National Policy Statement for Freshwater Management 2020

Practice and Guidance note

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What is a Functional Need?

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Auckland Council
Te Kaunihera o Tāmaki Makaurau

1.1 Executive Summary

The Government's Essential Freshwater package aims to arrest the ongoing loss of river and wetland habitats and values by avoiding activities that may result in these losses except:

- For rivers, where there is a functional need for the activity to occur at that location and the effects are managed via the Effects Management Hierarchy[1]; and
- For wetlands, where the loss is related to specific activities[2], or where the loss is related to construction of specified infrastructure, there is also a functional need for the activity to occur at that location[3].

This Practice and Guidance Note (PGN) is originally prepared by Environment Canterbury Regional Council and kindly shared for publication with their consent. This PGN addresses the difference between functional and operational needs and provides some hypothetical examples to assist those trying to determine whether there is a functional need for their activity at a location.

1.2 Introduction

The Government's Essential Freshwater (Action for Healthy Waterways) package came into effect on 3 September 2020. As part of that package, the Government recognised that the cumulative loss of river and natural inland wetland habitats is an ongoing issue. The National Policy Statement for Freshwater Management 2020 (Freshwater NPS) therefore includes policies to address these issues.

The implications of these policies and the associated definitions of the terms has already been addressed in two Environment Canterbury Technical Advisory Notes issued on 18 November 2020[4]. One aspect of these policies, however, continues to cause some confusion, specifically where a proposal will result in a loss of extent and/or values of a natural inland wetland[5] or river, whether there is a "functional need" for the activity in that location.

This PGN revisits this question and provides hypothetical examples of functional versus operational need to help those proposing work in and around wetlands and

[1] National Policy Statement for Freshwater Management 2020, policy 3.24. The Effects Management Hierarchy is defined in Section 3.21 of the National Policy Statement for Freshwater Management 2020
[2] National Policy Statement for Freshwater Management 2020, policy 3.22(1)(a)
[3] National Policy Statement for Freshwater Management 2020, policy 3.22 (1)(b).
[4] Essential Freshwater Package Technical documents (https://www.ecan.govt.nz/your-region/your-environment/water/essential-freshwater-package/technical-documents-for-consent-applicants/)
[5] Where the activity is also necessary for the construction or upgrade of specified infrastructure.

rivers to determine whether their proposal meets the policy criteria regarding functional need.

1.3 Functional Need versus Operational Need

Functional need is defined in the NPSFM 2020 as:

> *"the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment."*
>
> [emphasis added]

The important part of this definition is underlined above, notably that the activity can only occur in a wetland or river environment.

Where it is technically possible that an activity can occur elsewhere, but where there are technical, logistic or operational reasons why it is preferred for the activity to occur at the location (e.g., issues of cost, land ownership), there is no functional need. Rather, these are **operational needs**.

As recognised by the Environment Court in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*[6], while a functional need is often obvious for infrastructure, it can be complex when dealing with other activities where there is a less sharply defined functional versus operational requirement.

In practice, whether there is a functional or operational need for an activity will depend on the specifics of the proposal including why the project is being undertaken at that location. To assist consent applicants in preparing their applications, some examples are provided below.

Example 1: Construction of a new bridge on an existing road

Following a large flood event, a bridge on an existing road has been severely damaged and needs to be replaced. The works to replace the new bridge will require activities within a wetland adjacent to the road and these works will have adverse effects on the values of that wetland.

In this instance, the bridge is considered **specified infrastructure** under the Freshwater NPS[7] and therefore avoidance of effects on the wetland is not required under the relevant policy in section 3.22 of the Freshwater NPS where the regional council is satisfied that:

[6] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196

[7] ***Specified infrastructure*** *means any of the following:*

(a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002)

(b) regionally significant infrastructure identified as such in a regional policy statement or regional plan

(c) any public flood control, flood protection, or drainage works carried out:

(i) by or on behalf of a local authority, including works carried out for the purposes set out in section 133 of the Soil Conservation and Rivers Control Act 1941; or

(ii) for the purpose of drainage by drainage districts under the Land Drainage Act 1908

"(i) the activity is necessary for the construction or upgrade of specified infrastructure; and

(ii) the specified infrastructure will provide significant national or regional benefits; and

(iii) there is a functional need for the infrastructure in this location; and

(iv) the effects of the activity are managed through applying the effects management hierarchy."

In this instance, the bridge must be repaired or replaced as the road is a vital transport link to rural properties. Given the terrain and existing roading infrastructure that the bridge connects to, it is impossible to relocate the bridge elsewhere. Given this, there is a functional need to undertake the works subject to managing the effects via the Effects Management Hierarchy specified in the Freshwater NPS.

Example 2: Construction of a new public highway through a wetland.

There is a proposal to construct a new public highway through a wetland as this is the shortest and most efficient route to connect two townships. In the alternative, there is no reason (e.g., terrain constraints), other than increased cost[8], why the road could not be routed around the wetland.

In this instance, the highway is likely to be considered **specified infrastructure** under the Freshwater NPS as it would deliver a service operated by a lifeline utility (it may also be noted as regionally significant infrastructure in a regional policy statement). However, while the wetland option is cheaper, and therefore operationally desirable, given the alternative route is possible (in this instance), there is not a functional need to construct the road in that location.

Example 3: Construction of a new private road through a wetland.

There is a proposal to construct a new private road through a wetland as this is the shortest route to someone's new house. There is already an existing road to the property, but it is longer and more time-consuming to traverse.

In this instance, the road is not considered **specified infrastructure** under the Freshwater NPS as it is not a service operated by a lifeline utility (there is an existing road that serves that function) and is not noted as regionally significant infrastructure in a regional policy statement. As the activity does not meet any of the exception criteria, the Freshwater NPS directs that the activity should be avoided and there is no requirement to consider functional need.

[8] Assessment of costs should include a consideration of the potential costs of mitigations and/or offsetting that may be required to make up for any loss of wetland or river extent and values.

Example 4: Gravel extraction

Build-up of aggregate in a riverbed can increase flood risk to neighbouring properties and infrastructure. A primary mechanism to address this is to remove the aggregate from the affected reach. In this instance, where the purpose of extraction is to restore or improve flood-carrying capacity, there is a functional need to extract gravel from the location, as extracting it elsewhere would not achieve the alleviation of flood risk.

In the alternative, where an applicant seeks to extract gravel from a riverbed solely for commercial purposes[9] (e.g., to fulfil a roading contract), alternative sources of aggregate (e.g., from a land-based quarry) may be available, albeit from a greater distance and/or at greater cost. In these cases, there is no functional need for the activity to occur at that location, as the material could be sourced elsewhere, and the desire to extract from that location is operational.

Example 5: Fish screening and bypass discharge affecting an existing wetland

A fish screen for a private irrigation intake has been unlawfully installed with a bypass channel that discharges into a wetland, and therefore a retrospective resource consent is required. While the fish screen structure itself is unlikely to have adverse effects on the wetland, technical advice is that the sediment and increased water flow from the bypass will have adverse effects on the ecology and hydrology of the wetland.

In this instance, the intake and bypass channels are not considered **specified infrastructure** under the Freshwater NPS as they are not a service operated by a lifeline utility. As the activity does not meet any of the exception criteria, the Freshwater NPS directs that the activity should be avoided and there is no requirement to consider functional need

If, however, the intake, fish screen and bypass channel had been for a community drinking and stockwater supply, the intake would be considered specified infrastructure. In that instance, consideration would need to be made of whether there is a functional need to have the bypass discharge into the wetland. If an alternative option existed to discharge the bypass channel to avoid the loss of wetland values, even at increased cost, there is not a functional need to adversely affect the wetland because an option exists to regularise the activity without the same loss of wetland values.

Example 6: Subdivision of land containing a stream

A developer has lodged an application to subdivide an area for residential properties, but the area contains a modified (and degraded) natural stream, which is considered

[9] Gravel extraction from rivers can often both improve flood-carrying capacity and provide aggregate for commercial operations so there may be times when both outcomes are being met.

a river under the Resource Management Act 1991 and the Freshwater NPS. To maximise the number of sections that can be developed, the current proposal intends to reclaim part of the stream, resulting in a loss of extent.

In the alternative, a different area could be subdivided, or the proposed subdivision could be re-designed to preserve the existing stream. Given this, while there is clearly an operational desire to infill the stream in order to maximise the number of sections in the subdivision, there is no functional need to do so.

1.4 Conclusion

This PGN provides council's interpretation of the difference between functional and operational need and the application of the Freshwater NPS.

Assessment of functional need will always depend on the context of an activity and there are likely to be specific questions when applying this guidance.

For further guidance, please refer to the "Essential Freshwater Policies & Regulations" section of the Auckland Design Manual.