuring that the generation of adverse effects on or by freshwater do not have impacts on other environments such as estuaries.

[31] Considering the NES-F, it was common ground of the parties that our starting point for an examination of this matter was the meaning of the NES-F and its purpose as derived from the document itself. Given that the regulation itself is generated in the context of the NPS-FM 2020 and the RMA, it is important to understand that these represent starting points for its development.

[32] Overall, we conclude that it is the intent of the NPS-FM, and of the relevant legislation with regard to which it was developed, to provide an integrated approach to freshwater management. The objective was not to subsume the entire environment including the CMA and land use within the purview of the freshwater regulations or freshwater regime set up under s 80A. To do so would be anathema given the requirement to develop the regional plans and regional coastal plans separately to those for freshwater. Having said that we acknowledge that it is intended that the NPS-FM should work together with other documents including the NZCPS, regional policies and plans and regional coastal plans to create a seamless whole.

Does the NES-F 2020 intend to cover all wetlands (excepting those removed by the definition of natural wetlands in the NPS-FM)?

[33] The NES-F Regulations do not state any specific purpose, simply that they are generated under s 43 of the RMA. Accordingly, there is no clear statement to enable an understanding of the purpose of the regulation or what its coverage might be. However, the title of the Regulations does specifically identify freshwater and this may be indicative of an intent to cover only freshwater.

[34] Natural wetlands are not defined within the NES-F itself and the words take their meaning from the NPS-FM. We conclude that this shows a clear connection between the two documents and an intent that this be part of the method to achieve the NES-F 2020. The other part would be the development of freshwater plans envisaged under s 80A of the RMA.

[35] Of particular importance to our consideration of the intent of the Regulations and their effect is the definition of “river or connected area” which is defined in the NES-F 2020 Regulation (Section 3) as:

- (a) a river; or
- (b) any part of the coastal marine area that is upstream from the mouth of a river.

[36] This is a matter of particular importance because it clearly includes within the purview of the freshwater regulations any area of a river within the coastal marine area upstream of the mouth of that river. When we consider this, it is clear that there is a distinction between this definition and that of coastal waters.

[37] “Coastal water” is not defined in either the NES-F 2020 or the NPS-FM 2020. The definition of “coastal water” and “coastal marine area” are in the RMA s 2. **Coastal water** as defined would include water within a river that has saline content, but which may or may not be within the CMA.

[38] The **Coastal Marine Area**, by definition in the RMA, includes not only the sea itself but also that part of a river either a distance five times the width of the mouth of the river or one kilometre upstream of the river mouth, whichever is the lesser. It includes the foreshore, seabed, coastal waters and the air space.

Overlap of salt/freshwater (brackish water)

[39] We think the definition of river and connected area in the NES-F is critical to an understanding of the intent of these documents. We say this because of the Court’s particular experience not only in this plan but in many other cases with areas relating to tidal influence, tidal prisms, brackish water and the particular values that this

represents.

[40] We recognise that it is not possible to give an exact position for the limits of salt in freshwater, except in some cases such as where, there are basins (a matter we discussed in *New Zealand Fairy Tern Charitable Trust v Auckland Council*²) naturally shaped such that salt water can proceed no further inland. The position for saline intrusion at its maximum is set by the geology and geomorphology of the area; by gradient, or by features such as waterfalls. Saltwater being heavier than freshwater will lie beneath fresh water.

[41] However, there will be times, in particular during storm surges when high tide and landward flood conditions coincide, when saline intrusion will occur far higher up a river than at other times. The point at which the saline influence is lost up stream can vary over quite a wide range, in some cases not described by metres inland but by kilometres. This is particularly true in low-lying areas. There have been ongoing practical difficulties in ascertaining when an area has coastal waters or is freshwater.

[42] As Mr Gardner said for the members of Federated Farmers, many farmers do not know from day to day whether the river water adjacent to their land will have any salt content or not and this can change depending on atmospheric and flow conditions, and the influence of the tidal cycle (whether king or neap tide). Mean high water springs, commonly used to establish a salt / freshwater boundary, is itself an averaging of historical data, usually based upon assumptions given that it is not possible to measure tidal heights at every location around the coast (the Northland coastline itself is some 3,000 kilometres long).

[43] In respect of the 1,700 or so waterways that meet that coastline in Northland, some often have very low flow rates, i.e., less than 15 litres per second for the majority of time. Even such small catchments can run to relatively high volumes at peak flood.

² *New Zealand Fairy Tern Charitable Trust v Auckland Council* [2019] NZEnvC 172.

Conclusion on boundary

[44] Therefore, we conclude that in promulgating the freshwater management provisions, the Ministry for the Environment wanted to provide as much certainty as possible as to the areas that would be affected by the regulations.

[45] The mouth of the river is generally established by consultation between the regional council and the Ministry of Conservation. We have been handed the known river mouth data for many of Northland's rivers. By utilising these agreed figures (however imprecise) the regulations become more certain as to their application. The condition of the water above the river mouth, as defined, is not a matter that requires particular evidence but rather is controlled by requirements of the NES-F and Freshwater Plans, while water below that point forms part of the estuary, harbour or embayment and is therefore is controlled by other means, being the NZCPS and regional coastal plan.

[46] Natural wetlands include those both above the coastal marine area ("natural inland wetlands" as defined in the NPS-FM 2020) and below it. Even inland, however, wetlands landward of the CMA may contain saltwater or brackish water under certain conditions, due to sea water percolation through beach sands and gravels at high tide to wetlands behind the beach as described by Dr Gerbeaux³. Wetlands are described by a range of different terms, some "conflicting and confusing"⁴, but there is no "dividing line" that separates wetland from open lake or open coastal water.

[47] The depth of water in the CMA to which ecosystems can be described as "wetland" is not clear, being variously described as "shallow" (the RMA definition – with "shallow" being interpreted by some to be "less than a few meters deep"⁵) and, in the Ramsar Convention on Wetlands, as "areas of marine water, the depth of which at low tide does not exceed six metres"⁶.

³ PJR Gerbeaux Affidavit at [38].

⁴ Ibid at [25].

⁵ Ibid at [28].

⁶ Ibid at [36].

[48] As noted earlier, “wetland” appears to be taken to include areas of mangrove and seagrass and may extend to seaweeds/algae. All of these may inhabit the intertidal zone. If such areas were to come under the NES-F Regulations this would have the potential for conflict with coastal plans or regulations regarding fisheries.

Interpretation of the Regulations

[49] Section 5 of the Interpretation Act 1999 requires the Court to consider the following:

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material and the organisation and format of the enactment.

[50] Firstly, we note that the Regulations do not discuss mangrove or saltmarsh areas or the CMA or coastal marine area explicitly except:

- (a) In Interpretation (3) in the definition of “river or connected area” (defined earlier);
- (b) In 10(3)(c), in a condition as to feedlot discretionary activities; that the feedlot must be at least “50 metres away from any waterbody, any water abstraction bore, any drain and the coastal marine area”.
- (c) In 13(4)(c), which requires, for a permitted activity for holding cattle as a permitted activity, that again the stockholding area must be “50 metres away from any water body, any water abstraction bore, any drain and the coastal marine and area”; and
- (d) In 24(1)(b), that a discretionary activity, if granted, will not result in an increase in concentration of contaminants in freshwater or other receiving environments (including the coastal marine area and geothermal water) compared with the concentrations as at the close of 2 September 2020.

- (e) In 34(1)(b), that for the non-complying activity of the discharge of synthetic nitrogen fertiliser, the discharge must not be “into the air, or into or onto land, including in circumstances that may result in the synthetic nitrogen fertiliser (or any other contaminant emanating as a result of natural processes from the fertiliser) entering water”.

[51] In relation to those references to coastal marine areas it is clear that such areas are distinguished from fresh waterbodies. As the references are related to land-based activities, they do not give any particular indication as to whether or not wetlands in the coastal marine area are intended to be controlled.

[52] As we discussed, Part 3 of the NES-F addresses wetlands, with issues under the following headings [our numbering] and commencing with the sections shown:

- (1) Restoration of natural wetlands, s 38;
- (2) Scientific research, s 40;
- (3) Construction of wetland utility structures, s 42;
- (4) Maintenance of wetland utility structures, s 43;
- (5) Arable and horticultural land use; s 50;
- (6) Natural hazard works, s 51;
- (7) Drainage of natural wetlands, s 52;
- (8) Other activities, covering certain non-complying activities, with s 54 including vegetation clearance, earthworks taking, diversion or discharge of water within a 100 metres setback from a natural wetland.

[53] In none of the above sections is there any mention of the coastal environment and no specific provisions making reference to any particular characteristics of the CMA, including tidal cycles or other issues that might affect activities within wetlands there. However, in regulation 56 which covers matters to which restricted discretion activities are restricted, there is a specific reference to the coastal environment

(56(a)(1)):

- (a) The extent to which the nature, scale, timing, intensity and location of the activity may have adverse effects on –
 - (i) the existing and potential values of the natural wetland, its catchment and the coastal environment.

[54] Sections 58, 59 and 60 cover the effects of passage of fish and refer to structures in “river or connected areas” but do not otherwise refer to any part of the CMA.

Conclusion on Regulations

[55] It is not possible to say that the lack of any real discussion of mangroves, saltmarsh or the coastal marine area determines whether activities in wetlands in the coastal marine environment are regulated by the NES-F. What we can say is that the NES-F follows the NPS-FM and is concerned about freshwater impacts on receiving environments. While such receiving environments clearly include the coastal marine area and the coastal environment generally, we are not able to take, from this, that activities in all natural wetlands are intended to be controlled by the Regulations.

[56] Again, the titles of headings and paragraphs are not determinative but do lead us towards a view that the concern of the Regulations in this regard is activity that might occur on land. The restrictions we list above in the NES-F that mention the CMA do so in terms of preventing adverse effects of activities on land from having adverse effects on natural wetlands (including those in the CMA), but do not appear to cover the effects of activities within the CMA.

[57] Put another way, the NES-F seeks to ensure that coastal waters are not inappropriately affected or contaminated but does not control activities within the CMA itself.

[58] There is a lack of clarity in the drafting of the NES-F as regards the area of application of the Regulations. As we have discussed, the Ministry for the Environment may have intended to include at least some areas of CMA within the NES-F. One clear example is the definition of “river or connected area”, which includes “any part of the coastal marine area which is upstream from the mouth of a

river”.

[59] No other clear examples can be determined by reference to either the Regulations themselves or the NPS-FM, except the use of the term “natural wetlands”. If it was intended that the Regulations generated for freshwater are to apply to all areas including the CMA, then this should have been made explicit. Section 80A indicates a clear demarcation of regional plans (i.e., for land-based activities) and regional coastal plans.

[60] We conclude the NES-F is not directed at the coastal marine area. The boundary is the “river or connected area” upstream of the river mouth. We conclude that the NES-F only has regulatory effect upstream of the river mouth, even if it includes coastal water. Below that point natural wetlands are included as part of the coastal marine area and/or coastal waters and are controlled by regional coastal plans and the NZCPS as appropriate. Although the NES-F is not mandatory outside the “river or connected area” it will still be relevant when considering appropriate provisions in a regional plan or regional coastal plan. This is because of the interconnectedness of these coastal and river areas.

[61] We reach this conclusion because:

- If the NES-F had effect within the CMA, it would be mandatory and would have significant consequences on issues relating to marine areas and potentially also under the Fisheries Act 1996, depending on the depth of water to which the natural wetland definition is deemed to apply.
- Freshwater planning instruments prepared under s 80A would not integrate directly with the area covered by regional plans and as such would lead to issues as to how these would be implemented and enforced. We have concluded that given the mandatory nature of the NES-F as Regulations, we must construct them against the party which seeks to implement them. In this case, the Government must be clear that it wishes to constrain activities within all coastal water areas as they relate to natural wetlands.

- Given the number of wetlands in the CMA, particularly in the Northland Region, this would be a significant imposition for management of much of the coastline. Arguably such effects may even be more dramatic if the NES-F applies to deeper coastal water and areas that are always covered by seawater, even if this was only to a depth of 3 to 6 metres.
- We have concluded that the Regulations do not clearly indicate an intent to control such areas. There is clearly an extension in respect of “rivers or connected areas”. We consider that for clarity that has been utilised as a convenient and clear demarcation point.

[62] Our concluded view as to the best interpretation of the documents that are before us is that the NES-F is intended to apply to all areas of freshwater and to rivers or connected areas, including not only for fish passage, but in respect of water quality control and all provisions including those relating to natural wetlands. This in our view would give the desired degree of certainty as to the application of the Regulations and accordingly as to the scope of matters controlled.

Reason for Declarations

[63] In our view, the Council will still need to consider the extent to which NES-F requirements impact upon “river or connected areas”, even if they have been identified as CMA. The consequences of this are not at this stage clear.

[64] It does mean that larger estuaries, embayment, harbours and the like, which support natural wetland features, would not constitute areas controlled by the NES-F if they are downstream of the river mouth. On shorelines where few or no streams or rivers enter such estuaries, the boundaries may be relatively easy to identify. In relation to other rivers, it is only those areas upstream of the river mouth and are within the CMA that would be controlled. In relation to larger harbours such as the Hokianga and Mangawhai Harbours (the subject of evidence before us), in the areas above the river mouth the regulations would apply. The Regional Plan covers both inland and coastal areas, so its provision would need to reflect those requirements.

Outcome

[65] We accordingly make the following declarations:

- A:** The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F / Regulations) apply to the coastal marine area (CMA) only to the extent that they cover the area of CMA upstream of the “river mouth” as defined in the Resource Management Act 1991. In particular, they do not apply to the general CMA, open oceans, estuaries, bays and other areas not falling within the definition of “river or connected area”.
- B:** The Court is empowered to consider the Regional Plan provisions affecting those parts of the CMA not encompassed within that definition in terms of the New Zealand Coastal Policy Statement (NZCPS) and other documents, without considering any constraints imposed by virtue of the said NES-F.
- C:** For those areas of the CMA that are covered within the definition of “rivers or connected areas” where the Regulations do apply, the NES-F will need to be considered in forming a view as to the most appropriate provisions for those areas.

Directions

D: The Court issues Directions as follows:

The Council has provided a draft list of provisions that could be affected by the NES-F if:

- (i) The list should be modified and circulated to the parties and Court as a consequence of the declarations by 26 February;
- (ii) By 5 March, the Council is to file a memorandum with a draft timetable to rehearing, and identifying steps necessary; and

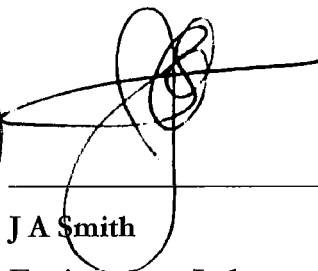
(iii) The Court will hold a further pre-hearing conference as soon as possible after 5 March to consider the conduct of the final hearing in respect of the CMA areas not covered by the NES-F and an approach to be adopted for those freshwater areas (Topics 9 and 7) and any areas that maybe covered in terms of any appeals that are within the rivers or connected areas.

E: A copy of this declaration is to be provided to the Minister of Conservation as to the inter-relationship of the Coastal Marine Area and the NES-F-2020.

F: Costs applications are not encouraged but reserved to the conclusion of the substantive issues.

For the court:





J A Smith

Environment Judge