

MEMORANDUM

To: Sue Simons, Chair of the Waikanae North Expert Panel

From: Matt Allan / Lisa Wansbrough

Client/Matter: Environmental Protection Authority / 712809 – Waikanae North Project

Subject: Peer Review

Date: 3 September 2026

A. INTRODUCTION

1. We have been asked to peer review the memorandum prepared by Patrick Senior dated 23 September 2025 concerning the Waikanae North Development (**Opinion**). The Opinion addresses the statutory decision-making framework under the Fast-track Approvals Act 2024 (**FTAA**), the classification and proposed reclamation of watercourses on the site, natural inland wetlands, the scope of the listed project, and the proposed cancellation of an existing consent notice. These issues are addressed in **Sections C to G** below.
2. As requested, we also address comments from the Greater Wellington Regional Council (**GWRC**) under s 53 of the FTAA only to the extent they engage matters raised in the Opinion (principally watercourse classification and the relationship between Policies P31, P38 and P110). We express no view on the other issues raised in GWRC's comments.
3. We note at the outset that the Opinion responds to questions posed in a planning memorandum that, as we understand matters, is not before the Panel. The questions can largely be gleaned from the Opinion itself, but their precise terms, and any assumptions accompanying them, are not available.
4. In addition, you have asked us to review comments from the Department of Conservation (**DOC**) and the applicant's response on whether the proposed culvert/weir structure in the Ngārara Stream constitutes a "complex freshwater fisheries activity". While you have not asked us to advise on that specific question, you have asked us to advise whether, if the structure does act as a dam, additional consents would be required under the GWRC Natural Resources Plan (**NRP**). This question is addressed in **Section H** below.

B. EXECUTIVE SUMMARY

5. Our conclusions are summarised below.
6. **FTAA framework (Section C).** We do not recommend that the Panel adopt the Opinion's four-step framework, or its proposition that Steps 2-4 are not required if the Panel is satisfied

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at Step 1. Section 81 requires one integrated decision for each approval sought. The Panel must genuinely consider the matters incorporated by cl 17 of Sch 5 on their own terms, give the greatest weight to the purpose of the FTAA in the overall evaluation, address conditions under the applicable provisions, and, if decline is under consideration, apply the limiting requirements of s 85. The RMA considerations are not a separate consenting pathway, and the FTAA purpose is not an alternative reached only if they do not support consent.

7. **The disputed watercourses (Section D).** We agree with the Opinion's statutory analysis: the RMA distinguishes a modified natural watercourse, which remains a river, from a wholly artificial watercourse, which does not. We would qualify its treatment of *Carruthers*, in which the High Court did not determine the source of flow question, and we would not go so far as to set the GWRC Guidance Note aside. The Panel will need to make an express finding on whether each disputed channel is wholly artificial or is the modification of a pre-existing natural watercourse; expert agreement to set classification aside does not remove that need, because classification governs activity status and the approvals required. We respectfully disagree that Policy P31 functions as an exception to Policy P110: the text runs the other way, and a P110 exception must be met before the offsetting and compensation limbs of P31 become available.
8. **Wetlands (Section E).** There is no ordinary RMA pathway for the wetland reclamation, which is prohibited under reg 53 of the NES-F, but the FTAA supplies one directly through s 42(5)(a) and cl 17(3)–(4) of Sch 5. While that removes the jurisdictional bar, it does not remove Policy 6 of the NPS-FM from the assessment. Refer to **Section E** for further discussion.
9. **Scope (Section F).** The dwelling yield is reasonably arguable but not free from doubt: "approximately" imports tolerance in both directions, but a maximum of 1,201 dwellings is some 20 per cent above the listed figure, and the authorities do not determine how far that tolerance extends. We are comfortable with the off-site stormwater works on immediately adjoining land as falling within limb (b) of the FTAA definition of "project", provided they are genuinely ancillary. We recommend that the Panel make express findings on both matters rather than treating scope as settled by the EPA's acceptance of the application.
10. **Consent notice (Section G).** We agree that the FTAA does not confer power to cancel a consent notice under s 221 of the RMA, and that the matter should be dealt with outside the FTAA process.
11. **The culvert / weir structure (Section H).** The NRP has various overlapping permitted activity rules that apply to structures in rivers, including dams as well as other structures that may not ordinarily function as a dam, but could involve temporary damming as an associated activity. In other words, the NRP regulates both dams, as well as other structures that even if not treated as a dam *per se*, involve damming as an associated activity. From a cursory review, it appears that the proposed structure, even if classified as a dam, would not meet the permitted activity conditions of Rule R127, which specifically applies to dams, or the other permitted activity rules that apply to other structures that could involve associated damming. For any of the potentially applicable permitted activity rules, the placement of the structure in the bed would constitute a discretionary activity under rule R145 – the rule that the applicant has already identified. However, any associated damming of the river cannot be authorised under Rule R145, which expressly excludes damming, and requires consent under Rule R147 (or Rule R148 if the conditions of Rule R148 are not met). The applicant has already

identified the need for a regional consent under Rule R147, but only in relation to the diversion of the river but not the potential damming that may occur in flood conditions.

C. FTAA FRAMEWORK

12. The Opinion describes the approval framework for resource consents as containing four sequential steps:

- (a) an assessment under the Resource Management Act 1991 (**RMA**) provisions incorporated by cl 17(1)(b) of Sch 5;
- (b) consideration of the FTAA purpose under cl 17(1)(a);
- (c) the decline threshold in s 85(3); and
- (d) a residual discretion.

It states at [2.2] that "[i]f the panel is satisfied under Step 1, then Steps 2-4 are not required".¹

13. We do not recommend that the Panel adopt that four-step framework, including the proposition at [2.2]. In our view, it does not fully reflect the statutory structure and risks separating matters that Parliament has brought together in the decision required by s 81. The statute prescribes one integrated decision-making exercise for each approval sought, rather than a series of separate or alternative statutory pathways. That exercise contains distinct analytical components:

- (a) Section 81 is the starting point. For each approval sought, the Panel must decide whether to grant the approval, with any conditions, or decline it. In making that decision, s 81(2) requires the Panel to consider the application and specified advice, reports, comments and other information; apply the applicable provisions in the relevant schedules; comply with the statutory requirements governing conditions, including ss 83 and 84A where applicable; and provides that the Panel may decline only in accordance with s 85. For a resource consent, the applicable provisions include clauses 17 - 22 of Sch 5.²
- (b) Clause 17 is therefore an important component of the s 81 decision, but is not itself the whole decision-making framework. Under cl 17(1), the Panel must take into account the specified matters, giving the greatest weight to the purpose of the FTAA. Those matters include the relevant RMA provisions identified in cl 17(1)(b). The RMA considerations are accordingly not a separate "RMA consenting pathway". Nor is the FTAA purpose a subsequent alternative pathway which is reached only if the RMA considerations do not support consent. They form part of the statutory assessment required in making the s 81 decision.³ That is confirmed by the text: cl 17(1) imposes a single composite obligation to take into account paragraphs (a), (b) and (c), with the weighting direction internal to it, and s 81(2)(b) itself directs the Panel to the applicable

¹ Opinion at [2.1]–[2.2].

² FTAA, s 81(1)–(3).

³ FTAA, s 81(2)(b), (3)(a) and Sch 5 cl 17(1).

clauses "in relation to the weight to be given to the purpose of this Act when making the decision".

- (c) We acknowledge that, in the ordinary course, a favourable assessment of the cl 17(1)(b) matters would only be reinforced by the weighting. The difficulty with the proposition at [2.2] of the Opinion is therefore not necessarily the outcome it would produce, but the truncation of a statutorily mandated exercise.
- (d) The *Bledisloe* fast-track decision supports that approach. The Panel there emphasised that the FTAA purpose could not be considered at the expense of the other mandatory matters; that the relevant criteria should receive genuine consideration on their own terms; and that the statutory direction to give the purpose the greatest weight operates in the overall evaluation. Environmental effects do not become less significant because the purpose favours development; rather, the legislation affects the weight accorded to the competing considerations in reaching the decision.⁴
- (e) Without undertaking a detailed survey of FTAA decisions, we simply observe that subsequent fast-track decisions issued since the Opinion have reinforced that approach. *Pound Road* (issued after the December 2025 amendments to the FTAA) and *Waihi North* similarly undertake the substantive assessment of the relevant statutory considerations before giving effect to the prescribed weighting in the ultimate decision.⁵ The *Waihi North* Panel was also inclined to read cl 17(4) of Sch 5 alongside s 85(4), and on that basis adopted the approach that directive avoidance policies which would ordinarily require decline are taken into account as such, but do not require the Panel to decline.⁶
- (f) Section 85 operates within, and constrains, the decision-making exercise required by s 81. Section 81(2)(f) provides that the Panel may decline an approval only in accordance with s 85. Correspondingly, s 85(3) applies where, "in complying with section 81(2)", the Panel forms the view that there are one or more adverse impacts and that those impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the Panel has considered under s 81(4), even after taking into account any conditions the Panel may set in relation to those impacts and any conditions or modifications the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for them.⁷ "Adverse impact" is defined broadly in s 85(5) as "any matter" considered in complying with s 81(2) that weighs against granting the approval.
- (g) Section 85 can be seen as a distinct threshold inquiry within the s 81 determination, and the matters relevant to it emerge from the same decision-making process.

⁴ *Bledisloe North Wharf and Fergusson North Berth Extension*, final decision, at [118]-[122], particularly the discussion at [121] by reference to the Court of Appeal decision in *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541.

⁵ *Pound Road Industrial Development*, final decision, at [118]-[120] and [782]-[788]; *Waihi North*, Part G1 at [4]-[7].

⁶ *Waihi North*, Part G1 at [4] and [7].

⁷ See *Pound Road* at [113], where the Panel sets out the approach it would take to s 85(3). We commend that approach to the Panel, should s 85(3) fall to be considered.

Subject to the mandatory decline provisions in s 85(1) and (2),⁸ s 85 constrains the Panel's power to decline: even where matters weigh against grant, decline is available only if the threshold in s 85(3) is met. We agree with the Opinion that even where that threshold is met, s 85(3) is permissive: the Panel may, but is not required to, decline.

- (h) Nor does s 85(4) permit an adverse effect or policy inconsistency to be disregarded merely because it cannot, by itself, justify decline. It provides only that the Panel may not find the s 85(3)(b) threshold satisfied "solely" because an adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that the Panel must take into account or otherwise consider in complying with s 81(2). The underlying effect or concern remains part of the s 81 assessment and may also be relevant to the conditions that are necessary and appropriate. Further, the express use of "solely" means that an inconsistency or contrariness *may* contribute, together with other adverse impacts, to the conclusion that the adverse impacts collectively meet the threshold in s 85(3)(b).⁹
- (i) Conditions likewise form part of the s 81 process rather than a later adjunct to it. Section 81(2)(d) requires compliance with s 83 in setting conditions, while s 85(3)(b) requires the Panel, when considering whether the decline threshold is met, to take into account conditions it may impose and modifications or conditions proposed or agreed by the applicant. The adequacy of conditions may therefore be relevant both to the substantive assessment and to whether the statutory threshold for decline is reached. Clause 17(3) and (4) of Sch 5 reinforce the same structure: a provision that would ordinarily require decline of a resource consent application must be taken into account as such, but must not be treated as requiring the Panel to decline. Importantly, an adverse effect need not satisfy the s 85(3) threshold before it may properly be addressed by conditions; *Pound Road* expressly rejected the conflation of the decline threshold with the separate condition-setting powers.¹⁰

14. In short, the Panel makes one integrated decision under s 81. For a resource consent, it must genuinely consider the matters incorporated by cl 17 on their own terms, give the greatest weight to the purpose of the FTAA in the overall evaluation, address conditions under the applicable condition-setting provisions, and, if decline is under consideration, apply the limiting requirements of s 85.

D. THE DISPUTED WATERCOURSES

15. The Opinion concludes that the disputed watercourses are drains rather than rivers or streams, relying principally on the exclusion of artificial watercourses from the RMA definition of "river",¹¹ the NRP definition of "drain", and *Carruthers v Otago Regional Council*.¹² It also

⁸ Section 85(2) is confined to resource consents affected by an aquaculture reservation under cl 17(5) of Sch 5 and is not engaged here.

⁹ See *Pound Road* at [736]: inconsistency with planning provisions "may fall within the broad definition of 'adverse impact' in s 85(5)" but "does not, of itself, establish that the adverse impacts meet the proportionality threshold in s 85(3)(b)".

¹⁰ *Pound Road* at [197]-[201], especially [198]-[199].

¹¹ RMA, s 2: "river means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal)."

¹² *Carruthers v Otago Regional Council* [2013] NZHC 632.

considers that limited weight should be given to GWRC's non-statutory Watercourse Types Guidance Note, particularly insofar as it relies on source of flow to distinguish a river from an artificial watercourse.¹³

16. The applicant records that the 20 disputed channels were excavated as farm drains to drain historic wetlands and that its review of historic aerial photography and field assessment identified no evidence of a pre-existing natural stream channel or surface waterbody along the relevant alignments, either on the site or upstream.¹⁴
17. We understand GWRC's position to be that the disputed channels were constructed to drain historic wetlands and that, under the methodology in the Guidance Note, such channels are to be regarded as modified forms of the pre-existing waterbodies and therefore as rivers. GWRC also relies on its 2013 mapping of highly modified rivers and streams, while acknowledging that the relevant categorisation was prepared specifically for the NRP rules concerning maintenance and removal of aquatic vegetation and sediment.¹⁵
18. The NRP definition of "drain" does not determine the RMA question. We observe that the note to that definition is not free from ambiguity (it records that many watercourses considered to be drains are highly modified natural watercourses, including channels dug to drain natural wetlands), but it does not need to be resolved, because what matters is the RMA definition of "river".
19. The statutory starting point, and legal distinction drawn by the Opinion, is correct. The RMA definition distinguishes a modified natural watercourse (expressly including a farm drainage canal), which remains a river, from a wholly artificial watercourse, which does not.
20. The distinction is also substantially supported by *Carruthers*. The High Court held that a wholly artificial watercourse does not become a river merely because it receives water from, or is connected to, a natural river.¹⁶ The Court subsequently observed that the expression "modified watercourse" suggests that there must have been a pre-existing natural watercourse before the modification occurred.¹⁷
21. We would, however, slightly qualify the Opinion's statement that the High Court "rejected" the source of flow approach in the GWRC Guidance Note. *Carruthers* is persuasive authority that the source of the water does not matter – the High Court said it was "inclined to the view" that the source of the water did not matter – but the Court expressly did not determine that question. The Court's conclusion instead rested on the failure to establish that the artificial system was the modification of a pre-existing natural watercourse.¹⁸ The critical distinction is between an artificial watercourse and a natural watercourse that has been modified: a modified watercourse "is a natural watercourse, which has been modified", and prior to modification "was a 'continually or intermittently flowing body of water'".¹⁹

¹³ Opinion at [3.1]-[3.6].

¹⁴ Substantive application report, at 7.2.5.3.1.

¹⁵ GWRC s 53 comments at [53]-[58].

¹⁶ *Carruthers*, at [28].

¹⁷ *Carruthers* at [51].

¹⁸ *Carruthers* at [51]-[54].

¹⁹ *Carruthers*, at [51].

22. The Opinion suggests that the GWRC Guidance Note should be treated with caution “if not actively set aside”.²⁰ The weight to give to the GWRC Guidance Note (if any) is ultimately a matter for the Panel, however we offer some comments below:

- (a) We would not say that the Guidance Note must necessarily be “actively set aside”. The Note may potentially be considered as an “other matter” under s 104(1)(c) RMA²¹ if the Panel considers it relevant and reasonably necessary. More generally, it must at least be considered by the Panel under s 81(2)(a) FTAA, given that GWRC refers to it in its s 53 comments.
- (b) We also observe that the applicant’s ecologist used the Guidance Note in undertaking the site assessment, including its criteria concerning morphology, flow permanence and source of flow, and consulted GWRC’s broad-scale mapping.²² To that extent, the issue relating to the Guidance Note is fairly confined.
- (c) There is some force in the Opinion’s caution about the Guidance Note – supported to a degree by *Federated Farmers*. We note the guideline in *Federated Farmers* was put aside because it purported to instruct the Court and criticised judicial decisions.²³ By contrast, the Guidance Note makes no equivalent overstep and is candid about its non-statutory status:
 - i. It states that, although it has been legally reviewed, it is not a legal opinion on the interpretation of the RMA or NRP and that its recommendations are guidance rather than strict protocols that must be followed.²⁴
 - ii. It also expressly acknowledges that source of flow does not appear in the relevant definitions, describing it instead as a “good indicator” of whether a watercourse is artificial.²⁵
- (d) Similar to *Federated Farmers*, we note the Environment Court’s observation that courts “consistently attribute little weight” to non-statutory Ministry guidance material.²⁶
- (e) The real difficulty with the Guidance Note’s proposition that source of flow is a “good indicator” is *Carruthers* itself, in two respects:
 - i. The Guidance Note treats a natural source of flow as a “good indicator” that a watercourse is a river. Based on Fogarty J’s discussion in *Carruthers*, that may not be sound. Arguably, neither connection to a natural waterbody nor the natural derivation of the water is determinative of that question; and
 - ii. The Note’s inference, that a channel constructed to drain a historic wetland is the modified form of that waterbody, omits an important element of *Carruthers*: a

²⁰ Opinion, at [3.5].

²¹ Relevant under cl 17(1)(b).

²² RMA Ecology report dated March 2026, section 2.2.2, pages 11-12.

²³ *Federated Farmers v Northland Regional Council* [2022] NZEnvC 16, at [21] onwards.

²⁴ GWRC, *Watercourse Types Guidance Note*, page 2.

²⁵ GWRC, *Watercourse Types Guidance Note*, page 5, footnote 3.

²⁶ *Blue Grass Ltd v Dunedin City Council* [2024] NZEnvC 83 at [53].

modified watercourse presupposes a pre-existing natural watercourse (a "continually or intermittently flowing body of water") before modification. An historic wetland is not necessarily a flowing body of water.

23. The Panel will need to make an express finding on whether each relevant channel is wholly artificial or is instead the modification of a pre-existing natural watercourse. In doing so, the Panel will need to consider what the historic evidence establishes about the pre-drainage condition, noting that the earliest aerial photography post-dates construction of the drainage network. We do not express a view on the weight or sufficiency of the competing evidence; that is a matter for the Panel.
24. Should the Panel determine that each relevant channel is wholly artificial, *Carruthers* supports exclusion from the definition of "river". However, if the channels are modified pre-existing natural watercourses, and therefore rivers, as GWRC identifies, it appears that resource consent would be required for their reclamation under reg 57 of the National Environmental Standard for Freshwater (**NES-F**) and Rule R142 of the NRP.²⁷ GWRC's stream ecologist considers that, if the disputed channels are rivers, an SEV assessment of the affected network and potentially further offsetting would be required; if the applicant's artificial watercourse classification is accepted, he considers the assessment methodology broadly appropriate to that classification, subject to his concern about the customised habitat assessment method.²⁸
25. We understand the experts may have since agreed, through conferencing, to focus on quantifying the ecological values of the disputed network while setting classification aside. That agreement may narrow the evaluative dispute, and may mean the practical consequences of classification are modest. However, it does not remove the need for the Panel to determine classification, which governs activity status and the approvals required.

NRP policies

26. On the policy framework, we agree with the Opinion that Policies P31, P38 and P110 of the NRP are engaged if the watercourses are rivers, but we respectfully disagree with its statement that "P31 functions as an exception to P110".²⁹ The operative text runs the other way. P31's closing words provide that, in relation to activities within the beds of lakes, rivers and natural wetlands, limbs (e) to (g) – the offsetting and compensation limbs – "only apply to activities which meet the exceptions in Policy P110".³⁰ Therefore, an activity must first meet a P110 exception before P31(e)–(g) become available. P31 does not provide a way around P110.
27. In terms of why that matters on this application:
- (a) Because the offsetting and compensation limbs of P31 are conditional on first meeting a P110 exception, the availability of an exception is the threshold question for any P31-based pathway.

²⁷ GWRC s 53 comments at [53]–[63]; G Taylor, *Stream Ecology Comments*, Summary and at [10]–[16].

²⁸ G Taylor, *Stream Ecology Comments* at [10]–[16].

²⁹ Opinion at [3.9].

³⁰ Policy P31. We note the extract of P31 in GWRC's comments at [28] omits this sentence.

- (b) P110(b) requires both a functional need for the activity in that location and one of the reasons listed in (b)(ii), none of which is directed at residential subdivision.
- (c) The applicant's response to comments³¹ addresses those requirements in relation to the Ngārara Stream, relying on (b)(ii)(3) (reclamation associated with the creation of a new river bed, without piping) for the reclamation of the channel abandoned by the realignment. They are not addressed in relation to the disputed tributary channels, consistent with the applicant's position that those are not rivers.
- (d) If the Panel finds otherwise, that question will arise (and has not been the subject of detailed analysis in the material that we have reviewed).

28. GWRC separately considers that functional need for the reclamation of part of the Ngārara Stream, and application of the effects management hierarchy, have not been demonstrated as reg 57(2) of the NES-F requires.³² That engages the same functional need concept as P110(b)(i), and arises whatever view the Panel takes of the disputed tributaries. Whether reg 57(2) is satisfied is a matter for assessment by the Panel. The Panel may find the course taken in *Maitahi Village* instructive. The Panel there considered reg 57(2) 'for completeness' and found that, if it applied, there was a clear functional need for the stream realignment and that the effects management hierarchy had been addressed, particularly through aquatic offsetting.³³

"Avoid" and offsetting

29. We otherwise agree with much of the Opinion's treatment of the modern authorities on "avoid". *Port Otago* confirms that the content of an avoidance policy must be understood by reference to the value it protects. The Supreme Court accepted protection from material harm as the relevant standard, and accepted that mitigation, remedy and, where appropriate, adaptive management may result in material harm being avoided.³⁴ The High Court decision in *Te Rūnanga o Ngāti Whātua* is consistent with that approach in the freshwater context: Whata J rejected the proposition that "no material harm" was legally incapable of satisfying the relevant avoid policies, and accepted that whether material harm remains, including after an appropriate offset, is ultimately a matter for the "expert trier of fact" (here, the Panel).³⁵
30. We would, however, qualify the suggestion that a general "net positive biodiversity" outcome is enough.³⁶ Under *East West Link*, whether an offset satisfies an avoid policy is a question of fact and degree measured against the terms of the relevant avoid policy: the question is whether the relevant adverse effect can be avoided in fact.³⁷ That is distinct from the "bucket

³¹ At pages 25-26.

³² GWRC s 53 comments at [46]-[52].

³³ *Maitahi Village*, final decision, at [462].

³⁴ *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 at [65]-[68]. The Opinion cites *Port Otago* at [283]-[284]; the relevant discussion is at [65]-[68].

³⁵ *Te Rūnanga o Ngāti Whātua v Auckland Council* [2024] NZHC 3794 at [14]-[15].

³⁶ Opinion at [3.12]-[3.13]. The Opinion's treatment is brief, and we have understood it as advancing an overall net positive biodiversity outcome as an answer to the avoid policies.

³⁷ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [176]. Glazebrook J at [229]-[231] would additionally require, as a matter of law, that offsets relate to the protected values and ordinarily operate at the point of impact, applying a precautionary approach; the majority left those as matters of evidence for the fact-finder.

approach", by which unrelated environmental benefits are offered up against a protected adverse effect – an approach the majority held cannot be used to circumvent an avoid policy, although compensatory benefits may remain relevant once the avoid policy is satisfied or the relevant exceptions pathway is engaged.³⁸ A net gain in biodiversity overall does not answer the question the policy asks. These policies protect a particular thing (the extent and values of the affected beds), so the question is whether that loss has been avoided, not whether the site is better off in ecological terms overall. We emphasise that this arises only if the Panel finds the disputed channels to be rivers; if they are drains, these policies are not engaged in relation to them.

E. WETLANDS

31. The Opinion concludes that there is an RMA consenting pathway for reclaiming the Project Wetlands through Policies P31, P38 and P110 of the NRP, as well as an FTAA pathway. In reaching that view it reasons that Policy 6 of the National Policy Statement on Freshwater (**NPS-FM**), although highly directive, is a policy rather than a rule, and may permit some wetland loss provided that wetland extent and values are not lost overall.³⁹
32. The Opinion does not address the activity status of the wetland reclamation under the NES-F, and does not refer to reg 53, s 87A(6) of the RMA, or the FTAA provisions dealing with prohibited activities. That is explicable, as the Opinion records that additional consent triggers for works around wetlands would require a further detailed planning review.⁴⁰
33. The substantive application has since undertaken that exercise. It proceeds on the basis that, because the site is rurally zoned, the Project does not qualify for the urban development pathway in the NPS-FM and NES-F, and that earthworks resulting in the drainage and reclamation of the Project Wetlands are therefore prohibited under reg 53. It expressly seeks approval for those works under the FTAA.⁴¹
34. While there is no ordinary RMA pathway, as s 87A(6) would ordinarily require refusal,⁴² a pathway is instead supplied directly by the FTAA. Section 42(5)(a) expressly allows a substantive application to seek approval for an activity that is prohibited under the RMA, and cl 17(3)-(4) of Sch 5 then requires the Panel to take into account that the RMA provision would ordinarily require decline, while not treating it as requiring decline. The *Waihi North* Panel adopted that analysis.⁴³
35. The FTAA pathway removes the jurisdictional bar, however it does not remove Policy 6 from the assessment. Policy 6 remains a provision the Panel must take into account under cl 17(1)(b), and we address it briefly.
36. The Opinion is right that Policy 6 is highly directive, and that a policy is not a rule. We are less comfortable with the final sentence of [4.5], which reads Policy 6, on the basis of the

³⁸ *East West Link* at [177]-[179].

³⁹ Opinion at [4.1]-[4.7].

⁴⁰ Opinion at [1.4].

⁴¹ Substantive Application at sections 5.4 and 5.6.

⁴² As the Supreme Court has put it, prohibited activities are "forbidden and no consent may be granted for them": *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195, at [16].

⁴³ FTAA, s 42(5)(a) and Sch 5 cl 17(3)-(4); *Waihi North*, Part G1 at [5]-[7].

passage cited from [99]-[112] of *East West Link*, as open to an interpretation allowing some wetland loss provided overall extent and values are not lost. As we read it, the flexibility recognised in the cited passage in *East West Link* is a margin for "genuine, on-the-merits" exceptions – i.e. true exceptions that "protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes".⁴⁴ That is a different question from whether overall extent and values are maintained.

37. Policy 6 is not to be interpreted in a vacuum: cl 3.22(1) specifies the circumstances in which loss of extent is provided for, and the urban development exception in cl 3.22(1)(c) is excluded here by the site's rural zoning. P110 of the NRP is in materially similar terms in relation to natural inland wetlands.
38. We note that the applicant's response to comments records that the application applies the cl 3.22 effects management hierarchy, notwithstanding its position that the rural zoning excludes the Project from the urban development pathway.⁴⁵
39. GWRC observes that the NRP and RPS do not anticipate consent being granted for a prohibited activity, with the consequence that there is no policy guidance on applying the effects management hierarchy or assessing an offset package for such an activity.⁴⁶ The observation is reasonably made. It has often been observed in relation to non-complying activities that they will rarely, if ever, find direct support in a plan;⁴⁷ we suggest that the position can be even more forcefully stated in relation to prohibited activities. In the absence of direct guidance, GWRC proposes the principles in Schedule G2 of the NRP, RPS Change 1 Policy 24A(e)⁴⁸ and the National Policy Statement on Indigenous Biodiversity (**NPS-IB**) as providing further relevant direction, and applies P31's sequencing of offsetting before compensation.⁴⁹ The Panel will be familiar with the distinction between the NPS-FM and the NPS-IB in relation to natural inland wetlands, and with cl 1.4(3) of the latter.⁵⁰
40. The extent and values affected, the adequacy of the proposed ecological package, and the weight to be given to the relevant provisions (including those GWRC identifies) are matters for the Panel.

Policy P38, GWRC's comments, and the Ngārara Stream

41. The Opinion states that, in relation to the dune-slack wetland, P38 permits offsetting if the approach in *East West Link* at [176] is satisfied, but that compensation "is not allowed".⁵¹ We broadly agree with the distinction, but the position on compensation is more nuanced. What the majority rejected was the use of unrelated compensatory benefits to accept a breach of

⁴⁴ *East West Link* at [109]; and see [111]: "as with any exception to the application of a strong policy, the case to be made out is a difficult one". Opinion at [4.5].

⁴⁵ Section 53 Comments Response Covering Report, 11 August 2026, at 4.1.1.

⁴⁶ GWRC s 53 comments at [39].

⁴⁷ E.g. *PVB New Zealand Group Ltd v Kapiti Coast District Council*, W064/06, at [19].

⁴⁸ Which we understand remains subject to Environment Court appeal: <https://www.gw.govt.nz/your-region/plans-policies-and-bylaws/policies/regional-policy-statement/>

⁴⁹ GWRC s 53 comments at [40]-[45].

⁵⁰ E.g. the NPS-IB applies to the terrestrial environment (cl 1.3(1)), which excludes freshwater ecosystems as those terms are used in the NPS-FM, while cl 1.4(3) provides that the NPS-FM and NES-F prevail in the event of conflict.

⁵¹ Opinion at [4.6].

an avoid policy; compensatory benefits may remain relevant once the avoid requirement is satisfied or exceptional circumstances have been established such that an exceptions pathway is engaged.⁵² That is potentially relevant under the FTAA, because s 85(3)(b)(ii) requires the Panel to take into account measures proposed to avoid, remedy, mitigate, offset **or compensate** for adverse impacts. Compensation is therefore not excluded from the assessment, but a compensatory measure that does not address the value the policy protects should not be treated as establishing compliance with it.

42. Turning to GWRC's relevant comments, we note that Ms Dixon considers the applicant's assessment adequate and its framework appropriate, and – subject to like-for-like offsetting – agrees the package achieves a net-gain outcome for the 1.69 ha of wetland loss. Her remaining concern is qualitative rather than one of area: she considers W3 and W5 to be dune-impounded fens, principally fed by groundwater and rainfall, whereas the proposed offset wetlands are floodplain swamps associated with Ngārara Stream. Because wetland type reflects hydrology, substrate and nutrient status, and different types support different plant communities, her concern is that the replacement wetlands would not deliver the values lost; she also identifies a wider risk of progressively replacing harder-to-create fen systems with swamp habitat.⁵³ That concern is reflected in the planning framework. See, for instance, principle 3 of Appendix 6 to the NPS-FM, under which no net loss "is demonstrated by a like-for-like quantitative loss/gain calculation", and is achieved where the extent or values gained at the offset site, measured by type, amount and condition, are equivalent to or exceed those lost at the impact site. Principle 7 prefers offsets close to the impact site or within the same ecological district. Schedule G2 of the NRP, engaged through P31, is to similar effect, requiring that the ecological values achieved through the offset be "the same or similar to those being lost".⁵⁴ Those principles provide a benchmark against which the measures fall to be assessed.

F. SCOPE

43. Schedule 2 describes the listed project as involving "approximately 1,000 residential dwellings".⁵⁵ The application seeks between 1,181 and 1,201 dwellings, with up to 1,158 residential allotments.⁵⁶ The Opinion considered approximately 1,200 dwellings to be within scope because "approximately" imports flexibility, the footprint of the Project remains the same, its effects were assumed to remain broadly comparable, and RMA scope principles concerning changes in scale and effects, and prejudice to other parties, supported that result.⁵⁷
44. There remains an arguable basis for that conclusion. The application continues to concern the same land and the same broad residential development project, and the word "approximately" in the Schedule 2 description imports tolerance rather than a fixed ceiling. The Collins English Dictionary (NZ Edition, 2007) defines "approximately" as meaning "close to; around; roughly or in the region of". This definition suggests some minor and reasonable variance will be allowable. Unlike the "up to" formulation used in many other Schedule 2

⁵² *East West Link* at [177]-[179].

⁵³ M Dixon, Wetland Ecology Comments, Summary and at [1], [3], [6]-[11].

⁵⁴ NRP, Schedule G2, principle 6(h).

⁵⁵ FTAA, Sch 2.

⁵⁶ Substantive Application, at sections 1.4 and 2.

⁵⁷ Opinion at [5.1]-[5.4].

listings, "approximately" is capable of accommodating movement in both directions, though not a proposal of a different kind or materially greater scale.⁵⁸

45. Limited contextual support is available from the listing process. The application for listing described the project as providing "[o]ver 1000 residential dwellings", staged "across 4 distinct areas" of "in the order of 300 houses per stage".⁵⁹ While the enacted description governs and such material carries only limited (if any) weight, it does indicate that a yield potentially in the order of 1,200 dwellings was within the contemplation of the listing sought. The question is how far upward that tolerance extends.
46. *Ngāti Kuku* establishes that the wording of the Schedule 2 description controls the jurisdictional scope of a listed project. The High Court rejected an attempt to include the Mount Maunganui wharf extension when Schedule 2 referred only to extension of Sulphur Point, notwithstanding extrinsic material indicating that a wider project may originally have been intended.⁶⁰ More directly, *Jones* holds that a Schedule 2 project description sets the outer limit of a substantive application, because the application must relate "solely" to the listed project. It also holds that Schedule 2 does not impose a corresponding inner limit, so that a project may be reduced below the listed scale, the Court illustrating the point by reference to a 1,000-house project being reduced to 999, 950, 900 or even 600 houses.⁶¹
47. On balance, we consider the position on the dwelling yield to be reasonably arguable. The application concerns the same land, the same master-planned development, and the same activity that Schedule 2 quantifies. The word Parliament chose was "approximately", not "up to", and the increase, while not insignificant in percentage terms, does not convert the project into one of a different kind.
48. We would not, however, describe the position as free from doubt. A maximum of 1,201 dwellings is approximately 20 per cent above the listed figure, and current case law does not determine how far "approximately" may extend above a stated Schedule 2 quantity.
49. We would recommend that the Panel address that question expressly, rather than treat it as settled by the EPA's acceptance of the application. We are aware that the Panel in the recent *Lake Pūkaki* decision declined to revisit an EPA scope decision, taking the view that its role under s 81 was to grant or decline the approvals sought rather than to re-run the s 46 determination, and that any challenge to the EPA's decision would have had to be brought by judicial review.⁶² We would respectfully suggest a different course here. Jurisdiction is always an issue, and a decision-maker must satisfy itself that it has the power to make the orders it proposes to make.⁶³

⁵⁸ Compare *Jones v Environmental Protection Authority* [2026] NZHC 1872 at [36].

⁵⁹ Application for listing, available on the Ministry for the Environment website: <https://environment.govt.nz/acts-and-regulations/acts/fast-track-approvals/fast-track-projects/waikanae-north-developments/>.

⁶⁰ *Ngāti Kuku Hapū Trust v Environmental Protection Agency* [2025] NZHC 2453, [2025] 3 NZLR 380 at [20], [24], [56]–[58] and [73]–[74]. The Opinion cites the decision as *Ngāti Kuku Hapū Trust v Port of Tauranga*.

⁶¹ *Jones* at [33]–[40].

⁶² *Lake Pūkaki Hydro Storage and Dam Resilience Works*, final decision, 3 July 2026, at [556].

⁶³ See e.g. *Cabra Developments Ltd v Auckland Council* [2017] NZEnvC 184 at [18].

50. Should the Panel harbour any doubt, two mechanisms now exist that did not when the Opinion was written: the applicant may *reduce* the scope of the application by notice under s 68A, and (more relevantly) the Schedule 2 description may be amended by Order in Council under s 117A.⁶⁴

Off-site stormwater works

51. We are comfortable with the Opinion's conclusion concerning the off-site stormwater weir and detention area, provided the works are genuinely ancillary to the Project. The stormwater works engage limb (b) of the definition of "project" in s 4(1), under which a project "includes any activity that is involved in, or that supports and is subsidiary to," the project as described in Schedule 2.⁶⁵ Works within limb (b) are part of the listed project as a matter of statutory definition, so an application including them still relates "solely" to that project. We consider that *Ngāti Kuku* is distinguishable: the Mount Maunganui wharf extension was a 'co-equal' component of the development rather than an activity subsidiary to the Sulphur Point extension. We note too that Schedule 2 describes the third column as the "approximate geographical location" of the listed project – here, "169 to 171 Peka Peka Road, Kapiti" – which introduces a degree of flexibility.
52. The question is accordingly one of characterisation: whether the works genuinely support and are subsidiary to the delivery of Waikanae North, or amount to an independent project. In our view, the indicia point one way. The stormwater management area immediately adjoins the listed location, and is secured by an easement over Lot 6 DP 87994 conferring a right to drain water for the benefit of the project site itself.⁶⁶ The works serve no purpose independent of the development: they hold its stormwater intermittently, in large flood events, to achieve hydraulic neutrality. That the design post-dates the listing application does not change the position, because limb (b) asks whether an activity supports and is subsidiary to the project, not whether it was foreseen when listing was sought. We would nonetheless recommend an express finding to that effect, as with the dwelling yield.
53. As to the Opinion's reliance on the absence of prejudice, we have considered whether the inclusion of the easement land raises any question under s 53, given that owners and occupiers of adjacent land are invited to comment.⁶⁷ We are satisfied that it does not: the land subject to the easement appears to have been treated as part of the application land for the purposes of the invitations issued, with adjoining land invited accordingly.⁶⁸

G. CANCELLATION OF A CONSENT NOTICE

54. We agree with the conclusion in the Opinion concerning cancellation of an existing consent notice.⁶⁹ The FTAA expressly enables a substantive application to seek the change or

⁶⁴ FTAA, ss 68A and 117A. Section 117A permits amendment of a listed project description, or of the description of its approximate geographical location, by Order in Council on the Minister's recommendation, where the resulting scope would not be substantially different having regard to the benefits, purpose, location, scale and nature of the works.

⁶⁵ FTAA, s 4(1), definition of "project".

⁶⁶ Agreement to grant easement dated 23 July 2025.

⁶⁷ FTAA, s 53(2).

⁶⁸ Panel Minute 1, Appendix 2, Map 1.

⁶⁹ Opinion, at [6.1]-[6.3].

cancellation of a resource consent condition, subject to the statutory requirements. It does not correspondingly confer a power to cancel a consent notice under s 221 of the RMA.⁷⁰

55. In that respect the reasoning in the Opinion remains persuasive: implying such a jurisdiction would require reading into the FTAA a power Parliament has not conferred.⁷¹ The recommendation that the consent notice be dealt with through an appropriate process outside the FTAA remains sound.

H. THE BOX/CULVERT WEIR STRUCTURE IN THE NGĀRARA STREAM

56. As part of the Project, the applicant seeks to realign the Ngārara Stream running through the site and construct a downstream twin-box culvert.⁷² These works are described in more detail in the applicant's Engineering and Infrastructure Report as follows:⁷³

The flow control system consists of a twin box culvert, using 2m wide * 0.8m flow depth concrete culverts and a high-level overflow weir that will operate in the extreme flood events. The box culvert structure will be formed with a box culvert with an internal height of 1.2m and embedded 0.4m to provide greater than 25% minimum embedment for fish passage. This structure is shown by drawing 2911-ALL-SW-482. An insert of the drawing is shown by Figure 25 below:

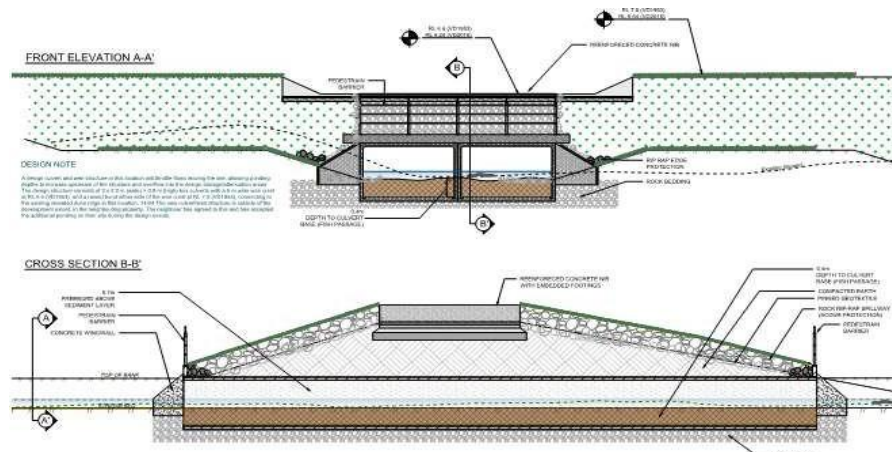


Figure 25 Ngārara Stream Flow Control System

57. In its comments on the proposal pursuant to s.53 of the FTAA, DOC advised that it considered the stream diversion and installation of a box culvert weir to be a “complex freshwater fisheries activity” as defined in section 4 of the FTAA, and that the weir would fall within the meaning of a dam for the purposes of the Freshwater Fisheries Regulations 1983 (**FFR**).⁷⁴

⁷⁰ FTAA, s 42(4)(b) and (6).

⁷¹ See *Ngāti Kuku* at [57]–[58], observing that "adding words is very rarely legitimate" and that courts are slow to conclude that unexpected statutory wording is the product of a drafting error; the Opinion cites the same decision at [56]–[57].

⁷² Applicant's substantive application at 4.1.3, page 47: [00-Substantive-Application-Waikanae-North-Developments-Limited-Final-30-March-2026.pdf](#)

⁷³ Appendix 14 to substantive application, Engineering and Infrastructure Report (Replacement), pages 37-38: [Appendix-14-Engineering-and-Infrastructure-Report-Replacement Redacted.pdf](#)

⁷⁴ DOC comments on proposal dated 28 July 2026 at 3.3 to 3.12.

58. In its response to comments, the applicant denied that the activity is a complex freshwater fisheries activity. In summary, it said:⁷⁵
- (a) While the structure was described as a twin box culvert weir, the structure does not fit within the ordinary meaning of a weir, which it identifies as “a barrier built across a stream to raise the upstream water level”.
 - (b) The proposed structure does not operate to dam the stream, because it sits above the culvert and only operates as an overflow device in extreme events.
 - (c) While the stream realignment involves diverting the current course of the river, this diversion does not mean that the watercourse falls within the meaning of a diversion structure, which is defined as “...*any structure designed to divert or abstract natural water from its natural channel or bed whether permanent or temporary*”. While “structure” is not defined in the FFR, the applicant notes that the RMA definition of a structure is “...*any building, equipment, device or other facility, made by people and which is fixed to land; and includes any raft*”. The applicant states that the diversion involves excavation of the land but does not constitute a structure.
 - (d) In any event, the applicant has not applied for approval for a complex freshwater fisheries activity and to the extent that DOC maintains that a separate approval is required, the matter is one for the applicant and DOC to address outside of the FTAA process.
59. You have asked us to advise whether, leaving aside the issue of whether the activity involves a complex freshwater fisheries activity, if the culvert and weir are found to be a dam, would additional GWRC consents be required under the NRP?
60. We do not express any opinion on whether the proposed structure falls within the meaning of a dam or diversion structure under the FFR, but generally agree with the applicant’s observation that this is ultimately a matter for separate resolution between the applicant and DOC because the applicant has not sought any approvals under s 42(4)(j) as part of the FTAA process.
61. However, even putting this issue aside, the question of whether the proposed structure operates as a dam is relevant to the approvals the applicant has sought under s 42(4)(a) of the FTAA for resource consents that would otherwise be applied for under the RMA. Sections 13 and 14 of the RMA respectively impose restrictions on the use of river beds and water, including that:
- (a) No person can erect a structure on the bed of a river unless allowed by a rule in a national environmental standard, regional plan or resource consent;⁷⁶ and
 - (b) No person may take, dam or divert water unless it is expressly allowed by one of the specified instruments, including a regional plan, or a resource consent, or it falls within one of the limited uses specified elsewhere in s 14(3) of the RMA.

⁷⁵ Applicant’s covering response to section 53 comments received, 11 August 2026, at pages 26-27.

⁷⁶ Section 13(1)(a) of the RMA.

62. The damming of water is addressed in both the NRP and the NES-F, both of which are relevant to the Panel's assessment of the application.
63. From an effects assessment perspective we note that regardless of the precise classification of the structure under various instruments, consideration of the approvals required under the RMA will inevitably involve consideration of similar issues / effects that would also be relevant to an approval under the FFR, as well as other broader considerations. This was discussed by the Environment Court in *Re Auckland Regional Council*,⁷⁷ where the Court was asked to make a declaration (and did so), that the effects of impediments to the passage of freshwater fish were within the jurisdiction of a consent authority when considering an application for resource consent under ss 13 or 14, notwithstanding that additional approvals were also required from the Director-General of DOC under the FFR.⁷⁸ In noting the overlap, but ultimately different purposes of the RMA and the FFR, the Environment Court made the following observation:

[51] The purpose of the Regulations is the narrow and circumscribed process of the preservation and protection of freshwater fish and their habitats. By contrast the purpose of the Resource Management Act is the sustainable management of all natural and physical resources. The focus is quite different and far more wide ranging and all embracing.

[52] Consideration of the issue of fish passage under the Resource Management Act encompasses the considerations mandated by the Conservation Act and the Freshwater Fisheries Regulations (conservation, preservation) and extends beyond those considerations, to determine, in an integrated manner, whether the application for an activity in the bed of a stream, or lake, properly promotes the sustainable management of natural and physical resources, in its broad sense.

What Rules would apply under the NRP if the structure acts as a dam?

64. You have noted that a number of rules may overlap. We agree. This is because the NRP regulates both the placement of a structure in the river, with different rules applying depending on the type of structure but also regulates damming associated with the use of the structure (in keeping with the separate but related purposes of ss.13 and 14 of the RMA). For example, there are several permitted activity rules of potential application to the structure:
- (a) Rule R125: River Crossing Structures – provides for the placement or construction of a river crossing structure, including but not limited to, weirs, fords and bridges, but excluding culverts and a river crossing that dams a river, that is fixed in, on, under, or over the bed of a river⁷⁹ and associated activities, subject to compliance with the conditions set out in the rule.
 - (b) Rule R126: Culverts and ancillary culvert structures – provides for the placement of a culvert or an ancillary culvert structure that is fixed in, or on, the bed of a river,

⁷⁷ *Re Auckland Regional Council* [2002] NZRMA 241,

⁷⁸ *Ibid* at [1].

⁷⁹ For completeness, Rules R125 and R126 exclude activities regulated by the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017. We have not mentioned this in our summary because it is not of relevance to the proposed activities.

including any associated disturbance, deposition, diversion, discharge of sediment or temporary damming of water.

- (c) Rule R127: Establishing a dam – the placement of a new dam, that is fixed in, on, or under the best of a river including associated disturbance, deposition, diversion, discharge of sediment or damming of water.
- (d) Rule R128: New structures – The placement of a new structure, including sediment retention weirs, pipes, ducts, cables, hydrological and water quality monitoring equipment, fences, erosion protection structures, debris arrestor structures and structures associated with a vegetative bank edge protection except a structure permitted by Rules R125, R126 and R127 and passive flap gates, that is fixed in, on, under or over the bed of any river or lake. This appears to be a broader catch-all category for any other type of structure that does not neatly fall within any of the other rules.

65. For structures that do not comply with those rules, and where no other specific activity rule applies, Rule R145 classifies all other uses that are not permitted, controlled or restricted discretionary under Rule R122 to Rule R129 as a discretionary activity. However, Rule R145 expressly does not apply to the reclamation, damming or diverting of water. The damming or diverting of water within or from rivers which does not meet Rules R122, R125, R126, R128, R130, R131, R134, R137 and R138 and R159 is a discretionary activity pursuant to Rule R147, or a non-complying activity under Rule R148 if the conditions in Rule R147 cannot be met.

66. The application identifies the following NRP rules as applying to the proposal:⁸⁰

5.2.1 Regional Plan Rules

The proposal requires resource consent in respect of the following rules:

1. As a restricted discretionary under Rule R50 for the discharge of stormwater from new subdivision and development.
2. As a discretionary activity under Rule R107 for the undertaking of earthworks and vegetation clearance that is not permitted by Rules R101 and R104.
3. As a discretionary activity under Rule R117 for activities in natural wetlands, specifically the discharge of stormwater and the clearance of indigenous vegetation.
4. As a non-complying activity under Rule R118 for activities in natural wetlands, specifically for the diversion of water into a natural wetland, and the reclamation of a natural wetland.

⁸⁰ Section 5.2.1 of the substantive application, at pages 54-55.

5. As a non-complying activity under Rule R120 for activities in outstanding natural wetlands, including the discharge of water, the diversion of water and the placement of new structures with an area greater than 10m² in area.
 6. As a discretionary activity under Rule R142 for the reclamation of the bed of a river.
 7. As a discretionary activity under Rule R145 for the installation of culverts that do not comply with the permitted activity standards of Rule R126.
 8. As a discretionary activity under Rule 147 for the diversion of water within or from rivers.
 9. As a restricted discretionary activity under Rule 160 for dewatering that does not comply with the permitted activity standards of Rule R159.
67. According to the applicant's assessment, Rule R126 (the permitted activity rule applying to culverts and ancillary culvert structures) applies to the structure, but because the structure does not comply with the conditions of that rule, the activity is discretionary under Rule R145. While the applicant identifies that the activity also triggers a need for consent under Rule R147, this is for the diversion of water within or from the rivers rather than for any damming of the river.
68. While it is beyond the scope of this advice to comment on whether the proposed structure falls within the meaning of a dam for the purposes of the NRP, we note that:
- (a) The NRP does not define the terms "culvert", "dam" or "weir", but defines an "ancillary culvert structure" as meaning "...*components attached to a culvert to protect against erosion, scour, or as means to direct flow, such as wingwalls, headwalls, or aprons*".
 - (b) The terms are also not defined in the RMA.
 - (c) While standard dictionary definitions define a weir as a form of dam,⁸¹ this is not always the case. For example the NES-F contains separate definitions for a culvert, weir and dam, and expressly excludes a weir from the definition of a dam.⁸² Other statutory regimes that regulate dams, also contain separate, and in some respects, more technical, definitions of a dam.⁸³
 - (d) Caution is required when seeking to apply definitions in one statute to other legislation, where the legislation does not specifically provide for this. The courts generally regard each statute as a separate legal entity, except where the statutes are in *pari materia*, i.e. dealing with the same or a related subject matter.⁸⁴ This approach is intended to maintain coherence across statutes that are part of a broader

⁸¹ For example, the New Zealand Oxford Dictionary defines a dam as "a barrier constructed to hold back water and raise its level, forming a reservoir or preventing flooding", and a weir is defined as "a dam built across a river to raise the level of water upstream and regulate its flow".

⁸² Regulation 3 of the NES-F.

⁸³ For example, s.7 of the Building Act 2004 defines a dam for the purposes of that Act, and regulation 5 of the Building (Dam Safety) Regulations 2022 also defines a "classifiable dam" as being a dam with a height of 4 or more metres and which stores 20,000 or more cubic metres of water or other fluid.

⁸⁴ *New Zealand Airline Pilots' Association IUOW v Aircrew Industrial Tribunal* HC Auckland A374/85, 3 June 1986.

legislative framework or scheme. Factors that may make it appropriate to “borrow” definitions include the statutes sharing a similar purpose, being administered by the same officers, or having been enacted around the same time as part of a consistent legislative effort.⁸⁵

- (e) Overall, s 10 of the Legislation Act 2019, specifies the approach to ascertaining the meaning of legislation, including secondary legislation such as the NRP.

69. In the context of the NRP, the permitted activity rules identified above apply to different types of structures within a river, but even where the structure is not treated as a dam, the rules anticipate the potential for the placement of the structure to involve temporary damming as an associated activity. For example:

- (a) Rule R125 applies to river crossing structures such as fords, weirs and bridges, but specifically excludes culverts and dam structures. It nonetheless applies to the associated temporary damming of water related to the placement or construction of a river crossing structure;⁸⁶
- (b) Rule R126 solely applies to the placement of culverts and ancillary culvert structures in river beds, but also include any associated temporary damming of water, subject to the conditions in R126;⁸⁷
- (c) Rule R127 specifically relates to dams; and
- (d) Rule R128 appears to be a catch-all category for any other type of structure that does not fall within Rules R125, R126 and R127, but which is fixed in, on, under or over the bed of any river or lake. It includes any associated temporary damming.⁸⁸

70. We note that 2.13 of the NRP states that “*an activity needs to comply with all relevant rules in the Plan, unless the rule itself states otherwise*”. Where the structure comprises a combination of different elements, it is possible for more than one of these rules to apply, but with the corollary that the activity would need to comply with all of the relevant conditions in order to be a permitted activity.

71. Non-compliance with any of Rules R125 to R128 triggers need for discretionary consent under Rule R145 (except in relation to damming, diversion and reclamation) and under Rule R147 or R148 for elements of the activity that involve damming, diversion and reclamation. It is evident from the way in which this rule framework operates that regardless of whether a structure would fall within the meaning of a dam for the purposes of Rule R127, if the structure results in damming of the river, temporary or otherwise, this element of the activity is still subject to regulation under the NRP, with both Rules R145 and R147 / R129 applying in the event of non-compliance with the applicable permitted activity conditions.

72. From a brief review of the permitted activity rules, it does not appear that the proposed structure would comply with the permitted activity conditions under any of the rules:

⁸⁵ Laws of New Zealand, Part V Statutory Interpretation (23): External Contextual Guides.

⁸⁶ Rule R125(e) of the NRP.

⁸⁷ Rule R126(e) of the NRP.

⁸⁸ Rule R128(e) of the NRP.

- (a) Rule R125 does not apply to culverts or river crossings that dam a river so, is not applicable to the question of what rules would apply if the structure were found to be a dam. Nonetheless, to the extent that the structure includes a weir, it would not comply with the requirements in condition (j) (amongst other potential non-compliances).
 - (b) The applicant acknowledges that the structure does not comply with the conditions apply to culverts and ancillary culvert structures under Rule R126.
 - (c) If the structure falls within the meaning of a dam for the purposes of Rule R127, it appears that at the very least, the structure would not comply with the conditions relating to maximum water depth in condition (k), if the whole structure is deemed to be a dam. We have not identified information about the maximum potential impoundment of water that could occur during extreme weather events when the weir would be in operation, and therefore cannot comment on whether the structure would comply with those conditions.
 - (d) If Rule R128 were engaged (for example, in combination with R126 and/or R127), the placement of the weir, including the fall height and lateral profile would not comply condition R128(l). There may also be additional non-compliances.
73. Overall, therefore, regardless of which of the permitted activity rules that would be engaged by the placement of the structure in the river, the non-compliance of the structure triggers a need for consent for the structure under Rule R145 as a discretionary activity, which has already been identified by the applicant as the relevant rule which applies due to non-compliance of the structure.
74. However, if the structure is found to be a dam (or if it operates functionally to dam water during flood conditions), a regional consent under Rule R147 would also be required. Regardless of whether the structure falls within the meaning of a dam for the purposes of Rule R127, not being a dam does not necessarily mean that no “damming of water” will occur. As Rule R145 expressly does not apply to damming, the relevant rule applying to both diverting a river and damming it is Rule R147. This rule has been identified by the applicant as triggering a need for consent in relation to the diversion of the river but not in relation to any temporary damming that may occur in flood conditions.
75. Rule R147 is discretionary only if the damming or diverting does not result in river flows falling below the minimum flows in chapters 7 to 11, and is not in an outstanding river identified in Schedule A1. If either condition is not met, Rule R148 applies and the activity is non-complying. We have not verified the position on either. Given the consequences for activity status, we recommend it be confirmed.
76. To the extent floodwater is detained outside the bed, Rule R151 may also apply.
77. If the Panel does not consider it has sufficient hydrological information to assess whether the culvert/weir structure would have a damming effect in flooding conditions, we recommend that further assessment of this be requested from the applicant.