Environmental limits
in a future resource management system

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Purpose of the paper

The purpose of this paper is to provide an Environmental Defence Society perspective on the place and treatment of environmental limits in a reformed resource management system. It is designed to assist the Ministry for the Environment (Ministry) in its detailed policy work underpinning new legislation to replace the Resource Management Act (RMA) – notably the proposed Natural and Built Environments Act (NBA) and the Strategic Planning Act (SPA). The paper builds upon the model recommended by the Randerson Panel, and is cognisant of other work (notably a Cawthron authored report commissioned by the Ministry).

We provide a holistic look at how we think limits should fit into a new system. We consider it important that the matter is considered in the round, particularly where a whole legal framework like the RMA is being rethought at once. We provide recommendations that are intended to support drafting instructions for the NBA. We are happy to work further with the Ministry on options for the detail of drafting.

We broadly support the Panel's framing, and our further discussion below is located firmly within that context. Our intention is to refine that framing rather than replace it. Where there is any tension with the Panel's recommendations, we highlight this specifically.

Structure of this paper

1. A summary of the environmental limits framework recommended by the Randerson Panel
2. Refining the Panel's conceptualisation of an environmental limit
3. The extent to which environmental limits already exist in the current system
4. What kinds of *things* (ie domains) require environmental limits?
5. What considerations should determine *where* environmental limits are set for these things?
6. Under which *legislation* should limits be set?
7. What types of *provision* should have the status of "limits" and does it matter?
8. Should there be regional/local as well as national limits?
9. The relationship between limits and consenting
10. Should some limits be legislated?
11. What should the broader architecture around limits look like?
12. What are the implications of limit setting for the other roles the system needs to play?
13. List of recommendations

Introduction

Many speak of the need for "environmental limits". However, there is not a common understanding of what that means or how that would work in a reformed resource management system. The Randerson Panel in its report *New Directions for Resource Management in New Zealand* (Panel's report) spoke of the need to have a system that recognises environmental limits more strongly than at present, and said that these would be primarily contained within a new NBA. To this end, the Panel has suggested indicative drafting for the front-end provisions of the NBA. Those sections are important for environmental limits, including the Act's purpose and principles, a section on "outcomes" and a specific section on "limits". Also significant is drafting outlining a new framework for national direction.

Some commentators, such as Cawthron,[1] have suggested that environmental limits should be driven by a piece of legislation that sits "above" the NBA. This could potentially be the SPA envisaged by the Panel. Still others claim that, at least for some things, environmental limits *already* exist in the RMA at a legislative level and that care needs to be taken when proposing new wording not to downgrade them. The Parliamentary Commissioner for the Environment, for example, has intimated that section 5 of the RMA already contains some important limits that should be retained.[2]

In theory, a system that sets environmental limits in some shape or form is uncontroversial. Limits are crucial to achieving the long-term public interest in a healthy environment and all forms of wellbeing. New Zealanders cannot thrive in an environment that is polluted and degraded. The planetary boundaries model has been a powerful one with respect to limits on the global scale.[3]

However, environmental limits spurs debate when applied to the nitty gritty of system design in New Zealand, for two key reasons. First, people can use the term "limits" or related terms like "bottom lines", "targets" and "boundaries" to mean different things in practice. Secondly, we can apply the concept of limits to very different kinds of things. Public intervention in some scenarios (eg water quality) may be more justifiable than others (eg visual amenity). Limits can be permanent or they can be temporary. They can be universal or they can allow for exceptions. They can be expressed in different ways (eg as a minimum standard for a river or as a maximum amount of a pollutant entering it). We therefore need a common understanding of what we are referring to and what the consequences of that should be.

[1] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at v.

[2] See S Upton "RMA reform: Coming full circle" (RMLA Salmon Lecture, 2020).

[3] See <www.stockholmresilience.org/research/planetary-boundaries>

Environmental limits in the Panel's report

Below, we briefly paraphrase the core recommendations made by the Panel that have a bearing on limits. This is a snapshot, and more detailed aspects of the Panel's recommendations appear throughout this paper. The Panel's report did not have a particular chapter on "limits", so relevant recommendations appear in various places.

- The NBA should have a purpose and principles section that recognises the need to establish and defend environmental limits. Limit setting is a core means by which the purpose of the Act is to be achieved.[4]
- The Minister must establish environmental limits for particular domains through mandatory national environmental standards, as well as the standards needed to achieve them.[5]
- The law should allow for binding targets to be set by the Minister.[6]
- It should be clearer in national direction and plans as to what activities will and will not be allowed, so that less significance is placed on consenting decisions.[7]
- Spatial strategies created under the new Strategic Planning will need to be consistent with environmental limits set under the NBA.[8]
- A more agile planning process is needed to ensure (among other things) that provisions implementing limits are responsive to environmental change. Regulations may be used to provide temporary management of environmental matters (including presumably where limits are threatened) while more appropriate management tools are put in place.[9]
- Consenting decisions must comply with environmental limits once they are established.[10]
- A stronger framework for monitoring, enforcement and evaluation is needed if limits are to be defended in practice.[11]
- Consents and other authorisations that are already granted will need to be reviewed if they threaten environmental limits.[12]

The Panel's report included a number of recommendations that directly relate to providing for environmental limits under new legislation. Broadly speaking, we support those recommendations, and we build on them below.

The Panel carefully designed a set of terminology around environmental limits, as well as four key related concepts: bottom lines, outcomes, targets and precaution. Some of these terms are proposed to be defined in the NBA. We think this framing is generally appropriate, and provides a good starting point. The conceptualisation of the Panel can be seen below, and we then provide some commentary and recommend some refinements.

[4] Panel Report, ch 2, Appendix 1.
[5] Panel Report, ch 2, Appendix 1.
[6] Panel Report, ch 2, Appendix 1.
[7] Panel Report, ch 8.
[8] Panel Report, 139-141.
[9] Panel Report, chs 7, 8.
[10] Panel Report, ch 9, Appendix 4.
[11] Panel Report, ch 13.
[12] Panel Report at 218.

The Randerson Panel's conceptualisation of environmental limits

1. The foundations of an effective system of limits are environmental "**bottom lines**". They are described as "boundaries or points at which significant and potentially irreversible harm to the environment and associated human health and wellbeing occurs" and as biophysical tipping points or thresholds defined by the laws that exist in *nature*. Bottom lines are not envisaged by the panel to be *legal* concepts, only a general description of biophysical realities that exist outside the law.

2. "**Environmental limits**", in contrast, are a closely defined *legal* and ultimately *regulatory* concept that specifies the lower boundaries of a safe operating space for humanity. They are said to be a warning that bottom lines are being approached and to establish cut off points at which damaging activities must cease. Effectively, environmental limits describe the lowest boundary of an environmental domain (a minimum measure of its health), and must always be set above a biophysical bottom line, including a **precautionary** buffer between them.

3. While it is not made abundantly clear, the concept of a "**standard**" seems (as it is in the current system) to be conceived of in a broad way as a regulatory tool, and one method of imposing restrictions or performance requirements (eg on a particular activity) to ensure an environmental limit is not infringed, or a target is met. A standard is a general term, however, and can also be imposed (eg under a national environmental standard (NES)) to achieve things other than the defence of an environmental limit.

4. "Outcomes" and "targets" are concepts that are linked to each other. **Outcomes** are said to be high level enduring goals that reflect a desired future state. Essentially, they are conceived of as "positive" outcomes to strive towards, rather than "outcomes" in their broader sense of a "tangible result".

5. **Targets** are said to be time bound steps for moving towards achieving these positive outcomes. However, the Panel's proposed drafting reveals more nuance to the concept, in that targets can be "binding" or "non-binding". Binding targets can be set in order to achieve positive outcomes (see 4 above).

Figure 1.1: The conceptual relationship between outcomes, targets, limits and bottom lines

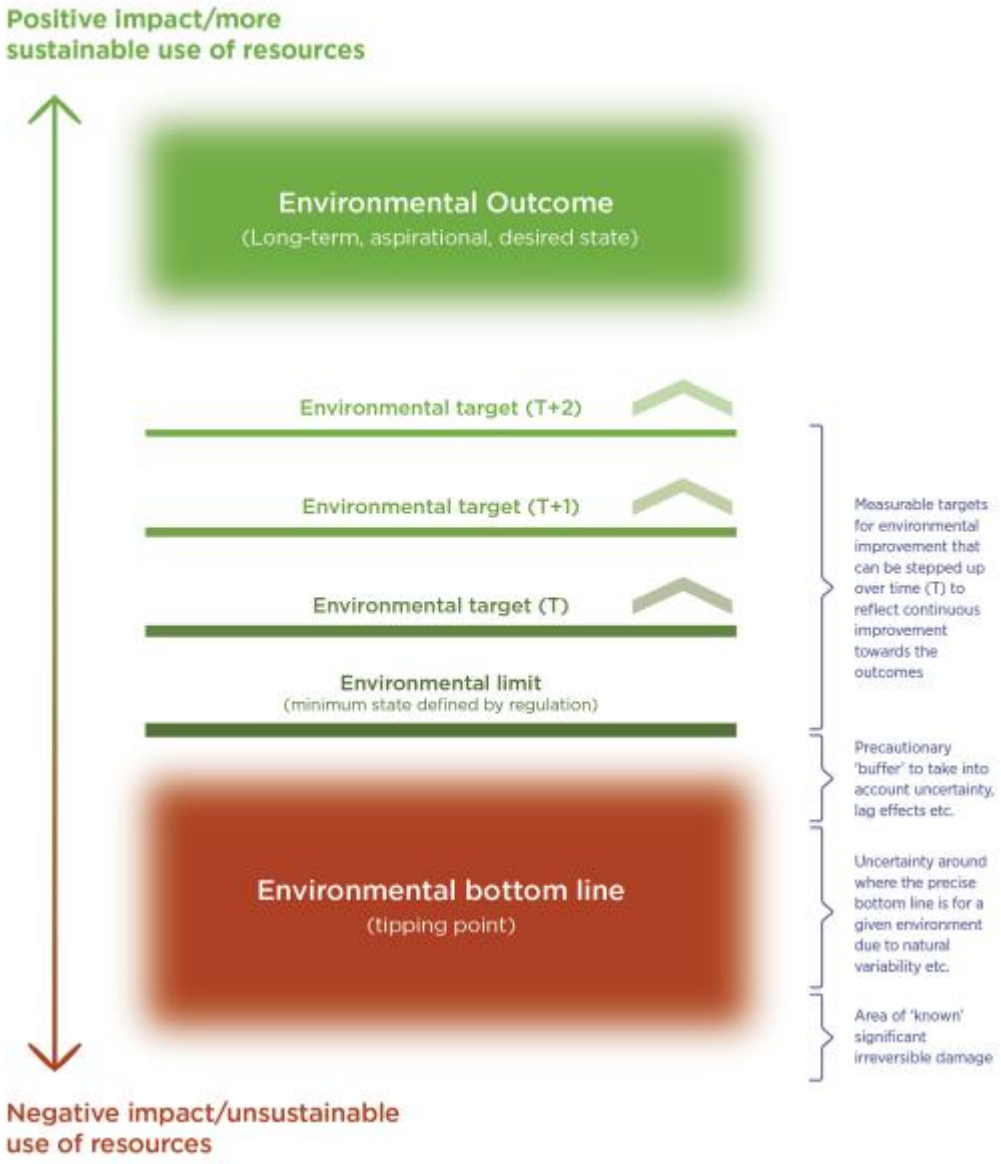


Figure 1: The Randerson Panel's conceptualisation of outcomes, targets, limits and bottom lines.

There are four key related concepts in the Panel's conceptualisation: limits, bottom lines, targets, and outcomes. Limits are to be set above bottom lines, and targets are designed to be stepping stones towards positive outcomes.

While we think the above conception is sound, there are questions to pose and some improvements that could be made.

Refining the Randerson Panel's conceptualisation

Below, we build on the conceptualisation of the Randerson Panel, including in pictorial form (see Figure 2). We then highlight the differences between our conceptual framework and the Panel's in table form.

Bottom lines

Even if it is not a legal concept defined in legislation, a "bottom line" forms an important foundation of an effective system of limits, because limits need to be set with reference to them. An environmental bottom line should be seen primarily **as a description of an unacceptable outcome to be avoided,** not any given method or tool (such as a rule or standard) designed to achieve it. This concept is consistent with how the Panel has described a bottom line, but one can question whether the Panel's choice as to where they are set - "tipping points" (where there is wholesale ecosystem collapse or change to a fundamentally new state) – is the right foundation for limit setting. Cawthron has rightly pointed out that minimum acceptable outcomes are not set by nature (which only knows cause and effect, not right and wrong), but by people and their values:[13]

> some earth systems exhibit gradual, variable, or complex responses to increasing human pressures, rather than clear threshold effects. Consequently, environmental limits cannot be defined based solely on natural system dynamics and scientific analysis, but also require a normative assessment of acceptable levels of system change.

And the Parliamentary Commissioner for the Environment has questioned whether a tipping point is the right place to use as the foundation for a limit, because the bar is set too low.[14] We share both these sentiments. Ecological tipping points are thresholds that are so obviously undesirable that there is unlikely to be meaningful debate about their acceptability. But in many situations (such as water that is clean enough to drink or swim in), people rely on minimum outcomes that far exceed ecological tipping points. As explored further below, we recommend that bottom line outcomes be *legislated* in some shape or form across the domains listed in section 8.

Bottom lines should be clearly distinguished from the positive outcomes described by the Panel in its proposed section 7. It is worth noting that the Panel's use of the term "outcome" to refer only to a "positive" outcome or a "desired" state makes sense in context. This is because its draft section 7 represents a conscious rejection of the RMA's effects-based ethos (preventing or mitigating *bad* things) and seeks instead to ensure the NBA has what is often referred to as an outcomes-based focus (achieving *good* things). The word "outcome" is therefore logical shorthand for the adoption of this different approach.

However, the positive outcomes in section 7 do not provide a sound normative basis for where limits should be set, since they are all about "ideal" rather than "minimum" states. Indeed, the Panel did not intend for section 7 outcomes to be guidance for the limit setting function. Strictly defending minimum levels of environmental health – bottom lines – is a quite different thing that the system needs to do, and this is fully consistent with how the Panel has conceptualised "bottom lines" in its

[13] See Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at i.
[14] S Upton "RMA reform: Coming full circle" (RMLA Salmon Lecture, 2020).

analysis even though it has not been defined in legislation. To know *where* limits are to be set, we need a clear sense of the specific bottom line outcomes that are to be avoided.

A requirement that there be a margin of safety above conditions "where significant and irreversible damage may occur", as included by the Panel in section 8, is (1) not specific enough (ie not targeted at domains), (2) not set at an adequate level to meet societal expectations (it sets a low bar), and (3) does not itself express actual outcomes (in that "significance" and "damage" can be interpreted in vastly different ways).[15] We therefore consider that there is a gap in the framework proposed: a sound normative basis as to *where* limits should be set.

Principles and bottom lines

To the extent that **principles** in legislation specify minimum environmental outcomes (some may argue this includes some things in section 6 of the RMA), these can be considered to be bottom lines. However, not *all* principles do this. Some are procedural (eg transparency, participation), while some are about balance (eg intra-generational equity).

Well known substantive principles are not adequate substitutes for clearly articulated bottom lines. For example, sustainability itself is not a bottom line, even though it might contain them (depending on how it is worded and applied). It is therefore a very good thing that the Panel has proposed a section on environmental limits that is separate from a broader set of implementation principles in section 9. That said, as discussed further below, the linkages between these sections pose risks.

Bottom lines – minimum outcomes to be defended no matter what the trade off – are quite different from the positive outcomes currently contained in the Panel's draft section 7. But they are still a core part of the Panel's logic, and there is a significant gap that must be filled. To fill this gap, we think it is important that they be *legislated* in some shape or form across the domains referred to in section 8 (eg water quality, air quality etc). Bottom lines should be more targeted to the things we value, and stronger, than just the prevention of ecological collapse or the exceedance of tipping points.

An Act's purpose and principles can, but do not always, articulate environmental bottom lines, and are not a valid substitute for them. This is significant when it comes to how the Panel has drafted the link between (1) the Minister's limit-setting function and (2) the purpose of the NBA, which is explored later.

Environmental limits

A framework of environmental "limits" is ultimately needed. A limit is a tool that strictly prevents a bottom line being exceed. Limits must be backed up by regulatory force – in that people can be coerced if need be. This does not mean that a system of environmental limits is necessarily just "regulation" in the traditional sense. For example, legislative provisions and objectives and policies in subordinate instruments like National Policy Statements (NPS), regional policy statements (RPS) and council plans could conceivably still contain limits even though they do not themselves have regulatory force.[16] This is because they can bind other tools that *do* have regulatory force (eg rules,

[15] For example: what if something is significant but reversible over long periods of time?
[16] A private person cannot be prosecuted for failing to comply with an RPS.

standards and consent conditions). The courts have confirmed that instruments can contain detailed "rule like" policies that directly require regulatory instruments to implement or comply with them. We return to this point further below when we consider how a limit should be defined and what consequences should follow from that status.

We see room for the Panel's conceptualisation of an "environmental limit" to be more nuanced. In particular, it should extend the legislative status of a "limit" not just to a description of the state of an environmental domain, but also the consequent restrictions on human activity needed to defend it. There is an important relationship to clarify here between limits, standards, and targets.

A system of environmental "limits" – involving clear restrictions with regulatory backing – are crucial to ensure bottom lines are not infringed. There are three ways in which we think limits can be described, and they exist in a cascade, as explained below. This is slightly broader than the Panel's conceptualisation of a limit, but consistent with its intent that limits must bite.

Type 1 limits

First, limits can describe the minimum acceptable state of something we value. We can call this a "type 1" limit. This is the way in which an environmental limit is conceived of by the Panel. For example, one can speak of a "limit" as to the level of nutrients contained in a river. This is a limit focused on the water body or receiving environment itself. Another example could be parts per million of carbon dioxide that exists in the atmosphere.

At the top of a cascade of limits (type 1 limits) are those that describe the minimum acceptable state of something we value. This is what the Panel has defined as a limit. As the Panel pointed out, the point of type 1 limits is to ensure that bottom lines are not infringed, including a precautionary buffer.

Type 2 limits

Secondly, a limit can refer to a maximum amount of the thing causing harm *to* the thing we value. We can call this a "type 2" limit. Often – including in the case of pollution – this is measuring the amount of an input. For example, there can be "limits" to how much, or at what rate, nutrients can be discharged into a waterway, how much carbon dioxide can be emitted to the atmosphere, or whether invasive pests can be brought into the country.

Type 2 limits are not *always* measuring an input, because humans can harm the environment in ways other than putting things into it. For example, other measures of human interaction include the number of fish taken, the number of seabirds killed, or the amount of wetland cleared. Performance standards for buildings can be thought of in this way. Sometimes, limits on the type of harm caused are only indirectly about human interactions. For example, type 2 limits can be expressed in terms of the maximum numbers or density of pest species like rats or stoats (which were originally caused by human actions but now have a life of their own).

Type 1 and 2 limits are closely linked. Limits on things causing harm need to be set *in order to achieve* the minimum level of quality for the thing we value. Yet the relationship between type 1 and type 2 limits is not a linear one. Different causes of harm (eg sediment, nutrients, habitat destruction) can combine to impact a single measure of environmental health (eg a

macroinvertebrate community index (MCI) score in a river). Equally, a single cause of harm (eg sediment) can cause harm to multiple measures of environmental health (eg MCI score, visual clarity, etc). This emphasises the need for a limits framework to be underpinned by a strong legislated principle of ecosystem-based management rather than risk a siloed approach to imposing limits just for different domains.[17]

The Randerson Panel appears to characterise type 2 limits generally as "standards",[18] being the regulatory tool (ie the actual restriction on behaviour) through which type 1 limits are defended or achieved. We think viewing these "standards" as a second type of "limit", rather than just a method for achieving them, is preferable, for several reasons:

- it gives such restrictions the same legal status as the type 1 limits they are responsible for defending/achieving. The legal consequences that flow from this status are potentially significant, and are explored further below.
- it more clearly distinguishes between "standards" that are imposed to defend limits and other "standards" that are imposed in pursuit of other goals.
- it potentially widens the type of tool that can impose a "limit" to things other than just standards. That could include non-regulatory *policies*, which need to be given effect to through regulatory restrictions at both plan making and consenting stages. Limit setting through non-regulatory tools is returned to further below.

Next in the cascade (type 2 limits) are limits that identify the maximum amount of the thing *causing harm* to the thing we value. Type 2 limits must, as a package, be designed to defend type 1 limits. The standards and other tools needed to defend type 1 limits should themselves be classified as limits. Currently, the Panel refers to standards needed to achieve limits, but does not give those standards the status of limits.

Type 3 limits

Thirdly, a limit can be expressed as a maximum amount of a particular human activity. We can call this a "type 3" limit. This is focusing on the type of action *producing* something that causes harm, rather than a limit on the thing causing harm itself. It is an activity-based rather than effects-based restriction. For example, limits can be expressed as:

- the maximum number of livestock per hectare, rather than just the type 2 limit (the total amount of nutrient discharge from those livestock);
- the number of new coal plants that can be built (rather than a cap on greenhouse gas emissions from them);
- the licensing of new oil and gas operations (rather than limits on the climate and environmental impacts they can have);
- the number of people allowed into a national park (rather than the various types of harm they can cause when they are there);
- the minimum operational requirements/design specifications of a wastewater treatment plant or stormwater retention facility (rather than the composition of discharges from them).

[17] See further below on how reconsidering the structure of national direction in a coherent National Planning Framework could help.
[18] See the Panel Report at 496, draft s (1)(b).

Not all restrictions on specific human activities amount to type 3 limits, only those that are needed to defend type 1 or type 2 limits. It will be important for a future system to specifically identify the distinction between restrictions that are regarded as limits and those that are not.

Again, the relationship between type 3 limits and the other types described above is not linear. A single human activity (eg a specific activity associated with agriculture) can produce multiple harmful things (eg sediment, nutrients, methane). These (as pointed out above) can in turn impact on multiple limits expressed as minimum standards for the health of the environment (eg in stream measures of turbidity, nitrogen etc).

At the bottom of the cascade are type 3 limits. These specify a maximum "amount" of a particular human activity. Type 3 limits must be designed to ensure type 1 and 2 limits are met.

Citing Haines-Young et al, Cawthron has adopted a definition of a limit that is broader than the Panel's proposed statutory definition:[19]

> The level of some environmental pressure, indicator of environmental state or benefit derived from the natural resource system, beyond which conditions which are deemed to be unacceptable in some way...

This includes "pressures" – maximum amounts of harm – because focusing only on the state of environment "tells us little about how human activities and environmental change should managed, simply defining an endpoint to be avoided or achieved".[20]

It is also worth noting that all types of limit, if expressed in a qualitative way rather than numerically, can also be described in terms of the *risk* of harm. For example, a type 3 limit on a particular activity (like seabed mining) could be expressed as a requirement that a decision maker be satisfied there is only a *negligible* or a *minor* risk of it infringing a type 1 or 2 limit (which might, for example, specify the maximum extent or duration of a sediment plume). This recognises that there is almost always some uncertainty as to an activity's impacts.

If a restriction entertains more than a minimal amount of risk, it ceases to be a true "limit". A precautionary approach is a vital component of establishing (or changing) any environmental limit, and great care needs to be taken that legal provisions describe limits in this way.[21] A direction that an activity "must not" cause particular effects essentially allows for zero risk, which will most often be the most appropriate formulation.

If a limit is described in a qualitative way (in terms of unacceptable effects), it must be worded so that only a very low level of risk of those effects occurring is allowed. This requirement should be added to a statutory precautionary principle.

[19] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at i.
[20] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 33.
[21] This would be important where a limit is phrased in a qualitative way to meet particular performance standards rather than hard and fast numerical figure that has to be met.

The relationship between limits and targets

All three types of limits described above have a relationship with the concept of *targets*. Sometimes, type 1 limits have already been exceeded (as with some freshwater catchments), and the challenge is to return (at a minimum) to the safe space above them**.** If a type 1 limit is not *currently* being met – in that an aspect of the environment is below its minimum measure of health – that limit should automatically be categorised as a binding target. In other words, these targets *are* a type of limit, and not a fundamentally different concept (see Figure 2 below).

This aligns with the Cawthron Report, which states that targets can either identify goals or be used to "return to the 'safe and just operating space' defined by environmental limits".[22] This take on targets is also generally consistent with the Panel's approach. There, the Minister is proposed to have powers through NESs to set binding targets to achieve (type 1) limits.[23] That said, the Panel's proposed drafting on target setting does not in our view make a clear enough distinction between two very different types of binding target: (1) those needed to achieve positive "outcomes" (desired states) in section 7, and (2) those needed to return to a safe space above bottom lines (minimum outcomes). According to the Panel, binding targets can be set to achieve either of those things.[24]

The latter type of target should itself be legally defined as a "limit", not just a tool that can be set to *achieve* a limit alongside other things. The extent to which a distinction between a target and a limit actually matters in drafting is discussed further below when we explore what consequences designation as a "limit" should have in law. If it has real consequences, then deeming some binding targets to "be" limits will be important.

The relationship between binding targets and type 1, 2 and 3 limits

Binding targets are more easily expressed as type 1 and type 2 limits. In other words, they outline a minimum state of health for an element of the environment in the future (eg maximum global temperature increase), or specify a maximum amount of harm (eg a pollutant) allowed to be caused *to* that environment in the future (eg net zero CO_2 emissions).

However, it is also possible for binding targets to relate to type 3 limits (specific human activities). Where they inevitably cause unacceptable harm, particular activities can be phased out or pared back over time. For example, a ban on new offshore oil and gas exploitation and a plan for a transition to other energy sources can be seen in this way. Banning the importation of cars that fail increasingly stringent emissions standards over time is another. These are type 3 limits expressed as targets.

Usually, binding targets will focus on a minimum standard to be reached for the environment, and give flexibility as to the best or most efficient way to achieve that through a mix of type 2 and 3 limits. However, a system should at least require consideration to be given to whether type 2 or even type 3 limits are realistically required – as a matter of science – to be established in order to

[22] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at i.
[23] See the Panel Report at 496.
[24] As described further below, it is anomalous that binding targets *must* be set to achieve positive outcomes listed in section 7, but it is not clear that they *must* be set to achieve limits under section 8 that have been exceeded.

achieve type 1 limits in the future. In some cases, there may be no realistic prospect of achieving them without imposing a limit on a particular activity. Requirements for winter grazing under the NES for Freshwater are an example of this,[25] and maximum stocking rates may need to be another. If these are imposed, these should also be legally classified as "limits". The system should not allow ambitious binding targets to be set without consideration of how they are to be met – that is pushing the problem further down the track.

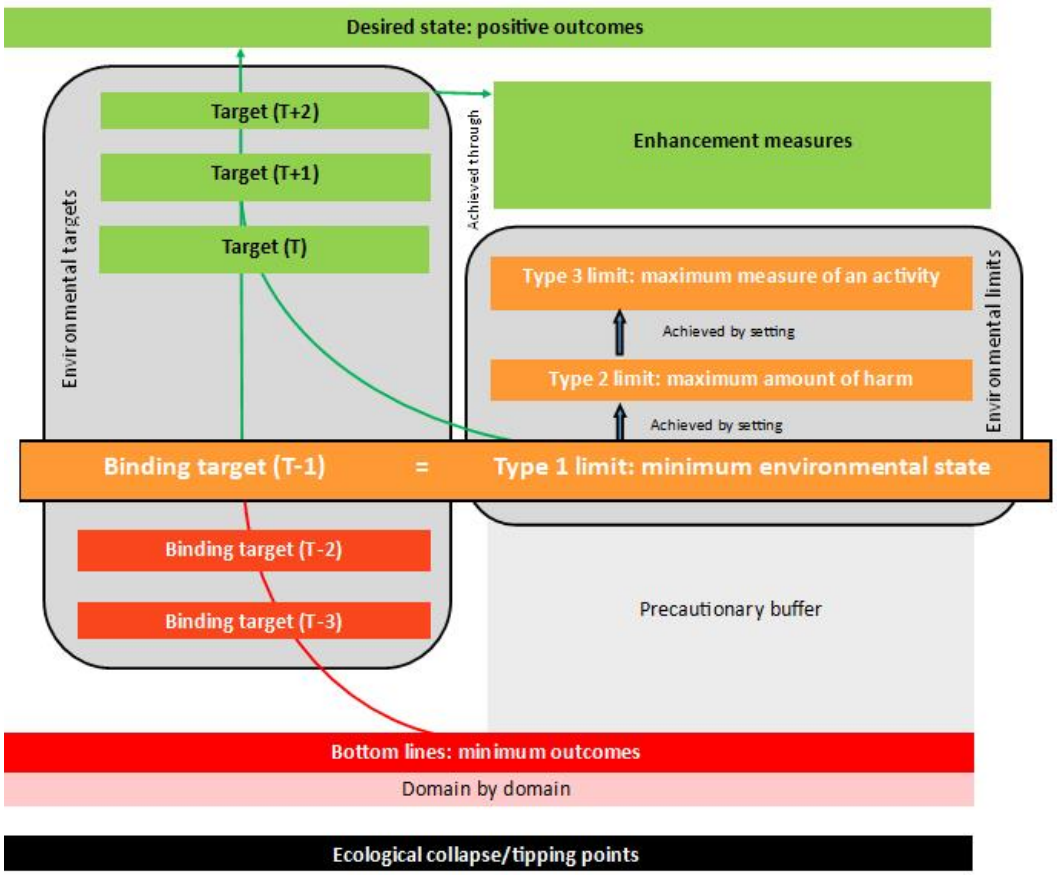
If an environmental limit has already been exceeded, it should require a binding target to be set. A clear legal distinction should be made between binding targets that reflect limits and binding targets that are set to achieve positive outcomes. The former is a type of limit, whereas the latter is not.

Below, we outline in pictorial form our slightly modified model, alongside the Panel's model. Key differences shown in the figure are that our model:

- locates bottom lines (minimum outcomes) well above tipping points
- recognises that binding targets are *themselves* a form of limit in cases where limits are currently exceeded
- recognises that a series of binding targets (shown in red) are needed to progress upwards towards a limit where it is currently exceeded, not just to progress towards positive outcomes (shown in green)
- clearly distinguishes between outcomes that are bottom lines and outcomes that are positive outcomes
- Splits "limits" into a cascade of three different types.

In essence, our model reflects a traffic light. Red reflects a situation where we are needing to get back within limits, orange reflects a situation where we are holding limits, and green reflects a situation where we are above limits heading towards desired outcomes.

[25] See Resource Management (National Environmental Standards for Freshwater) Regulations 2020.



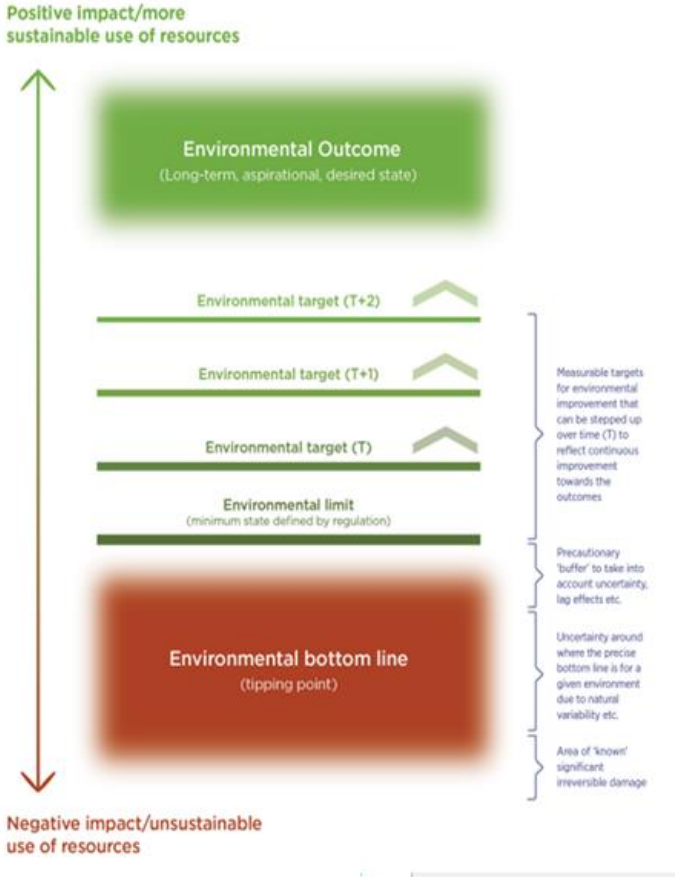


Figure 2: Our conceptualisation of limits alongside the Panel's model on which it builds. The red and green lines in our model recognise that our starting point can be different depending on how degraded an environment is; some limits have been exceeded already and require us first to reinstate them, whereas others are still intact and require improvement. Note that the targets in green can be either binding or non-binding at the discretion of the decision-maker.

Panel's concept	Our concept	Explanation of our concept
Environmental outcome	Positive outcome	Positive outcomes – what the Panel describes simply as "outcomes" – are those to be pursued *above* minimum acceptable outcomes. They reflect where we *want* to be, and encompass the matters contained within the Panel's proposed section 7.
Environmental bottom line	Bottom lines to be defended	An environmental bottom line is a *minimum* outcome that has to be defended no matter the trade-off. It can be expressed generally (eg the avoidance of ecological tipping points), or tailored to particular domains, areas or features (eg a minimum outcome in a catchment). It is not the same concept as the positive outcomes expressed in the Panel's section 7.
	Bottom lines to be achieved	Bottom lines include minimum outcomes that are not being achieved at the moment but have to be met at some point in the *future*. These are an important subset of bottom lines because they require different types of response. The Panel does not clearly distinguish these types of bottom line.
Environmental limit	Type 1 environmental limit	A type 1 limit specifies the minimum acceptable state of an aspect of the environment (eg nutrients *in* a river) that will – with the addition of a precautionary buffer – defend the bottom line outcome.
Environmental standards	Type 2 environmental limit	A type 2 limit specifies the maximum amount of harm that can be caused *to* an aspect of the environment (eg discharges *to* a river). It is often a measure of pollution or input. The Panel refers to this generally as an environmental "standard".
	Type 3 environmental limit	A type 3 limit specifies a restriction on a particular activity that causes harm (eg stocking rates). The Panel refers to this generally as an environmental "standard".
	Regulation (including rules, standards etc)	Regulations are a general term for any provision that can be directly enforced through coercion. Some regulations may express environmental limits, but others may not. On the flipside, and as explored later, not all limits are necessarily contained in actual regulations.
Target	Target: positive outcomes	Targets are always about improving things relative to what we have at the moment. Some targets are about the achievement of "positive" outcomes, where we seek to move *above* minimum outcomes.
	Target: bottom lines	Other targets are about achieving minimum outcomes (bottom lines) that have *already* been breached. These targets are actually a species of type 1 environmental limits (ie where a limit is to be met in the *future* this can equally be called a target). The Panel does not clearly distinguish between targets for achieving positive outcomes and targets for achieving bottom lines.

What this conceptualisation means for a future system

The conceptualisation above means that successfully incorporating "limits" into a future system involves ensuring that many related concepts, tools and moving parts are working effectively together, not just focusing on a handful of provisions in a single statute. Drafting refinements will span many parts of the proposed legislation, not just the Panel's proposed section 8.

While it may seem obvious, having a clear structure and definitions around limit setting and its consequences is crucial when it comes to drafting legislation and structuring subordinate instruments. This structure is currently not well articulated in the RMA, despite its intention to protect the environment. For example:

- It is not always clear which outcomes (including those articulated in sections 5, 6 and 7) are non-negotiable bottom lines and which are matters that can be weighed up and traded off (see the discussion of *King Salmon*[26] below)
- It is not always clear whether national direction is intended to impose firm environmental limits or instead to achieve broader outcomes (as shown by the confusion as to the meaning of particular terms in the New Zealand Coastal Policy Statement (NZCPS) and their relationship to other terms)
- By the time the system gets to imposing type 3 limits (on particular human activities, where the rubber hits the road), the conversation has often been politicised and morphed into one about how to *balance outcomes*[27] rather than how to *implement* type 1 or type 2 limits (even where they have been set).[28] Limits are often relitigated through value-based negotiation, which is unfortunately allowed by a system that is reactive and standoffish in its approach to limit setting.[29] That is not just in the consenting context, but also when national direction and plans are being created through highly charged political processes.

While the Randerson Panel's recommendations go a long way towards remedying these structural issues, we see room for refinement. We have outlined a slightly different conceptualisation of limits above. In short, we think there needs to be a coherent and highly structured cascade of limits by which the following occurs:

- The purpose and principles of legislation unambiguously *recognise* the pre-eminence of maintaining bottom lines and strictly defending the environmental limits which are designed to achieve this.
- An internally consistent set of bottom lines (minimum outcomes) are clearly articulated in legislation. These cannot be set only with reference to nature or science, as they are value based.

[26] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

[27] For example, see one Ministry's advice with respect to how DIN limits in an NES on freshwater quality should not be included because they could have economic impacts in some places.

[28] For example, a discussion about how to spread the costs and benefits of implementing those limits by reallocating rights within an environmental envelope.

[29] For example, central government does not have to create national direction, national direction where it is created does not have to have the primary function of imposing environmental limits, and Part 2 of the RMA arguably does not itself impose limits (see discussion of King Salmon in the next section).

- Bottom lines are distinguished clearly from positive outcomes that are *not* bottom lines, especially where they might conflict.
- To *achieve* those bottom line outcomes (and nothing else),[30] comprehensive type 1 limits need to be created to outline minimum measures of environmental health across domains. As the Panel pointed out, these need to be above bottom lines, with a precautionary buffer to reflect risk and uncertainty.
- Type 2 limits must be imposed on all forms of harm that, when combined, could impact on the achievement of type 1 limits.
- Further type 3 limits may be imposed to restrict which human activities can occur and how they occur. They *must* be imposed where it is clear that type 1 limits will not be maintained or achieved without them.
- Binding targets *must* be set where type 1 limits are already infringed. These need to be included within the legal classification of "limits" and be distinguished from targets set to achieve positive outcomes which can be binding or non-binding.

However, there are many more nuanced questions that need to be addressed when considering how to implement this cascade within the Panel's proposed model. We address these over the remainder of the paper.

[30] Which is more than just to "contribute" to those outcomes.

Do we already have environmental limits?

Before looking at some more specific questions, it is useful to briefly consider how limits fit into the current system, as this offers lessons as to what a new system needs to do differently.

As the Panel has pointed out, the intention of the RMA (notably in the drafting of Part 2) was to make reference to "the biophysical limits of natural and physical resources".[31] The second part of section 5 was designed to "provide a framework to establish objectives by a biophysical bottom line that must not be compromised" and act as a "high level constraint" on the pursuit of other objectives. Section 6 matters of national importance were largely focused on biophysical constraints and can be seen as a set of "boundaries" to be defended.[32] In fact, the Resource Management Bill was specifically amended before enactment to address concerns that there had previously been a lack of hierarchy and priority between different matters, so the risk of including an unprioritised list of matters was clearly recognised at the time. The *idea* and *expectation* of limits has always been at the heart of the RMA's purpose.

Furthermore, the current system already has many environmental limits (including type 1, 2 and 3). It is not totally deficient in this regard, and provides much that is positive to build on (especially in terms of national direction on freshwater). A report by Cawthron has identified a number of these, some of which are expressed in a quantitative way.[33]

So where has the current system gone wrong? Overall, what the RMA lacks is a coherent *framework* for setting and defending environmental limits that lies between its laudable intention and the scattering of regulatory restrictions that resulted. This is in a number of senses:

- Limits do not have to form a *comprehensive* package (there are gaps), particularly at the national level[34]
- Limits do not form a *coherent* whole (the inclusion of various matters across sections 5, 6 and 7 is somewhat arbitrary, and there are uncertain relationships between policies that can be said to impose limits)
- As mentioned above, any limits that are set are not guided by sufficiently firm or clearly articulated bottom line *outcomes*
- Limits are not differentiated from other types of restriction or outcome in terms of their *legal status*; it is not clear what a "limit" actually is or what its consequences are (much depends on how "firm" and "directive" the wording of policies are relative to other relevant policies)
- Limits can be *eroded* over time without clear mechanisms to prevent this or even being aware of it happening

[31] Panel Report at 45, citing Hon Simon Upton.
[32] However, section 6 has often been treated as a matter of relative weighting based on the direction to "recognise and provide for", rather than hard line constraints that might be expressed through a phrase like "comply with". This was confirmed by the Supreme Court in *King Salmon* at [148]-[149].
[33] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) from 143-168 .
[34] For example, the Parliamentary Commissioner for the Environment has pointed out that estuaries do not received focused attention. There is an absence of national policy for forestry and standards for wastewater. Regulatory restrictions that can be regarded as limits can be decoupled from their policy context by having NESs without clear reference to associated NPSs (which in some cases, as with forestry, do not exist).

- Limits are not *responsive* to adverse environmental change – it can be challenging to ramp them up in a timely way
- It is not always clear who bears *responsibility* for setting or maintaining limits[35]
- Few binding targets exist to achieve limits that have already been infringed, and they are not mandatory
- Even where it is generally accepted that there is a limit, it is sometimes not known if that limit has or has not been infringed (there is a lack of information)

The current system has many restrictions that can be characterised as environmental limits, but they are not comprehensive. They also lack a strong normative foundation, any special status, and a future focus.

The inadequacy of the current system with respect to limits can be seen in the *King Salmon* decision. This case (and jurisprudence that followed) was a big step in the right direction, in that it overturned an interpretation of the RMA that had persisted for two decades despite being manifestly wrong.[36] Some heralded the case as finally imposing environmental limits.

However, closer inspection highlights deep flaws that remain in the system, and even the best case law cannot overcome them. We have explored this in our RM reform work, but because the Panel does not highlight this point specifically, we include a more tailored version of our analysis below. It offers some important lessons for how a new system of limits should be approached.

Environmental limits and the *King Salmon* decision

The *King Salmon* jurisprudence made a significant positive contribution to how environmental bottom lines are recognised in the RMA. The legal position prior to the case was that decision-makers were to engage in reaching what was generally called an "overall broad judgment" when making decisions on plans and consents. That meant that a decision-maker had recourse to Part 2 of the RMA in balancing the benefits and costs of a proposal, even if objectives and policies in lower planning instruments were much more specific, directive and protective. As the Randerson Panel said, this approach "allowed environmental limits in plans to be set aside on the basis of advancing [the] social, economic and cultural wellbeing" reflected in Part 2.[37]

In *King Salmon*, the Supreme Court overturned that approach. It emphasised that, in certain circumstances, the RMA was about defending firm environmental bottom lines set under it, not weighing up many factors. Central to the decision was the fact that the NZCPS contained directive and firm provisions concerning the protection of the coastal environment. It made clear that national direction could impose firm, policy-based limits and that subsequent lower level decisions would not be allowed to undermine them by referring back to the wider, more balanced set of considerations in Part 2 of the RMA. That was a big step forward, because "the failure of the RMA to deal well with cumulative effects is … partly rooted in the misinterpretation of its purpose statement".[38]

[35] For example, "limit" setting is not a defined function of any actor. Many instruments that *can* set limits are not compulsory.
[36] See S Upton "RMA reform: Coming full circle" (RMLA Salmon Lecture, 2020).
[37] Panel Report at 52.
[38] Panel Report at 52.

Since 2014, the Supreme Court's message has been applied and refined through a number of other decisions. However, overall, this line of case law still falls short in a number of senses. It has since been made clear that a balancing approach (including in the consenting context) will often still need to happen (eg where there are no firm and directive policies in planning instruments to point to, or where there are multiple provisions that conflict). This is a real issue, because limits are scattered across national direction, regional plans, district plans, policy statements and consents. It is not always clear whether something is a true limit or not, or how flexible it is meant to be. Much depends on the (sometime tortuous) unpicking of particular words in non-regulatory policies (like "avoid") and how dozens of provisions in different documents interact.

The Supreme Court also stressed that Part 2 is not an operative set of provisions; it sets an expectation that a cascade of subordinate instruments will impose strict protections. But it does not itself demand that firm limits *are* generated through planning instruments; regional plans are not mandatory, rules are not required, and the government could make the NZCPS less protective if it wished. In the RMA, Parliament has above all created a *framework* for limit setting rather than directly creating limits.

In addition*, King Salmon* does not change the "deliberate openness" of Part 2 itself, and questions still abound over what exactly the Court means when it concluded that the word "while" means "at the same time as". After all, enabling people to provide for their economic wellbeing cannot always happen at the same time as protecting crucial biophysical bottom lines.[39] Furthermore, the Supreme Court effectively confirmed that section 6 matters of national importance are not themselves true environmental limits, because although they require steps to be taken, they do not actually give primacy to the protective elements of sustainable management.[40] Essentially, while Part 2 (especially the second half of section 5) provides much to build on, it does not in itself establish a comprehensive range of environmental limits.

The important lesson from the Supreme Court is, essentially, that authorities can impose bottom lines if they consider Part 2 demands it (although there is no effective mechanism to ensure action is taken), and it is not permissible to undermine a higher level authority's decision to do so. In the context of the coastal environment, that is a good thing. Reasonably firm environmental limits are imposed under the NZCPS. That has been confirmed in a number of subsequent cases in which litigants have tried to carve out exceptions for particular sectors or activities (like ports or aquaculture). But outside of the coastal environment, the policy landscape is much more varied, and there are fewer comparable limits to give effect to. In such cases, it seems increasingly clear that being able to revert to Part 2 in the context of planning and consenting will be risky for the environment, not helpful.

There are other risks here, too. As more national direction is produced, not all of it is about setting true "environmental" limits. A concerning trend has been for the RMA to be used to impose "top lines" or "social and economic ceilings" in the interests of wider policy agendas, even where corresponding national level environmental limits are not in place.

[39] It is telling that the Court's solution (to litigants seeking to use Part 2 to override more specific limits in subordinate instruments) was not to say Part 2 imposes limits, but rather to say Part 2 cannot be used to override instruments that *do* impose limits. This is essentially saying that Part 2 itself is reasonably weak.
[40] *King Salmon* at [148]-[149].

This highlights something of an identity crisis about what the RMA is really for, which has been at least latent since its inception. The "environment" is regarded as a broadly defined amorphous whole, "sustainability" is as much about enabling broader wellbeing as it is about biophysical protections, and there is no defined concept of a "limit". For example, the new NPS on Urban Development specifically talks about bottom lines as minimum levels of development. A similar trend can be seen in the NES for Plantation Forestry, where in the interests of inter-jurisdictional consistency there are limits on the environmental restrictions councils can impose, despite the more open textured nature of Part 2. *King Salmon* is therefore a double-edged sword, and there are risks that recognising the primacy of firmly worded limits in subordinate instruments can swing both ways depending on what those instruments actually say.

The lesson from *King Salmon* is that a new system must not only require limits to be set and to hold firm once they have been set; it must also (1) articulate what types of things *cannot* be treated as limits; (2) clearly outline what the outcomes sought from limit setting are (and therefore where they should be set); and (3) clearly outline the consequences of something being a limit. Simply requiring national direction to be created does not in itself address the future risk that this national direction will still not do what it is meant to. We will return to these observations further below when we look at how to refine the Panel's drafting.

Deficiencies in the RMA hold lessons for what a new system needs to do differently. It must (1) articulate what types of things *cannot* be treated as limits; (2) clearly outline what we are trying to achieve by setting limits; and (3) clearly outline the consequences of something being a limit.

Which kinds of thing require limits?

In our view, clear legal consequences need to flow from designation as an environmental limit. If they do not, there is little point in having the concept. (For example, one legal consequence identified by the Panel is that things that are environmental limits *must* be set – they are not optional). Our recommendations as to what other consequences should follow are explored in the following section.

Because legal consequences flow from environmental limits, it is important that the law prescribes what domains must have limits associated with them. The current system does not clearly do this; regulatory restrictions are guided by the broad concept of sustainable management, which allows restrictions to be set and changed for many different reasons, including to establish minimum levels of development and maximum levels of protection (even though some – such as section 6 matters – have more weight than others).[41] Other than the NZCPS, national direction is not mandatory, and does not specifically need to contain environmental limits. Much of it does not.

Whether something requires a limit at all is a different question to *where* that limit is then set. It can be hard to distinguish between restrictions that should have legal force as limits, and restrictions that are ongoing policy choices where various things need to be weighed up as a context evolves. That said, widespread consensus about the unacceptability of some outcomes means some domains obviously require limits, even if there are hard short term trade offs to make. This suggests to us that limits should be established for natural elements of the environment, like water, soil, air, habitats and so forth. They are about safeguarding the elements of the natural world that sustain both people and other living things in a healthy and functioning state in perpetuity. At a minimum, they are about making sure we avoid ecological collapse and the decline of ecosystem services that would undermine the basis of our society.

Whether other things should have "limits" is less clear. A suite of limits needs to be internally coherent and focused on the same kinds of thing. A system should not be able to provide a laundry list of minimum outcomes, with no guidance on how to balance conflicts between them. That is an unacceptable feature of the current system where, for example, separate national direction on minimum levels of urban development could conceivably conflict with protections for coastal protection and freshwater quality, with no clear hierarchy.[42]

There are few foreseeable conflicts between outcomes relating to the protection of air, soil, water and habitats, since ecosystems by their very nature are sustained through a complex balance of natural processes. Where conflicts do arise, there needs to be sustained effort to use methods that achieve more than one limit.[43]

[41] Whether something is a "limit" in practice often needs to be unpicked by careful analysis (as in *King Salmon*) based on the wording of many instruments, including s 6 of the RMA, but there is no specific legal category and it is not often obvious except in the case of a prohibited activity.
[42] See NPS on Urban Development and NPS for Freshwater Management 2020.
[43] That is not to suggest there are no conflicts in terms of *how* those outcomes are achieved. For example, human health can conflict with environmental wellbeing through our use of chemicals to control pathogens (eg pesticides). Landfills are the result of addressing the human health risks of rubbish. Biosecurity can conflict with environmental health through the use of chemicals to control incursions of pest species (eg biofouling).

We also need to make sure that limits are durable. A system that allows inflexible limits to be set, that do not align with society's values, may undermine their long-term durability. This has been seen, for example, in frustration over the RMA's inflexible restrictions on urban change, density and amenity resulting in separate legislation (the Urban Development Act) being used as a way around them. It may also risk other limits – for which there *is* broad consensus – being eroded if they are closely associated through the same mechanism (again, we can see this in the weaker environmental protections that have been included under the Urban Development Act). That said, societal consensus is not just about conducting a poll on people's day to day priorities, it is about agreeing on what things should be viewed as non-negotiable over the very long-term. Part of the role of government is to actively build that consensus, not just respond to short-term pressures, and it is in that sense that Cawthron's desire for "democratic legitimacy" for limits should be seen.[44]

We therefore broadly support the elements identified by the Randerson Panel in its draft section 8 of the NBA, which closely reflect the things we have previously recommended have mandatory limits. Below, we add some commentary on those matters.

The quality, level and flow of fresh water	These should be separated out to make abundantly clear that limits are required for each of these aspects
The quality of coastal water	It is important that this specifically includes estuarine environments
The quality of air	Some reference should be made to the climate here as well as air quality. Although type 1 limits (binding targets) are set through the Climate Change Response Act, the NBA should be expected to set limits on human activities to contribute towards them (and we note the expanded jurisdiction of councils with respect to councils proposed by the Panel).[45]
The quality of soil	This should also include the quantity or existence of soil, not necessarily as the basis for primary production (eg protecting productive land from non-productive uses) but to prevent erosion and subsidence. Soil – and not just the things on top of it – is an important component of ecosystems.
The quality and extent of terrestrial and aquatic habitats for indigenous species	This should be retained, but an additional umbrella concept of ecosystem health and functionality should be included as something for which limits either must be prescribed or as a lens through which other limits must be prescribed. Proposed drafting includes a general principle on integrated management of the natural and built environments, but it does not highlight *ecosystems* as an integrative concept in limit setting.

[44] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at ii.
[45] Panel Report at 191.

All other outcomes will need to be pursued within limits for these domains, because they have *potential* to clash with them.[46] A clear hierarchy is particularly important, because the NBA will remain an integrated framework for resource management (that deals with both the natural environment and land use/development planning).

Some things present very few foreseeable conflicts with the defence of environmental limits. Yet they may not warrant classification as an environmental limit themselves, either because they involve a much more complex set of socio-environmental values (where restrictions and complementary measures can be highly place and community specific), or because they are not as objectively measurable as limits need to be. Landscape protection could be one example of this.

With some minor addition and clarifications, we see the list of domains for which limits must be set in the Panel's proposed section 8 as appropriate.

While they need not be expressly listed in legislation and are not exhaustive, things that in our view should not be treated as "limits" include the following.

Amenity	This term can include many things, including visual amenity and urban amenity.
Landscape	Including natural and cultural landscapes
Built heritage	There may be a valid distinction to be made here between aspects requiring limits (eg based on age or significance) and those where balance is required. It is, however, risky in our view to provide for built heritage to be subject to bottom lines in a blanket way.
The "quality" of the urban environment	Such concepts are too vague and changeable in nature to warrant firm limits.
Housing affordability	
Economic development	
Climate change adaptation	
Introduced species	For example, preservation of sport hunting species is not an environmental limit. That said, other forms of limit can be imposed under the Biosecurity Act.
Noise	Some limits may be needed to protect human health, but not to allow Nimby objections through a limits frameworks (eg as cities expand, noise becomes greater).
Public access	Public access is important, but must come lower in the hierarchy to those things requiring limits (eg to prevent kauri dieback) where there is tension.
Energy security	
Food security	
Natural hazards	

[46] That is by no means to say that they always do clash. Sometimes they can be used to defend bottom lines or enhance the natural environment. For example, a quality urban environment includes a green city. However, a separate status is needed so that there is no ability to trade off elements in the event they do conflict.

However, we stress that environmental bottom lines – minimum outcomes for which limits must be imposed – are not the only important outcomes in the resource management system. The outcomes listed above are crucial too. Land supply is particularly important, for example. So too is landscape protection, as highlighted by EDS's recent series of reports on the subject.[47] Recognising a separate envelope of limits does not mean we give up on housing affordability, natural landscapes, or any of the other outcomes such as food security, energy security, climate change adaptation[48] or biosecurity.[49] It simply means we direct our methods and energy into *ways* of achieving those things that do not infringe environmental limits where potential tensions arise. For example, building a seawall to adapt to a changing climate should not be allowed in places where that would infringe environmental limits.[50] Other mechanisms, like managed retreat, may be needed instead.

In other words, the existence of a hierarchy between limits and non-limits should not be taken as a moral signal that some outcomes are less *important* than others and we have to give up on some objectives. Too often is it cast this way. Kate Raworth's concept of a "social ceiling" being as important as an environmental "floor" is a valid one.[51] A hierarchy is simply a recognition that we must find methods that achieve both, and methods that do not do so are unacceptable. If anything, the metaphor needs to be revised so that the environmental floor becomes environmental walls; if these walls lose their integrity, the social ceiling will come crashing down as well.

Simply because something is not included as an environmental limit does not mean it is unimportant. An environmental limit simply outlines the biophysical realities within which many other important outcomes need to be pursued. Legislation should make this clear by stating that limit setting is vital to the long-term social, economic and cultural wellbeing of people.

We note that there is also an important but unresolved relationship between provisions concerning Te Tiriti o Waitangi and environmental limits. There are many synergies here, and te ao Māori should inform exactly how the environmental bottom lines in new legislation are expressed (including by building on the Panel's approach to Te Mana o te Taiao). But there are also potential tensions as well. Under new legislation, the principles of the Treaty will need to be given effect to. That is the right approach. But it is important the law makes clear that environmental limits, developed in partnership with Māori, are themselves defined as an *expression* of Treaty principles rather than something to be balanced against them. This makes the process for establishing environmental limits crucial to their legitimacy and durability.

Under new legislation, the principles of the Treaty will need to be given effect to. But it should also be made clear that environmental limits, developed in partnership with Māori and designed to protect the taonga of Aotearoa, are defined as an important *expression* of Treaty principles rather than something to be balanced against them.

[47] See www.eds.org.nz/our-work

[48] That can conceivably conflict with true bottom lines, however (eg moving activities like agriculture or aquaculture to different locations where a changing climate makes them more or equally productive). Such measures need to be done in a way that defends bottom lines.

[49] There is no hard and fast line between protecting industry and protecting the environment from biosecurity incursions. Often they will be the same thing. However, industry can sometimes *cause* such incursions in which case a tension needs to be resolved according to this hierarchy (eg one might think of wilding pines).

[50] For example, constructing seawalls can cause the removal of habitat for estuarine species as the coastal margin changes: see the Parliamentary Commissioner for the Environment's recent report on estuaries.

[51] See K Raworth *Doughnut Economics*.

A hierarchy for outcomes above environmental limits?

As an aside (in that it is beyond the scope of this paper), there may need to be some degree of hierarchical relationship between outcomes for which limits are not required. For example, food security needs to be achieved within our envelope of environmental limits (it should not be an excuse for intensifying agriculture or horticulture at the expense of freshwater quality or flows), but it needs to stand firm in the face of pressure to expand cities outwards in all directions. Similarly, climate change adaptation measures (eg shifting the location of aquaculture areas) cannot be allowed to infringe environmental limits, and the provision of residential development capacity should not be done in a way that undermines adaptation plans. And the values of outstanding natural landscapes, even if not themselves articulated as bottom lines, should have robust protections in the face of human activities like urban expansion.

As presently drafted, those tensions are expected to be resolved through national direction and plans,[52] and the Panel has specifically declined to impose any kind of hierarchy between section 7 outcomes in legislation. We simply flag that further consideration should be given to whether some legislated guidance is needed about particularly important outcomes (eg in a manner akin to sections 6 and 7 of the RMA, or through a set of principles to guide the development of national direction to resolve tensions). At present, the list of outcomes to be achieved in the Randerson Report seems long and subject to negotiation where there are tensions, which arguably should not be left *entirely* to political prioritisation.

While a robust discussion about whether a hierarchy should exist above environmental limits needs to occur, this should not enable a race to get particular interests elevated *to* the status of limits. We offer this as a note of caution to policy makers as they enter the politically charged environment of select committee and public feedback, rather than a critique of the Panel's drafting per se. This phenomenon has been seen through efforts to get a variety of matters included in section 6 of the RMA, which is less about biophysical limits thana grab bag of things that deserve more weight than others. Part 2 has, as a consequence, become both incoherent and incomplete and a fertile ground for litigation.

A statutory definition of limits, which is clearly linked to the biophysical outcomes for which they are imposed, would be useful to prevent other matters being inserted through later amendment to the NBA. Perhaps more importantly, this would be crucial to ensure the Minister does not have power to include "limits" relating to completely different things like housing and development, that could clash with true biophysical limits.[53] As drafted, limits are simply defined in section 8 as a mandatory set of standards imposed to achieve the broad purpose of the Act.

[52] The draft NBA is to include a provision that where any tensions arise they are to be resolved with reference to national direction, but there does not seem to be a requirement that national direction actually *do so*. While this is left slightly unclear (see Panel Report at 83), there could be an active duty on the Minister to address any foreseeable tensions/relationships between outcomes in the Panel's draft section 7.

[53] The Minister has the specific power to prescribe limits for things other than those domains listed.

What should determine where limits are set?

Once it is accepted that some form of limit is required for certain domains, the system must have a way to determine *where* a measurable line in the sand is drawn. This paper is not concerned with the specific places in which various limits are set (there will be thousands of them, some dependent on location, type of resource or domain, or human activity), only with the features of a system under which they are set.

This question is linked to many other ones. For example, the following are important.

Questions closely related to where limits should be set

- The *location* in the system where limits are set – which legislative framework (and under which purpose and principles);
- *When* limits are set (up front through primary legislation, afterwards through the creation and review of national direction or other plans, or on a rolling basis through consents and other authorisations);
- By *whom* limits are set (central and local, accountable and independent institutions will bring different values and priorities);
- The *scale* at which limits are set (limits focused on a catchment, or a defined geographical space, will be influenced by different considerations then limits for other spaces);
- The process through which limits can *change*.

These more specific questions are considered further below. However, there are some higher level comments that can be made first.

First, lower-level limits need to be set in accordance with the cascade described earlier. In other words, type 3 limits (on specific human activities like aquaculture or urban development) and type 2 limits (maximum amounts of input/harm such as maximum levels/rates of sediment discharge) need to be set at a level that achieves a comprehensive range of type 1 limits (the minimum state of the environment being affected such as the carrying capacity of a river or an airshed). Type 1 limits in turn need to be set at levels that achieve bottom lines – prescribed minimum outcomes – with the addition of a precautionary buffer.

This means that, while there may be genuine scientific debate about where limits are set (eg the carrying capacity of a particular lake), this is *not a value based negotiation*. Limits should not be set through collaborative processes or negotiated accords.[54] Ultimately, limits are about whether a measure achieves bottom line outcomes or not – this should be the only relevant consideration. This sounds obvious, but part of the problem with the RMA is that it does not clearly specify whether something is a bottom line or not, and can also fail to give primacy to the defence of bottom lines even where they are recognisable (eg in section 6).

[54] Compare with cautionary tales outlined in Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at iv. We support the Panel's proposal to not include the RMA's collaborative planning process in the RMA.

Limits need to be set at a level that will defend environmental bottom lines (minimum outcomes). The law needs to be clear that this is the overriding consideration (not to achieve or contribute to a broader range of outcomes).

A key question is therefore how bottom lines should be described. They are at the top of the cascade and drive everything that happens beneath. Here, we see room for refining the Panel's approach.

To ensure they are durable, our view is that bottom lines should be enshrined in legislation in a reasonable amount of detail, so that they provide meaningful direction when more specific limits are being set through subordinate instruments. We agree with Cawthron (which describes these bottom lines as "goals"), in that:[55]

> While high level, the goals should be written precisely enough that it is possible to evaluate statutory limits and targets according to how well they give effect to the goals.

Refining the Panel's approach to bottom lines

Although the Panel views biophysical bottom lines as being the foundation of limit-setting,[56] it has not clearly included this concept within the NBA itself. The result is that its proposed section 8, which requires limits to be set for various things, does not in our view have a robust enough normative basis. This is because:[57]

- Limit setting under section 8 is defined as being "to achieve the purpose of this Act"
- The purpose of the Act is "to enhance the quality of the environment to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao"
- While the concept of Te Mana o te Taiao is biophysically focused and may provide a sound high level basis for limit setting, it exists alongside more general and undefined objectives like the "quality of the environment" and "the wellbeing of present and future generations" that would support consideration of multiple objectives (including development in built environments)
- While section 5(2)(b) does highlight that the purpose of the Act is to be achieved (among other things) by ensuring that use and development is within environmental limits, this creates a degree of circularity: under section 8, limits must be set to achieve the purpose of the Act contained in section 5, and under section 5 the purpose is to be achieved by setting limits under section 8. In other words, while it rightly singles out limit setting as an important function that is separate to other functions, it does not provide guidance as to *where* limits should be set other than by referring to the general purpose of the Act.[58]
- Furthermore, proposed section 7 imposes a duty on all those exercising functions and powers under the NBA (presumably capturing the Minister's limit setting function) to "provide for" the large range of undifferentiated outcomes in that section. A handful of these arguably support the responsible setting of environmental limits (although they are all very high level), but the

[55] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020).
[56] Panel Report at 64-67.
[57] Compare the concerns of the Parliamentary Commissioner for the Environment in S Upton "RMA reform: Coming full circle" (RMLA Salmon Lecture, 2020).
[58] Cross-reference to the Act's purpose is fine if it is descriptive (ie that the Act's purpose requires environmental limits in order to be achieved, and it won't be achieved without them), but it is problematic if it is normative (ie that limits are to be set in places that achieve the Act's purpose, which is about more than protection of the natural environment).

majority would not be appropriate as a normative basis for doing so. It is unclear which ones are or are not intended to apply to limit setting and which ones apply to other functions.

Leaving an uncertain normative basis for setting limits could undermine the concept. Once set, limits are designed to hold firm, but those limits will only be effective if there is no room for balancing different considerations when they are established in the first place.

We are therefore not convinced that current drafting would achieve the Panel's clear intent of putting to bed "the meaning of the word 'while' in the current definition of sustainable management",[59] since the normative basis of limit setting remains (1) a purpose statement in which bottom line outcomes are not clearly recognised or distinguished from others,[60] and (2) a "margin of safety above irreversible damage" in section 8, which is deficient for the reasons outlined earlier.

The NBA requires a much more targeted normative basis under which the distinct function of limit setting is undertaken. We recommend that section 8 be revised so that the purpose of setting limits is "to avoid infringement of environmental bottom lines", not to achieve its broader purpose. This would be achieved through a new legislated set of unacceptable outcomes specifically described in the Act in narrative form, which limit setting would need to avoid. This would complement the more general set of outcomes in section 7, which already provides guidance on the other key way in which the Act's purpose is to be achieved (identifying and promoting positive outcomes). The absence of corresponding bottom line outcomes is conspicuous.

How new bottom lines should be expressed requires further thinking, but they should not be left to processes within the Act itself (eg relying on national direction to do so). The basis on which limits are set needs to be clear in legislation through prescribing minimum outcomes. This also reflects Cawthron's recommendation that legislation should include "clear goals, narrative objectives, and principles" which would identify a "high-level rationale for setting environmental limits" and "specify the environmental outcomes that must be secured through the development of limits".[61] This is not clearly articulated at the moment.

Core values to underpin new legislated bottom lines

The Panel has, albeit briefly, characterised bottom lines as preventing ecological tipping points from being breached. We have already questioned whether that is an adequate basis for setting limits, and think that a suite of bottom lines need to be both broader and more specific to the range of minimum outcomes we want environmental protections to deliver. Bottom lines would ideally be expressed on a domain-by-domain basis, as long as they recognised the connections between them and the umbrella concept of ecosystem functionality.

[59] Panel Report at 74.
[60] What it does do is (1) codify *King Salmon*, in that it prevents national direction (which sets limits) to be undermined later in plan making and consenting; and (2) remedies one of the deficiencies that *King Salmon* was unable to fix by *requiring* limits to be set in national direction for some things.
[61] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at vi.

While legislation should create more specificity around them (and some useful ideas have been put forward by other commentators),[62] the core values underpinning bottom lines should in our view include the following.

The **protection of human health and life** is an obvious underpinning value. The need for bottom lines is generally uncontroversial where activities have even the smallest potential to make people physically ill or threaten their lives. That has been underscored by the approach to Covid-19 as well as recent responses to drinking water quality. This needs to be uncompromising. The greatest "environmental" success stories over the past century (eg urban air quality) can be explained by their actual or perceived relationship with human health and safety. However, this rationale applies equally to slower burning environmental issues that can impact on our health (eg novel chemicals or substances like hormones, antibiotics and microplastics) as it does to more immediate impacts (the things that make us cough or our stomachs upset such as wastewater overflows or polluted air).

Thus, to the extent that human activities in the natural environment have the potential to make people sick, there should be comprehensive limits to prevent that. The most obvious example is water quality (eg preventing contamination of drinking water sources and swimming beaches). But there are many others. The protection of human health is also closely linked to bottom lines for air quality (preventing respiratory issues), soil quality (contaminated land can contaminate our food), waste (which can interact with aspects of the environment like freshwater and soil but also impact directly on people), and freshwater flows. At present, the long-term human health implications of environmental degradation and ecosystem decline are underemphasised and need to be stressed in a new system. For many people, this will add urgency, legitimacy and durability to environmental bottom lines.

We also need to establish bottom line outcomes to ensure that the environment (and resources within it) will be **able to sustain human life and health in perpetuity**, not just prevent illness. This spans almost all the things described above requiring bottom lines, including the sustainability of particular resources that humans rely on to survive (eg freshwater, soil, clean air, seafood). But it is also a bottom line for broader ecosystem functionality and integrity, which encompasses all resources within them (living and non-living). These ecosystem services are complex and interconnected, not just a set of disparate resources that people can see and use directly. For example, pollination is a vital service performed by insects, which forms part of a much wider food chain. Imposing bottom line outcomes on particular resources or domains will not capture such things (as has been seen in the single stock limits under the Fisheries Act). The services that ecosystems provide to humans are well documented[63] and the maintenance of those should be explicitly stated in legislation as bottom lines.

Bottom line outcomes also need to reflect the **intrinsic value** of the natural world. This is particularly the case with living elements of the natural world (and the non-living elements that support them),

[62] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 132-136, which among other things points to the "environmental statements that accompany Sweden's 16 environmental quality objectives" such as "'the air must be clean enough not to represent a risk to human health or to animals, plants or cultural assets".

[63] See Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020).

which have a right to exist and thrive in their own right. This approach reflects te ao Māori. It is another reason why ecosystem integrity and functionality as a whole should have bottom lines.[64]

There are also more **specific elements of the environment that have intrinsic values** to be protected through bottom lines. For example, marine mammals have significant intrinsic value,[65] and need to be protected strictly irrespective of how threatened or vulnerable they are. So too do other **indigenous species of flora and fauna**, both as a whole and individually, particularly if they are endemic to New Zealand. We hold such species in trust for the globe, not just to prevent extinction or keep them in a precarious state above it, but to allow them to thrive. Intrinsic value of these species is over and above the health of an ecosystem as a whole. For example, the extinction of the takahē might not shake the foundations of an ecosystem's integrity, but the prospect of its extinction is still a deeply upsetting one and morally wrong. While the NBA would not be the only statute responsible for defending those bottom lines,[66] it would need to play an important part.[67]

Geographically specific bottom lines

Particular places may warrant different bottom lines for the reason that they are themselves *special* or *unique*. That is quite a different rationale for the imposition of a bottom line, and is not the same thing as *applying* general bottom line outcomes (eg swimmability) in order to translate them through regional or district level instruments into limits for particular places (eg a catchment). Geographically specific bottom lines recognise that the minimum outcomes sought are themselves different in some places, not just that limits need to be set in different places to achieve the same national level outcome.

The current system does not clearly articulate what those places are, or the specific bottom line outcomes associated with them, other than through bespoke legislation (eg the Te Urewera Act or Waitakere Ranges Heritage Area Act). The outcomes in the RMA apply to all places equally. A future system could expressly recognise the existence of places having unique characteristics, stress the need to maintain their intrinsic values, and provide a process both for their systematic identification and establishment of bottom lines and limits tailored to them.[68]

We leave this as a thought rather than a firm recommendation. If the NBA is to be framework legislation, then it would be possible for place-based bottom lines to be set through other mechanisms like bespoke legislation or conservation statutes (eg various classifications under the Reserves Act). We note the need for a fundamental review of our conservation legislation and EDS's current project looking at this.

Aside from intrinsic values, there are **values that New Zealanders hold dear** that should also inform how bottom line outcomes are described in a new system. For example, we *could* simply avoid

[64] While intrinsic value as a concept can be debated at length, it should in practice be uncontroversial because it is already referred to in the RMA and because it simply reinforces the anthropocentric reasons for which we protect functioning ecosystems.
[65] Albeit this is still judged by people, on the grounds that they are highly intelligent and resemble people in some ways.
[66] For example, the Marine Mammals Protection Act, the Conservation Act and the Wildlife Act.
[67] The protection of specific habitats and ecosystems they are a part of also needs to form a clear bottom line above and beyond the overall integrity of that ecosystem. The current system does not articulate this clearly.
[68] As pointed out later, the Minister has a duty to identify various nationally significant features and areas, but it is unclear the extent to which limits must be set for each of these.

swimming at polluted waterways or beaches if we didn't want to get sick. That would tick the box for a health based bottom line. But it does not accord with New Zealanders' values. Such things are important parts of our cultural heritage, and there is significant overlap with the protection of intrinsic values and protection of ecosystem integrity. For example, New Zealanders value indigenous species like kiwi and kākāpō and wild, undeveloped coastlines.

Environmental bottom line outcomes should be clearly articulated in legislation. These should be phrased in narrative form,[69] including integrating te ao Māori (and te reo Māori). The values that underpin them should include the protection of human health and life, the intrinsic value of the natural world as a whole as well as indigenous species, and environmental values that New Zealanders hold dear. Some bottom line outcomes may need to be place-specific, and new legislation could recognise the existence of these even if they do not specifically state what they are.

Care should also be taken to frame bottom lines as actual outcomes to be defended, not just management actions to be taken. For example, the RMA speaks of "safeguarding" various things, but one may legitimately ask "relative to what?", "to achieve what?" or "to prevent what?".

This is consistent with the Panel's intent, in that "clarity of objectives is required to ensure results are delivered".[70] However, the important reasons underpinning the Panel's discussion have not translated into drafting. For example, ensuring water is "safe" for drinking or recreation, achieving a "safe operating space" for people and nature, and ensuring native species are not "threatened with extinction" are not mentioned in the Panel's drafting but they underpin its analysis.[71] One can contrast climate change, where more rigour has gone into outlining *why* we want to set limits (eg to avoid the numerous consequences that will flow from a specific increase in global temperature increases) and therefore why limits (eg total net emissions) need to be set in particular places over time. Stating clearly what the minimum outcome is – as we have done with climate change – provides transparency and a moral strength to a system of limits.

Bottom lines would be best contained within a separate section (eg 7A). This would clearly distinguish them from the wider range of positive outcomes sought in section 7, and not overload a general purpose and principles section (see spotlight below). While a full appraisal of constitutional implications would be needed, and we do not recommend it per se, we flag that these could even be entrenched given their existential and therefore constitutional importance.

An alternative would be for bottom lines to be contained in a schedule to the NBA. That way, they would have legislative backing but could be more extensive and detailed.[72] Bottom lines contain a lot of complexity that cannot easily be expressed through a few words in the body of a statute or through statutory definitions. A schedule could also be amended if really needed in a "cleaner" way than if they were woven into a statute's purpose and principles (we have seen severe difficulties with doing so with Part 2 of the RMA over the years, which in consequence has become incoherent and politically fraught).

Schedules could also contain the more geographically-focused bottom lines described in the spotlight above. These could be expressed as minimum environmental outcomes to be achieved in particular regions and districts (as currently defined), or (preferably) bio-regions defined by the

[69] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020).
[70] Panel Report at 63.
[71] Panel Report at 51.
[72] Including the current section 7 outcomes in a schedule could also provide a cleaner approach to drafting.

features that outcomes relate to (eg particular ecosystems, catchments, airsheds, landscapes, or urban areas that span local jurisdictions). The Mackenzie Basin would be a good example of this. There is also an opportunity here to align legislative bottom lines under the NBA with the environmental outcomes sought under bespoke regional legislation (eg for Waitakere Ranges, Fiordland, Kaikoura, and the Hauraki Gulf), which do not currently have a clear legal relationship.

Moving away from a focus on general purpose and principles

The RMA is quite unusual in having a general purpose statement to which more detailed decisions defer, and there is no need for the NBA to be designed in this way. In fact, one can question whether Part 2 was ever really intended to support the enormous amount of scrutiny it now receives in almost every single plan and consent decision. Decision makers have frequently searched its few provisions for answers where there may not be any.

The Panel has recommended that rules and standards should be "the yardstick against which case-specific matters would be measured", not a general purpose and principles section. We agree. Heavy reliance has been placed on Part 2 in the planning and consenting contexts because a comprehensive suite of rules and standards (and supporting policies) have not been forthcoming at a national level.

The purpose of the NBA should therefore not try to be a precise legal or substantive test for subsequent decision-making.[73] However, to complement a new set of bottom lines linked to the function of limit setting, a purpose section should go further than it does now.

In particular, we note that the three ways listed to achieve the Act's purpose are not expressed in a hierarchical way. Human activity being within environmental limits is listed alongside promoting "positive" outcomes (presumably linked to the long list of undifferentiated outcomes in draft section 7) and a general mitigation hierarchy.

A set of bottom line outcomes should be provided for either in a new section 7A or in a schedule to the NBA. The latter could give a degree of flexibility and provide for a cleaner approach to drafting, as well as allowing more easily for regionally specific bottom lines to be legislated if required.

However, it should also be made clear in the purpose of the NBA (section 5(2)) that the setting of environmental limits provides an envelope within which all other outcomes are pursued and within which all other functions are to be performed. As drafted, there is no clear hierarchy.

The role of principles in setting environmental limits

Aside from a clearer articulation of the outcomes sought, a number of principles should also guide how limits are set. These should be clearly expressed in the normative core of new legislation.

Most important is the **precautionary principle**. Currently, precaution is implied and referred to obliquely in the RMA rather than being a core principle of decision-making. In a new system this principle should recognise that it will often be uncertain where limits should be set, and so a margin of error should be included when considering *any* type of limit. We support the Randerson Panel's

[73] The Panel says this about the Act's purpose in the context of consenting, but leaves the door open to the purpose guiding plan making and (more obviously), national direction.

proposal included in draft section 8(2)(a) with respect to limits (a requirement to include a margin of safety when setting them).

However, a margin of safety when setting type 1 limits is not the only application of the precautionary principle. The principle also applies when assessing whether type 2 and 3 limits on particular activities will or will not infringe those limits (or when assessing impacts of proposals at the consenting stage), and the degree of uncertainty that is acceptable. We note that the more general precautionary principle contained in the Panel's draft section 9(2)(g) could, because of the broad definition of "environment", apply equally to development-focused considerations. For example, it could conceivably justify a decision to proceed with housing in an ecologically sensitive area because *not to do so* could have a significant impact on housing supply. This provision should therefore refer to effects on the *natural* environment.

Other principles are important too. **Participation** is one, and we support the Panel's approach in section 9(2)(b). However, in the specific context of setting limits it should be made clear that this is about obtaining information and allowing people to have their say, and not an opportunity to relitigate the bottom lines for which the limit is being set.

Ecosystem based management should also be specifically listed as a principle, reflecting that ecosystem integrity is at the core of a system of environmental limits and should guide where limits are set for particular domains. Proposed drafting includes a general principle on "integrated management of the natural and built environments", but it does not highlight *ecosystems* as an integrative concept in limit setting. As Cawthron has pointed out, limits can be set in activity or domain-based silos:[74]

> setting limits on, for example, nitrogen discharges to water does not ensure that aquatic environments will be healthy. Both freshwater and marine environments are ecologically complex systems; their status is the result of multiple factors (and stressors) interacting in complex and often cumulative ways.

The principle of **non-regression** is particularly crucial and should be added to section 9(2). This states that once a bottom line has been established, it should not subsequently be made *weaker*. That guards against political flip flopping on issues that have long-term and existential significance, and would be valuable not just when setting or changing limits but also in any future attempts to amend the legislation itself. While we stop short of recommending it, the principles of non-regression and precaution could support the legislative introduction of a higher standard of proof applying to anyone seeking to weaken an environmental limit.

Various statutory principles should influence how limits are set. These should be clearly articulated in legislation, and include precaution, participation, ecosystem based management and non-regression. Tikanga principles should also be included. More specifically:

- The precautionary principle in draft section 9(2)(g) should refer only to the *natural* environment
- The principle of integrated management in section 9 should refer specifically to ecosystems as an integrative concept when setting limits (and other functions)

[74] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at v.

- Section 9 should include the principle of non-regression.

Under which legislative framework should limits be set?

Although we are working firmly within the legislative design parameters set by the current reform process (notably, the repeal of the RMA and enactment of the NBA and the SPA), above we have tried as far as possible to avoid talking too much about the NBA or SPA specifically. This is because limits could be contained in either, or both, of these statutes.

As described above, bottom lines should be legislated *somewhere* – these intergenerationally significant outcomes should be consistent, durable and transparent, and not left to politicised processes when creating subordinate instruments under generic principles like sustainability. A cascade of limits needs to be closely associated with bottom lines and located in the same statutory framework. But where should that be?

The NBA will have roughly the same scope as the RMA, even though it will look quite different in some ways. It will be regulatory and contain controls on a wide range of environmental matters. The SPA, on the other hand, is intended to be something new (a legislated framework for strategic spatial planning). Its nature is non-regulatory. Our take on the SPA is that it is meant to align or coordinate decision-making under other legislation by providing for regional spatial strategies, which will then influence other legislative instruments.

We broadly agree with the Panel's approach, in that the NBA should be the place where environmental limits are created and defended. There are two key reasons for this. Firstly, the NBA is set up as an integrated regulatory framework, and limits ultimately require regulatory expression. Secondly, the NBA will have a specific purpose focused on biophysical protection and the pre-eminence of limit setting within that. Even if it had a "green" element in its purpose, we see a risk that the wider ranging and multi-stakeholder vision developed through spatial strategies could dilute the focus on environmental limits in practice.[75] We have seen the same dynamic in the past where the general principles in Part 2 of the RMA have been used to undermine specific environmental limits in more focused subordinate instruments, and we should not repeat the same mistakes again at a macro level.[76]

As such, regional spatial strategies should be required to *comply with* environmental limits set under the NBA. In addition, they should be required to actively *give effect to* them. The latter is important because some limits (eg the extent of indigenous habitat) may require strategic spatial expression or translation (eg a plan for how habitat is to be increased or connected over time in relation to roads and urban growth).[77] In particular, strategic plans for the *creation*, over time, of a network of area-based protections could be provided for to give effect to biodiversity limits set under the NBA, in the same spirit as Natura 2000 areas established under the European Union Habitats Directive.[78]

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[75] See the Panel's proposed purpose at 132.

[76] For the same reason, urban growth planning in a spatial strategy (ie triggers for the release of land over time) should not occur through inflexible market mechanisms alone (ie a competitive land market approach). Such measures need to be firmly *subject to* environmental limits.

[77] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 143-144, where it is suggested that limits for various things require land use change and vegetative cover, which is inherently spatial.

[78] These types of plans (an action plan over time) are quite different to the regulatory plans created through regional combined plans. For more on Natura 2000 and how that could look in the NZ limits context, we refer you to our resource management reform reports at www.eds.org.nz/our-work.

This refines the more general approach of the Panel: that spatial strategies need to be "consistent with" national direction.[79]

Combined plans should then have to be consistent with a regional spatial strategy (as the Panel recommends), and this should be spelled out in provisions governing the development and approval of combined plans in the NBA. There should also be a specific exception to this requirement, where the strategy fails to comply with or give effect to environmental limits. This "out clause" is important, because environmental limits may need to be amended/strengthened quickly and may not be immediately reflected in a spatial strategy (although those strategies are likely to be high level enough to allow for such changes without being inconsistent).

Environmental limits under the NBA should form the envelope around which broader planning (eg transport, infrastructure funding etc) happens through a regional spatial strategy, not the other way round. A spatial strategy should be required to comply with and give effect to environmental limits set under the NBA. This is a slightly different formulation than the Panel's, which recommended that spatial strategies be "consistent" with "national direction".

What a "limit" under the NBA encompasses – how broadly it is defined – also influences the relationship between the NBA and the SPA. The Panel seems to envisage that limits are to be contained only in NESs, so a spatial strategy that is consistent with national direction is also automatically one that is consistent with the environmental limits contained within it. It is therefore not clear whether pre-eminence over spatial strategies is given to NBA instruments because they are *national* or because they contain *environmental limits*.

But *should* a limit only be contained within national instruments? Should it also include provisions set in combined plans that *give effect* to national instruments? Should it only encompass *regulations* and not policies? And should it include type 1 limits only (quality standards for the environment) or also type 2 and 3 limits (restrictions on activities)?

We explore these matters further below, and simply note here that they will be significant for the relationship between the NBA and SPA. In particular, the sequencing of various instruments and transitional arrangements matter. If limits are seen as being only contained in NESs, then these can be developed first and spatial strategies immediately after, followed by combined plans. If limits can also be contained in combined plans, then this process takes on a different and more complex dynamic as we transition to a new system.

How widely a "limit" is defined has significance for the relationship between the NBA and SPA. We return to this issue in the next section.

Although it is not the place in which they would be set, we think the SPA should still play an important role in a system of environmental limits. That is because it is well placed to be an "umbrella" statute with influence over multiple other acts under which other forms of limits need to be set (including, in the future, ones not within the scope of the current review like conservation legislation, marine focused statutes, and waste minimisation laws). It should not be treated just as a mechanistic framework under which spatial strategies are produced or the place to coordinate processes across statutes.

[79] See Panel Report, ch 4.

For example, the SPA would be a suitable place for high level principles of wellbeing to be expressed beyond just the standard references to social, cultural, economic and environmental wellbeing. That includes explicit recognition that humanity operates within the constraints of biophysical boundaries, and that decision-makers need to take a holistic and ecosystem-based approach to setting and defending environmental limits across multiple statutory frameworks. In our RM reform work we have identified international examples of umbrella statutes that do similar things. The SPA could also usefully contain general principles relevant to limit setting that would have influence under (although would not *bind*) many other "implementation" statutes. These principles should include precaution, non-regression, ecosystem based management, participation and environmental justice.[80]

Although it is not the place in which regulatory limits would be set, the SPA would be a suitable place for high level principles around the pre-eminence of environmental limits to be expressed, beyond just the standard references to social, cultural, economic and environmental wellbeing. The proposed purpose of the SPA drafted by the Panel should be revised to achieve this.

[80] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 133-134.

What types of provision should have the status of "limits"?

An effective framework of environmental limits relies on provisions defined as "limits" having higher status than other provisions with which they might conflict. A limit that is infringed is no longer a real limit. Limits therefore need to stand firm right down the chain of management tools (from legislation to national direction to plans and consents). In other words, classification as a limit needs to come with clear legal consequences if the concept is to be worthwhile.

Classification as a limit needs to come with clear legal consequences if the concept is to be worthwhile.

It is therefore very important as to (1) how the NBA defines a limit (what it includes) and (2) the consequences that then flow from being defined as a limit. Below, we test the Panel's approach to those two related things.

Although it is talked about often in general terms, an environmental limit is a new legal concept that is not present in the RMA. It is defined by the Panel as:

> the minimum standards prescribed through national directions by the responsible Minister to achieve the purpose of the Act.

Some things *must* have limits set, but the definition above arguably means almost anything *can* be classified as a limit as long as the Minister sets it through an NES. In that sense the concept is extremely – and, as described earlier, dangerously – broad, as it could dilute the concept and allow for tensions to appear within it (to be resolved by central government through national direction).

In other ways the concept is relatively narrow. There are four kinds of provision that the concept appears to exclude. There is also uncertainty as to whether it includes some things or not.

1. According to the Panel, a limit includes only "standards". In the absence of any other definition, this has a specific meaning and is limited to *regulatory* provisions. It does not obviously include policies or objectives (which is supported by the lack of reference to environmental limits in the Minister's powers to promulgate NPSs). In a way this is curious, given that a limit is defined in section 8 as standards prescribed through national *directions*, rather than through *NESs* specifically. Furthermore, separate references to "limits" and "NESs" with which consents need to comply implies that there may be some kinds of limits that are not contained within NESs. And NPSs are able to contain *binding targets*, which fall within the concept of an environmental limit in section 8. Yet the overall architecture suggests that limits are intended to be regulatory provisions only.

   It is unclear whether the term "standard" refers to *any* provision that can be contained within a national environmental standard, or if it is intended to reflect the narrower understanding of a "standard" contained in council plans (as distinct from provisions in the nature of rules or other regulations).

2. A limit includes only *national* standards, which do not encompass regulatory provisions made by councils under combined plans, or standards imposed through resource consent conditions. There is a curious reference to "national environmental limits" in consenting provisions, which begs the question whether "local" environmental limits are also contemplated where needed to implement the purpose of the Act. Furthermore, the Minister must "state the limits *to be* set in

order to fulfil the Minister's obligation…", raising the interesting possibility that an NES could require limits *to be* set elsewhere in the future, including in a combined plan.

However, these things are not clarified elsewhere and a local limit is inconsistent with how a limit is legally defined in section 8. Section 8 also specifies that councils can set "standards" that are more stringent than "those" (presumably referring to those "limits") prescribed by the Minister, but it appears as if these more stringent standards are not *themselves* limits, despite a further curious reference by the Panel to councils setting "environmental limits of their own".[81]

3. A limit includes only what we have described as "type 1" limits (standards that describe minimum measures of environmental health) and not type 2 or 3 limits (minimum standards for activities causing harm). While NESs that set limits must *also* establish standards to be complied with to achieve those limits, it appears that those standards do not *themselves* enjoy the status of limits.

4. It is unclear whether limits include some types of "target". Binding targets may be set by the Minister to fulfil the Minister's limit setting functions,[82] but drafting suggests that these may not *themselves* be limits. For example, they do not clearly *have* to be set (in contrast to limits), they are listed separately to limits as matters to be contained within NESs, and they are separate considerations when it comes to consenting. This is curious, considering that binding targets for the domains requiring limits can comfortably be described as "minimum standards" to be set through NESs.

The Panel's concept of a limit can encompass a wide range of domains or topics beyond those listed in section 8. However, it appears a limit is constrained to (1) regulatory standards; (2) made only through an NES; (3) that describes a minimum level of environmental health (rather than restrictions on activities).

There are a handful of legal consequences that flow from something being designated as a limit in the Panel's model. Most obviously, one consequence of the NBA is that some things *must* be prescribed as limits (standards for air, soil, habitat, water etc). But for *any* limits, whether mandatory or not, the key ramifications are as follows.[83] There may be other consequences envisaged, but they do not clearly appear in the proposed drafting.[84]

1. The limits to be set must be stated in an NES;
2. The standards that must be complied with to ensure limits are not breached must also be stated in an NES;
3. A consent cannot be granted contrary to an environmental limit;
4. Any consent (including a land use consent) can be reviewed[85] where there is a breach of an environmental limit.

[81] Panel Report at 217, [140].
[82] See Panel Report at 496, s 2(a).
[83] See Panel Report at 496, NES section (1)(a), cross-referencing s 9(3), which in turn cross-references s 8(2)(b). Section 8(2)(b) refers to any limit set by the Minister, not just mandatory ones.
[84] Although the Panel does not provide complete drafting for the combined planning process, presumably this would be linked to limits in a similar manner as consents (in that rules and standards could not be made that contravene an environmental limit).
[85] And existing land use rights can be overridden.

5. Regional spatial strategies must be consistent with environmental limits.[86]

However, one can question whether most of these consequences are really any different to any other run of the mill "standard" to be set under the NBA. Arguably they are not, in that:

- Standards for anything can conceivably *become* limits if the Minister so chooses, and as long as they are there to achieve the broad purpose of the Act. In other words, a limit could potentially be as broad a category as any "standard", at which point the specific legal consequences of being a limit would mean very little.

- In the Panel's drafting, consents are already required to comply with *all* NESs,[87] and spatial strategies must be consistent with all national direction,[88] not just to the extent they specify environmental limits. If limits are defined only as standards in NESs, then nothing is added by separately requiring compliance or consistency with the concept of a limit.

In short, the concept of a "limit" initially appears significant under the NBA (it is one of three key ways in which the purpose of the Act is said to be achieved), but in reality is little more than a restatement of the Minister's power to make national direction coupled with a requirement that NESs *must* be created for specific domains. That is not intended as a criticism, only as an observation as to how the concept is being used in a relatively narrow way.

Since designation as a limit does not have significant consequences, it is understandable that some uncertainty has been left in drafting as to what the definition includes and excludes (as we have identified above). Limit setting is conceived of as being the process of measuring and clearly articulating minimum measures of environmental health that must be maintained – that is the new concept vis a vis the RMA – but the machinery familiar from the RMA (standards in NESs and the rules and consents that must comply with them) is then expected to defend them in pretty much the normal way.[89] For the most part,[90] there is no need here for limits to have special status or consequences, because they are designed to fill the gap in the RMA (a lack of requirement on government to impose comprehensive minimum standards) rather than altering the tools under which they are then achieved (by giving them visibly different status within them).

Perhaps surprisingly, there are few legal consequences that flow from something being designated as an environmental limit in the Panel's model. This is because the Panel focused on the problem of limits not being set (and they therefore need to be mandatory for some things), concluding that the machinery by which they would be implemented is basically sound.

We recommend that there be the following legal consequences if something is designated as an environmental limit under the NBA.

[86] As noted earlier, it is unclear whether this is because they are *limits*, or because they are part of *national direction*.
[87] See the Panel's drafting on consent decision making at s (3)(a)(iii)
[88] See Panel Report at 132.
[89] In that NESs operate directly as regulations, rules cannot be inconsistent with them, and consents must comply with them.
[90] Although the reference to reviewing land use consents if a limit is infringed *would* give limits a special status. No drafting is provided for this, however.

Legal consequences of being a limit under the NBA: Our recommendations

1. Limits being set under a separate and more focused set of minimum outcomes that the limit is responsible for defending or achieving, not just reference to the general purpose of the Act (see earlier discussion)
2. A review or audit role for the Parliamentary Commissioner for the Environment (or other independent agency) where limits are being established or amended.[91] In addition, or alternatively, an independent panel of experts (including members with expertise in mātauranga Māori) could be established by the Minister to provide recommendations as to what limits should be set and at what level.[92]
3. A clear legal requirement (eg an addition to the implementation principles in section 9) that limits prevail in the event of conflict with other provisions[93]
4. A requirement that a consent cannot be granted contrary to an environmental limit (as recommended by the Panel)
5. Enhanced monitoring requirements
6. Priority attention by authorities[94] where a limit is infringed or threatened, and a duty to take action
7. A *duty* (not just a power) to review relevant resource consents where limits are threatened or infringed
8. Focused attention on limits through how instruments are structured (eg a dedicated, integrated NPS-NES focusing on "limits" within the new National Planning Framework, and specific sections on limits in regional and national state of the environment *reporting*)[95]
9. A requirement not only that a consent authority *can* decline a consent where it has inadequate information, but that it *must* do so where there is a real risk of an environmental limit being infringed
10. A requirement that any proposal to change a provision expressing a limit be publicly notified[96]
11. A requirement that regional spatial strategies comply with and give effect to environmental limits (subtly different to the Panel's recommendation, because it focuses on status as a limit rather than status as a provision in an NES).

Other consequences would be possible, but we stop short of recommending them specifically. Some, such as the introduction of a higher standard of proof for those seeking to weaken environmental limits, could warrant further exploration.

We recommend that at least 11 clear legal consequences flow from a provision being classified as an environmental limit.

[91] Whether through the NES making process or, if limits are contained in combined plans, the plan making process too.

[92] Again, this could apply only to limits in national direction, or also to limits in combined plans. See the discussion below.

[93] This is significant if limits include policy provisions as well as regulatory standards.

[94] The Minister, but potentially also local government.

[95] The structure of national direction (the "National Planning Framework" envisaged by Cabinet) could usefully be transformed so that there is a section up front on "environmental limits" (both policies and regulations) followed by other matters. Some of these limits will need to cut across domains and sectors, and how that is structured should be carefully considered (it should also align with environmental reporting). That creates a consistent lens when creating national direction based on outcomes sought, as opposed to the current scattering of domains, sectors, activities and topics that characterise NPSs and NESs.

[96] This relates to combined plans, on which see further below.

In light of these additional legal consequences, a limit will need to be defined more clearly in legislation. For one, it should be made clear in legislation that whether or not any given provision is a limit needs to be flagged.

Provisions that contain environmental limits should be specifically tagged as such, and that should be required by the NBA.

In one sense we think a limit should be defined in a narrower way than the Panel's definition, in that there should not be the ability for the Minister to create limits for anything to achieve the Act's broad purpose.

To be classified as a "limit", the Minister should need to be satisfied that a provision is necessary to defend or achieve a legislated bottom line.

Yet in other ways we think a limit should become broader, reflecting the idea that limits are not just about setting quality standards in NESs. Instead, many different kinds of provisions should have a special status as a "limit" so that they exist in a cascade from central to local and from policy to detailed regulation. All of these should have the legal consequences outlined above. In particular:

1. A limit should specifically include a **binding target** where that is necessary to achieve a bottom line.

Arguably the definition of a limit in section 8 already encompasses such targets. But that is not abundantly clear. Although the drafting is confusing, it appears that binding targets do not specifically *have* to be set to discharge the Minister's limit setting functions (instead, they "may" be set).[97] Yet other limits – presumably ones that are not targets – *do* have to be set. It is particularly anomalous that drafting appears to require the Minister to set targets to achieve *positive* outcomes in section 7,[98] but does not clearly require targets to be set to achieve limits that have been infringed.

While we assume this is not the intention, this could open the door to the perverse outcome that central government could decline to set binding targets for specified domains if they have already been infringed, while choosing to impose limits for things that are not specified as mandatory in section 8. At the very least, it has potential to cause uncertainty and litigation. Drafting should be clarified so that the Minister is obliged to set binding targets to achieve limits that have been exceeded.[99]

It should also be clarified that binding targets set to achieve s 8 limits have pre-eminence in the event of conflict with binding targets set to achieve the broader outcomes in s 7. At present, there is no distinction made between these quite different types of binding target.

When setting binding *targets* (where limits are already exceeded), the context is quite different to normal limit setting. The line in the sand is not something to defend, but rather something to move towards. That makes questions around limit setting more challenging, and more value based,

[97] See section subsection (2) of indicative drafting for NESs at page 496 of the Panel's Report, where binding targets to achieve the Minister's functions under s 9(3) (which includes a duty to set limits) "may" be set.
[98] Draft s 9(3)(b) (Minister's duties), mirrored by the draft section on NPSs (Panel Report at 495, s (1)(b)).
[99] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at vi.

because the question is not just about where the limit should be set, but also how fast we should move to get there and which things should be prioritised in terms of resourcing.

A new system will need to grapple with such questions and provide a robust architecture around them. The RMA is ill suited to such a task at the moment, because it does not provide a forward looking or strategic lens to planning. A new system will need to ensure that ambitious timeframes are established, that there is robust monitoring and reporting of progress, and that there is a strong accountability framework for success and failure. As presently drafted, it is not sufficiently clear that these targets are to be regarded as limits, and they will need to be cross-referenced to other parts of the Act dealing with how they are to be prioritised, how timeframes will be established, and how progress will be reported on. For example, the Parliamentary Commissioner for the Environment should be required to provide an independent assessment of progress and make recommendations to the Minister on timeframes.

The NBA may even require a sub-process to create this kind of plan within a National Planning Framework, because it is so different in nature from the "defensive" posture (preventing harm) of other limit setting. The Panel envisages that both NPSs and NESs should be able set targets, but does not outline the specific framework for that to occur.

A limit should specifically include a binding target needed to achieve a bottom line. Those targets are the same thing as a limit (see Figure 2 earlier). This seems consistent with the Panel's intent, but is not clear in drafting. The result should be that the Minister is more clearly obliged to set binding targets where limits have been infringed.

2. Limits should be defined to include **type 1, type 2 and type 3 limits** described earlier.

This will make it clearer which provisions – including limits in the form of restrictions on human activities – have the status and legal consequences of limits.[100] It is important they have this status, because type 1 limits will not be achieved if type 2 and 3 limits are not robust. Focusing only on type 1 limits may mean we know more about when limits have been infringed, but fail to do something about it in terms of restricting activities (especially where causation between pressures and states are not straightforward).[101] Furthermore, some type 1 limits may not easily be described with specificity, and a focus may need to instead be on type 2 or 3 limits:[102]

> while available scientific knowledge and data have enabled some boundaries to be defined in terms of environmental states (eg a particular chemical concentration), in other cases it has made more sense to define boundaries in terms of environmental pressures or impacts (eg emissions).

[100] As drafted, an NES must state what limits are to be set. These limits are defined *as* minimum "standards". An NES must also then state "standards" that must be complied with to ensure limits are not breached. Presumably this is referring to different *types* of standards – some specifying minimum levels of environmental quality (eg in stream metrics) and others restricting particular human actions (eg performance standards for discharges).

[101] The connection is reasonably clear where, for example, there is a direct discharge of contaminants to water, but can be much less clear when human activities or pressures impact cumulatively on something like biodiversity or marine habitats.

[102] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 33.

Current drafting does require *standards* to be imposed to achieve type 1 limits, but our point is that these should also enjoy the legal consequences of being a limit once they are imposed. To clarify, it would not be necessary to specifically define "type 1", "type 2" and "type 3" limits. This is just a convenient shorthand we have adopted to distinguish between different elements within the concept. What we see as important is that the concept of a limit encompasses provisions that restrict harm and human activities, not just minimum measures of environmental health.

A limit should be defined to include type 2 and type 3 limits as well as type 1 limits, as outlined earlier.

3. Limits should be defined to include **policies in NPSs** as well as provisions in NESs.

As we have discussed in our RM reform work and as pointed out by the previous Parliamentary Commissioner for the Environment, regulatory provisions in NESs should not be divorced from their policy context. Policies explain why regulatory standards are set where they are, aid in their interpretation, and assist any exercise of discretion where regulations require resource consents to be obtained. This is a key reason why the Panel has recommended being able to promulgate joint NPSs and NESs. In our view, NPSs may well be able to exist without NESs (if NPSs are to be implemented primarily through combined plans), but NESs should not exist without the NPSs that justify them.[103]

We see potential issues if "limits" only include regulatory standards contained in NESs. In our view, limits need to form a cascade flowing from legislated bottom lines, through to national policies, through to regulations.[104] Limits include all the provisions necessary to achieve bottom line outcomes, not just the regulations to be complied with. The need for multiple "policy limits" to achieve bottom line outcomes[105] is also endorsed by Cawthron.[106]

In particular, the types of minimum outcomes to be defended by environmental limits may not always be easily translated to specific regulatory standards (even if expressed in qualitative terms). Many limits will be specific to particular places (eg catchments) and need to be tailored through regulatory standards in combined plans. It may prove difficult to do that through NESs,[107] so this could result in a suite of national "limits" that is in practice incomplete, too general, or an uneasy fit for some places.

For example, the NPS Freshwater Management and NZCPS express a number of policies that can be said to describe "limits". These are much more complete in coverage than the much narrower range of regulatory limits that have been included in new national standards for freshwater. Similarly, it is hard to imagine an NES on biodiversity that adequately mirrors the breadth of policy limits contained in the draft NPS for Indigenous Biodiversity. Thus, while mandatory NESs would have to be created in a new system, it is still questionable whether these would in practice be able to express all important environmental limits. NPSs contain core limits.

[103] For example, it is problematic that the NES for Plantation Forestry does not have associated policy.
[104] Compare the Panel's conception in ch 8 of its report.
[105] What Cawthron calls "narrative objectives".
[106] Although it is unclear whether this term is being used in its legal sense: see Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 131.
[107] Unless there is an NES that has appendices setting separate standards for each waterway in the country.

Of course, NPSs themselves (eg on freshwater) would still *exist* and have to be *given effect* to. They would not disappear simply because new NESs would have to be created. However, that is not the same thing as policies being included as "limits". If provisions in NPSs could not have status as limits:

1. unlike NESs, they would not *have* to be created for things requiring limits (eg soil, air, water quality), meaning NESs could lack a solid normative foundation when they are set or reviewed
2. even if they *were* created, they would not be created under the more specific purpose of defending legislated bottom lines (instead, they would be created to achieve the more general purpose of the Act)
3. consents would not have to "comply" with the provisions in an NPS, even if they clearly expressed environmental limits (they will only have to have regard to them)[108]
4. they may not have the other legal consequences as limits we recommended earlier.

We recommend that "limits" include policies in NPSs where they are necessary for achieving bottom line outcomes. This has drafting implications for:

1. how limits are defined in section 8
2. the drafting relevant to the creation of NPSs (in that the Minister should be required to create integrated NPSs-NESs for the matters listed in section 8, and that NPSs *must* state limits to fulfil the Minister's obligations under s 9(3))
3. any relevant cross-references that relate to limits (eg the impact of limits in consenting and creating spatial strategies)

NPSs expressing limits should be required to be expressed in as much specificity as possible, so the outcome expected is clear when it comes to implementation through combined plans and assessment of consents. That requirement should be contained in legislation (eg as an implementation principle, or in provisions governing the content of NPSs).[109]

[108] It could undermine the careful jurisprudence developed in *Davidson* if limits were deemed only to be provisions in NESs.

[109] This is not a drawback of using NPSs specifically, as NESs can also be worded in qualitative terms. The distinction, even with the improvements proposed by the Panel, still leaves much room for interpretation as to what should be in an NPS vis a vis an NES.

National vs local limits

Above, we have covered three of the four ways in which the Panel's concept of a "limit" is constrained. In response, we have recommended that all of these be expanded. However, the fourth way in which the Panel's definition of limits is constrained poses more difficult issues.

The Panel sees limits as *national*, to be set by Ministers through national direction. But should there also be such a thing as a regional or local limit? This question hides a number of other related ones that need to be dealt with together. For the most part, we offer thoughts to consider rather than firm recommendations.

Who should be able to set limits?

Limits could conceivably be set by Ministers, regional councils, territorial authorities, or independent commissioners. If they are legislated, some limits could even be set by Parliament. Different limits could be set by multiple institutions having distinct mandates: for example, some limits by Ministers and others by councils. Limits could also be set in a *hierarchical* way across institutions, with regional or local institutions setting place-based limits to the extent needed to *translate* national limits to particular contexts (as has been seen for freshwater catchments).

In particular, if limits can be expressed in an NPS, as we have recommended (or even in a qualitative way through an NES, as envisaged by the Panel), those will inevitably need to be fleshed out when it comes to rule and standard setting at a regional or local level. Should those local rules and standards then *themselves* be considered to be limits? Again, the answer matters if designation as a limit has specific legal consequences. For example, if the NBA provides that a land use consent can be reviewed only if it is infringing a "limit" (a consequence already recommended by the Panel), does that mean:

- it can only be reviewed if it is infringing the type 1 limit set in an NES? (which may in practice be impossible to tell at an individual consent scale)[110]
- it can be reviewed if it is infringing a standard set in a combined plan, but only if that standard is specifically designed to give effect to the limit set in national direction?[111]
- It can be reviewed if it is infringing a standard set in a combined plan that is more stringent than the limit set in an NES?[112]

[110] It will often be impossible to tell this, because a type 1 limit envisaged in section 8 will almost certainly apply to a general measure of the health of a receiving environment like a catchment (total nutrients), not a limit on a particular land use within the catchment (eg nutrients from an individual farm). In other words, authorities could only determine whether a type 1 limit is being infringed by all users in a catchment when their impacts are combined, not whether a single existing land use is infringing that limit.
[111] Particularly relevant if the national level limit is expressed in an NPS that needs to be given effect to rather than an NES provision that is deemed to be inserted in the plan. As mentioned earlier, this is likely to be required given that an NES would not likely provide for all catchment specific limits across New Zealand.
[112] This is specifically allowed under draft section 8, but it is implied that any such standards are not themselves "limits" for the purposes of the Act.

- It can be reviewed for standards set in a combined plan that relate to things other than the mandatory limits in section 8 (given that councils may wish to set limits for things like greenhouse gases but the Minister may not)?[113]

Such questions will need to be resolved when it comes to detailed drafting, or risk extensive litigation as to what a limit includes.

Policy makers should carefully consider whether limits should be limited to provisions set by the Minister, or whether they should also include:

1. Provisions set by councils[114] that are required to give effect to or implement limits set by the Minister
2. Provisions set by councils that are more stringent than a limit set by the Minister
3. Provisions set by councils that are for matters other than the mandatory domains in section 8.

Through which instrument(s) should limits be able to be set?

Limits could conceivably be set through national direction, through combined plans, in consents or through other tools. This is a subtly different question to *who* should set limits. That is because central government *could* itself set limits directly through combined plans (eg by deeming some provisions in national direction to be inserted immediately in a plan, or by itself having the power to include provisions when plans are being created). The Panel envisages that central government is to have a much stronger role in plan development, audit, and approval, and we agree that is a good step.

We also recommend that a new national planning framework includes a specific part on a limits "strategy", outlining how central government intends to defend environmental limits. That could include many things, from directly setting standards in an NES, to setting directive policies in an NPS, to establishing timeframes for achieving limits that have been infringed, to how it intends to implement national direction through combined plans.

We recommend that a new national planning framework includes a specific part on a limits "strategy", outlining how central government intends to defend environmental limits. This would be broader than just directly setting limits through NESs.

Furthermore, limits contained either in place-specific national direction (eg schedules to an NES or NPS), or inserted by central government directly into combined plans, are a good idea. There are many places in New Zealand that have a strong national interest, and where limits otherwise risk being wildly different across artificial jurisdictional boundaries (eg in the Mackenzie Basin). National direction to date has been almost entirely generic, on the apparent assumption that there is a national interest only in matters that can be generalised across New Zealand, and left implementation to councils at a regional and local level. The Panel rightly envisages that NPSs and NESs can apply across New Zealand or be regionally specific.

[113] Climate change is not listed as something for which a limit must be set in section 8, but could be conceivably something the Minister *could* set a limit for if he or she wished, given the open ended definition in section 8.

[114] Or others, to the extent they have powers to make decisions on such provisions (eg iwi, commissioners, those with delegated authority etc).

"Limits" could also be defined to include provisions in combined plans set by central government, but not provisions created by councils. Alternatively, they could include provisions in combined plans only where those provisions are specifically flagged as necessary to *give effect* to limits set by central government (eg rules and standards designed to give effect to qualitative standards in an NES or policies in an NPS). For example, many meaningful freshwater limits in regional plans will fall into this category, because they give effect to the NPS Freshwater Management. It seems unlikely that extensive regionally specific standards are to be contained within an NES itself.

Close consideration should be given to whether a "limit" should include some provisions contained in combined plans. This could be where those provisions are (1) directly inserted by the Minister, or where (2) are flagged as necessary to give effect to limits set by the Minister. This may be desirable if limits are to hold firm. The reason is that consenting decisions would then be obliged not to contravene (rather than just have regard to) the more specific and tailored limits in combined plans, not just the potentially more general limits expressed through national direction.

If local limits *were* contemplated, it may also be significant where *within* a combined plan limits could be set. This is for two reasons.

First, the RPS part of a combined plan could not be changed through a private plan change process. This would provide any policy-based limits additional protection from erosion even following a three year moratorium on private plan changes. While we stop short of recommending it per se, it may also be possible to restrict the extent to which any combined plan provisions expressing limits could be changed through the private plan change process. That requires further exploration.

Secondly, there is a question as to whether (following the Panel's useful clarification of the functions of regional and territorial authorities) environmental limits should be set in both regional and district planning parts of a combined plan. Our view is that, if they extend to combined plan provisions, most will be contained in regional plan components given the domains in question, but some may relate to the land use functions of territorial authorities and need to be contained in district plan components.

If a limit were extended to some provisions in a combined plan, consideration would need to be given to exactly where that could be located within it. Limits could be constrained to just policy provisions in an RPS, or also contained in policies, rules and standards in district and/or regional plan components. Provisions flagged as limits could even be beyond the reach of private plan changes.

According to whose values should limits be set?

Again, this is a subtly different question to the ones above. For example, a regional council could be obliged to set limits that reflect national values (by giving effect to an NPS), or it could be given more latitude to set limits according to the values of the community it represents.

Different local values should never allow national limits to be infringed.[115] That has been part of the problem with the RMA. But there is a legitimate question as to whether the "greener" values of

[115] As reflected by the ability of councils in draft section 8 to make standards that are *more* but not *less* stringent than those in an NES.

some communities should be able to find expression by setting higher limits in combined plans. Local limits could be ones that set a higher minimum standard across the board (eg for water quality), or ones that target special places that have local significance or meaning (including importance to tangata whenua), such as particular significant natural areas or highly valued catchments. Locally treasured environments can often be more important to New Zealanders than an overall scorecard for environmental health, and limits are equally about addressing local degradation.[116] Local limits could also be expressed as more ambitious binding targets (eg quicker timeframes for improvement or higher metrics for quality) where limits have been infringed.

The Panel envisages that councils will be able to impose *standards* that are more stringent than national limits. But should those standards themselves have the additional status – and consequences – of "limits" if a community wishes?[117] In places, the Panel suggests that this should be the case, in that councils are to be empowered to set "environmental limits of their own".[118] However, that is not borne out by the drafting of section 8 that sees limits as provisions only within an NES.

There is a potential tension in drafting to be clarified here, too. NPSs will no doubt continue to provide strong non-regulatory directives for development (as has been seen for mandatory densification in some urban areas under the NPS Urban Development). These will be subject to national level environmental limits set through NESs. But to what extent are councils envisaged to retain the power – specified in section 8 – to set standards that are more stringent than national environmental limits if they conflict with national policy direction in NPSs?[119]

Consideration should be given to whether local communities, through their councils, should retain the ability to set "limits" of their own that are not just about implementing national limits. While the Panel envisages that more stringent standards can be imposed, it is unclear if these are themselves to be regarded as limits.

Related to this, there is a potential tension between the express ability of councils to set local standards that exceed national limits and the obligation of councils to give effect to development-focused NPSs. This needs to be clarified.

At what *scale* should limits be set?

Again, this is a slightly different question to those above. A limit can be set by Ministers or councils, in national direction or plans, and according to the values of different communities, but for all of these options there could be variation in the geographical scale at which it is set. For example, the Minister *could* establish a limit for freshwater quality in an NES (or inserted into combined plans) that applies to New Zealand as a whole, to a particular region, to a specific catchment, or even to

[116] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at ii.
[117] Notably, that would see regional or local limits have a different legal status when appeals on plan changes are being heard in the Courts, which could be significant.
[118] Panel Report at 217, [140].
[119] This would not be able to happen where councils set restrictions for other reasons (eg amenity), but there may be cases where environmental limits set by councils could conflict with national level development priorities.

particular parcels of land. This would address criticisms that recent environmental limits for freshwater are a "one size fits all" approach.[120]

Irrespective of who sets it, the scale at which a limit is set should ultimately be dictated by the biophysical realities that determine if it will actually work. Thus limits on freshwater quality need to be focused on individual catchments and ecological units within them. Limits on air quality need to be focused on airsheds and the activities that contribute to them. Limits on the quality of coastal water need to focus on the sea, the coast and catchments, including estuaries.[121] And limits with respect to biodiversity need to be focused on ecosystems and their connections across boundaries. Limits will not work if they are too abstract and designed only to apply at a high level across New Zealand. That has been a big difficulty with the RMA, where national direction has for many years been not just absent but also vague in terms of its application to regions, districts, cities, and – most importantly – ecologically defined locations. The Panel rightly provides that NPSs and NESs *can* be set at multiple scales and for particular parts of New Zealand,[122] but does not specify on what basis that decision about scale should be made when setting limits. In many cases this should be primarily about ecosystems and human activities that impact them.

The lesson here is not that national direction needs to include an exhaustive list of limits for every area in New Zealand. That would be unworkable and create duplication with the content of combined plans. Rather, the lesson is that a "limit" under the NBA needs to encompass the whole cascade of provisions under the NBA that will see it turn into a biophysical reality at the scale where it matters. The actual instrument in which this occurs – whether national direction or combined plan – is arguably less important as long as the scale is right.

Aside from how a "limit" is defined in section 8, this has ramifications for other aspects of drafting, as highlighted below.

The relationship between a duty to set limits and a duty to identify significant areas

The Panel has recommended that the Minister be required to identify nationally significant features, landscapes, areas and habitats through national direction (under his or her s 9(3) duties). Here, the Minister is to have a new obligation to engage with how the national interest applies at a regional, cross regional, and even finer scale. That is a positive thing.

But how does this duty to identify things at a more granular level relate to the Minister's function of limit setting? Once identified, does the Minister have to impose limits tailored to those areas? Or is this to be left to councils through standards in combined plans that are not themselves "limits"?

The answer is unclear. The Minister has an *obligation* to create limits in national direction that fulfil his or her obligations under s 9(3) generally, not just s 9(3)(c) (ie not just the limits specified in s 8). This suggests that the Minister might be obliged to set limits for any of the things listed in section

[120] In reality, many such criticisms are less about where limits should be placed to achieve bottom line outcomes as a matter of science, and more about criticising the fact that hard trade-offs need to be made in some places to achieve them.
[121] On the failure of existing national direction to do so, see the Parliamentary Commissioner for the Environment's 2020 report on estuaries.
[122] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at vi.

9(3) that are relevant, including areas of significant indigenous vegetation and habitats. This should be clarified.

If the Minister is responsible only for identification and not limit setting for these things, then it becomes even more important for either (1) the provisions that do so in combined plans to have the status of limits, or (2) for the NPSs that guide *where* those finer grained limits are to be set to have the status of limits.

A spotlight on limits and offsetting

A related question about the scale at which limits are imposed – whether in the National Planning Framework or elsewhere – is whether outcomes in one area can be traded off against outcomes in another. For example, the NBA should made it clear that bottom lines in one catchment or airshed cannot be traded off for improvements in another. For biodiversity, the situation is more complex. Should we measure minimum levels of biodiversity protection across New Zealand as a whole? Or should we allow some harm to be compensated for through improvements elsewhere?

Careful thought should go into how the concept of "limits" in the NBA intersect with any mitigation hierarchy (avoid, remedy, mitigate, offset) in the Act, including lessons learnt from the case law on offsetting. We suggest that offsetting should not be available where something has the status of a limit, including where it is local in its scale. We discussed offsetting in more depth in our RM reform reports.[123]

The geographical scale of a limit should be determined by the nature of the environment, not the ease with which it can be implemented in a single jurisdiction (eg by a single council). This could be made clearer in legislation. To us, it suggests that a "limit" should extend to at least some provisions in a combined plan (eg those needed to give effect to limits in national direction). This is because the right geographical scale (eg every catchment in the country) is unlikely to be expressed through national direction directly.

As identified earlier, recognising "local limits" through provisions in combined plans has important consequences for the relationship between the NBA and the SPA. In particular, it raises the question whether regional spatial strategies should have to be consistent with all "environmental limits" instead of just limits contained in "national direction".

In a sense it would be more procedurally straightforward for limits to be set only through national direction. Spatial strategies could then be created within those constraints, and then regional combined plans could be produced based on both of those things.[124]

However, this downplays the importance of establishing regionally specific environmental limits before spatial plans are created. Even if limits were only for nationally *significant* matters, they still often require *translation* to rules and standards in a regional context before they have real meaning (especially if expressed in NPSs). We have seen this with freshwater.

The risk is that spatial strategies would be developed before the true nature of limits are clarified in context, and that strategies could then override them (since combined plans would need to be

[123] See www.eds.org.nz/our-work
[124] See Panel Report, ch 16 on transitional measures.

consistent with them). The extent to which this would make a practical difference may depend on what spatial strategies end up looking like. If they are high level, then there may be no conflict between them and limits in combined plans. But for limits relating to biodiversity and habitat – which are focused on spatial measures and may require delineation of protected areas in combined plans (rather than just performance standards for activities) – it may make a very real difference.

Close consideration needs to be given to whether spatial strategies created under the SPA should be obliged to comply with environmental limits contained within combined plans. This is potentially significant, because limits may only become meaningful when they are translated to the characteristics of particular places.

Limits and consenting

In our previous work, we have observed that the current system, with its devolved and effects-based foundation based on sustainable management, sees few activities prohibited outright. More common is for regulation (rules and standards) to trigger an effects-based and discretionary assessment whereby many factors are weighed and interpreted. There can be a reluctance to impose hard limits, and it has been said that the RMA is in practice more about "dialogue … than dictat".

In practice, this has left consideration of where a firm regulatory limit should lie to the last possible step in the decision-making chain: individual consent decisions. Despite directions in the RMA to consider cumulative effects, this has meant the big picture is much more difficult to consider and limits have in reality either not been clearly set or have been eroded through 'death by a thousand cuts'. Sometimes consenting processes effectively result in a negotiated settlement between private parties who have happened to have the resources to litigate. Furthermore, we have previously pointed out that:

> There is also an efficiency and process issue here, in that over-reliance on permits to implement restrictions necessitates robust public participation at the project level, as it is only at that point that the implications of regulation become obvious. Doing so risks putting off making hard policy trade-offs until proposals are developed, and they then have to be relitigated multiple times.

The purpose of consenting decisions with respect to environmental limits is to assess whether an activity will or will not contravene them, not to determine where a limit should lie in a particular context.

Furthermore, the reality of limit setting is that some activities for which people want consent should not be allowed. Limits are not just a requirement that activities need to comply with certain measures when undertaking them. It is in this way that the "standards" to implement limits, referred to in the Panel's drafting, should be understood. Creeping closer to a limit should mean consideration of prohibited activity status, and the courage not to always allow a "consenting pathway" around it just because mitigation measures can be offered.

For example, in 2018 the Land and Water Forum suggested that additional water uses within a fully allocated catchment be treated as prohibited activities. It is an indictment of the current approach that such a basic and obvious measure to impose an actual regulatory limit – entirely in line with our values as a country – proved relatively controversial because of the trade-offs it would involve.

We therefore agree with the Panel that the balance should be shifted away from relying on consents as the main place where limits "bite". Making it clearer in advance – in national direction and plans – whether a particular proposal will be allowed (and what conditions it will be subject to if it is) would reduce cumulative impacts as well as provide greater certainty for industry. While limits should be able to encompass policies and not just regulatory standards, the obligation to impose a cascade of limits through national direction and combined plans should mean they are much clearer on the face of planning instruments and reliance on consent conditions is reduced.

This will be hard to legislate for. However, it should be included as an implementation principle either in section 9 or in provisions relating to the content of NPSs and combined plans. Furthermore,

the NBA should specifically oblige decision-makers to consider whether the existence of a limit means prohibited activity status is required.[125]

Environmental limits (including where expressed as firm policy provisions) should be made as clear as possible through provisions in planning instruments, reducing reliance on consenting decisions. We recommend that this be included as an implementation principle in section 9 or in provisions governing national direction and planning processes. The NBA should introduce a requirement for decision makers to consider whether the existence of a limit means prohibited activity status is required for some things.

[125] It would also be possible to make prohibited activity status the "default" status of an activity if it is not contemplated in a plan (at present it is discretionary). However, that may be unduly punitive, given that the reason a plan does not contemplate an activity could be an omission or a novel technology, rather than the significant risk of environmental harm.

Should some limits be legislated?

The discussion above has proceeded largely on the basis that the NBA is to set up a *framework* for limit setting under subordinate instruments. The Panel was clear in its view that while *outcomes* should be specified in legislation, limits and targets should not be. Instead, limits and targets would be set through national direction.

As we have said earlier, *minimum* outcomes are not included in section 7 outcomes, and need to be added to the NBA itself (eg in a section 7A) so that any subsequent limit setting has a sound normative basis. This would respond to the Parliamentary Commissioner for the Environment's observation that reference to the general purpose of the NBA is not adequate. It would also be fully consistent with the Panel's intent to include clear *outcomes* in primary legislation (in that it is "important to provide for environmental limits as distinct from other planning outcomes").

However, we also recommend that close consideration should be given to including some environmental limits (including targets, where limits have been infringed) in the NBA itself. Not all limits will be suitable for that. This is for several reasons:

- a cascade of limits will be far too detailed for primary legislation and would make the legislation long and unwieldy
- many limits will need to be regionally, locally or feature-specific, and parliamentarians are not necessarily the people best placed to establish those limits
- limits will need to be agile and responsive to changing circumstances meaning that legislative amendment is a cumbersome method for achieving necessary or urgent change.

However, some high level limits (eg possibly ones expressed as policies in the NPS Freshwater Management, NZCPS or draft NPS Indigenous Biodiversity) could be elevated to legislation. This could be in a schedule to the Act, and closely linked to the bottom lines they are intended to defend.

The advantage of doing so would be to make it harder for limits to be changed (legislative amendment would be required). We have seen that debate occur in the context of climate change legislation. The RMA contains a very narrow range of such limits already, expressed as activities that are prohibited if they produce certain effects (eg in s 107). We recommend that policy makers closely look at limits contained within national direction and consider whether those could be specified in primary legislation.

We recommend that policy makers closely consider whether existing limits expressed in national direction – particularly those expressed through policies – warrant inclusion in primary legislation.

The broader architecture of a system of limits

Below, we offer some thoughts on the broader architecture of the system that is needed to support environmental limits.

First, some words on process. The process for creating and changing national direction and combined plans is crucial if limits are to be set within them. These processes have been broadly laid out by the Randerson Panel, and we consider them generally appropriate. We do not repeat them here. However, we note our earlier recommendation that:

- the Parliamentary Commissioner for the Environment should have an audit/review role where environmental limits are being set, reviewed or changed in any instrument
- in addition, or alternatively, an independent panel of experts provide recommendations as to where limits are set.

We also reiterate that our current statutory frameworks do not really provide for a strategic approach to how environmental limits might *ramp up over time*. As discussed earlier, there is an opportunity in a future system for some targets to be explicitly included as "limits" and bring with them a more structured and strategic approach to achieving them (eg requiring milestones to be set at three or five yearly intervals).[126] The Panel's proposed NBA provides for targets to be set, but a specific process and principles (eg for setting timing, priority and proactive methods) might be needed for this quite different type of planning to occur within the broader framework of national direction and combined plans.

The Parliamentary Commissioner for the Environment should have an audit/review role where environmental limits are being set, reviewed or changed. Alternatively, an independent panel of experts should provide recommendations as to where limits are set.

Processes for national direction and combined plans may need to provide more detail for the specific process of setting binding targets where limits have been exceeded. That is quite a different task to setting limits that need to be defended.

Secondly, we note that limits may need to change fast in response to new information or a changing environment. They need to be upwardly mobile, and a precautionary approach needs to be taken whereby limits must be tightened if there is a real risk that they will not achieve minimum outcomes. However, planning instruments may sometimes be too cumbersome to respond to imminent or unexpected threats, whether that is because of a lack of knowledge of existing threats or because a novel threat emerges.

As identified by the Randerson Panel, the process for reviewing consent conditions and restricting existing uses needs to be improved – including an ability (and duty) to review them when limits are threatened. But the NBA could also usefully provide for parallel "emergency" style tools to be used to safeguard environmental limits in particular places where there is urgency. This would be a new feature, but we emphasise that it closely echoes the sentiment of the Randerson Panel that general substantive regulation making power may be appropriate where "quick action is needed to …

[126] Akin to the budget setting approach under the Climate Change Response Act.

manage an immediate risk of significant environmental damage" and where planning processes would be too slow.

Rather than a general regulation making power of uncertain scope, we suggest creating a more structured framework for emergency style tools. We have described this in our previous work on resource management reform, and can provide more information if needed.

We support the Panel's conclusion that a mechanism for increasing environmental limits is required where the need is urgent. We recommend the inclusion of an emergency order type of tool in the NBA with this specific purpose, rather than reliance on a general regulation making power.

Consideration should also be given to including ways of imposing environmental limits that are consistent with tikanga. This is not just about involving Māori in the planning process, but also about the tools that are used. We have previously pointed out, for example:

> Rāhui is a Māori concept that uses constraints on activities and locations in order to give time for an imbalance or other problem to be corrected. Rāhui are seldom permanent, and are usually ended when the problem they address is resolved. A rāhui may, for instance, be a temporary prohibition on harvest of a species when it has become scarce in a location. A permanent rāhui may be imposed, for instance, on food gathering at a battle site or place specifically associated with death. Temporary rāhui, as a way of paying respect, are often imposed after events such as a drowning. Rāhui has no direct current recognition in statute, although mechanisms such as temporary fisheries closures can be used as a means of enforcing a rāhui. Other mechanisms, like marine reserves, are less consistent with rāhui in that they have indefinite duration. This reflects a Western tradition of spatial separation of wilderness and human activity. Rāhui is also a tool to secure cultural practices, not just "environmental" ones as understood in the Western sense. As such, the concept of rāhui could in some cases present some tensions between Western and Māori ways of thinking.

Consideration should also be given to including ways of imposing environmental limits that are consistent with tikanga.

Various supporting measures will also be needed for an effective system of environmental limits. Many such measures have been outlined in the Cawthron report. The following are particularly important in our view.

Enforcement

Regulatory force for limits is largely meaningless if they are not enforced. However, while the goal is compliance with regulations that set limits, coercion (enforcement) is only one mechanism to achieve that compliance. Marie Doole has outlined various measures to improve compliance and enforcement, as have we previously in our RM reform work. We also support the measures proposed by the Randerson Panel.[127]

In particular, there needs to be a clear legal duty contained in the NBA not just to *set* limits but also to *enforce* them; robust *reporting* requirements for all responsible agencies as to what enforcement

[127] Panel Report, ch 13.

action (and other compliance measures) have been undertaken; and a system whereby a watchdog enforces authorities' obligation to enforce. Penalties also need to be significant to deter any risk of infringement. Recent amendments to the RMA concerning the stronger role of the EPA in enforcement should be rolled over and strengthened under the NBA (for example, to impose a duty, not just a power, to take over enforcement action where councils are failing to do so).

We support the measures recommended by the Panel to improve compliance monitoring and enforcement. A specific duty to enforce limits, once set, needs to be contained in the NBA. This could be added to section 9(3), although it would need to encompass not just the Minister but also councils and the EPA.

Funding

This includes funding for the research necessary to inform the creation of limits (whether they will achieve bottom line outcomes), the ongoing and systematic monitoring of limits, evaluating whether limits are effective, and measures to take corrective measures. This is particularly important where limits are expressed as binding targets for the future, because achievement of those targets in many cases will rely on proactive measures to restore and enhance degraded environments and invest in new infrastructure (eg wastewater upgrades), not just the prevention of further harm.

A system-wide view of environmental limits cannot, therefore, be considered only to include a regulatory and enforcement role. It needs to be linked closely to the system's operational and funding roles. The NBA will not likely be able to directly control funding levers, so we stop short of making specific recommendations. But there is an opportunity for the SPA to clearly refer to the need to provide funding necessary to realise the vision in a regional spatial strategy. A core part of that strategy, as referred to earlier, will be to comply with environmental limits.

Although the NBA may not have the levers to ensure it occurs, funding will be a crucial component of setting, measuring and evaluating environmental limits. It should be a specific consideration that goes into the creation of spatial strategies under the SPA, alongside a clarification that those strategies must *give effect* to environmental limits set under the NBA.

Monitoring

It is vital that limits have a sound scientific underpinning. At the moment, we lack systematically collected information to set a comprehensive range of limits.[128] There also needs to be robust, ongoing and consistent monitoring of all forms of limits once they are set. This involves not just the monitoring of compliance with regulatory provisions (eg consent conditions and permitted activity standards), but also monitoring of the state of the environment to see if regulations are having the desired effect. This type of monitoring already exists, but as outlined by Marie Doole, the Parliamentary Commissioner for the Environment, and ourselves in previous work, it needs to improve. We support the Randerson Panel's recommendations, which echo much of that.

In particular, the NBA needs to refer to the importance of monitoring those matters specifically labelled as type 1 *limits*, not just the general state of the environment. This can then support a clear

[128] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at ii.

reporting framework that shows whether or not limits are holding firm or not, measures progress towards achieving binding targets, and provides public accountability. As Cawthron points out:[129]

> the United Kingdom's Environment Bill and Vancouver's Greenest City Action Plan highlight the importance of environmental data collection and reporting on progress against limits and targets to promote government accountability for environmental performance.

While the Panel's drafting requires NESs to state how the NES will be monitored and reported on,[130] that should flow through to a specific duty on the Minister to do so in section 9(3), which should specifically refer to reporting on *limits*.

Reports under the Environmental Reporting Act should also be structured in more of a report card fashion, making it clear whether limits have been exceeded or not, and to what extent. The establishment in the NBA of clear bottom line outcomes and specific limits would make monitoring and reporting against those much easier, more structured and more transparent.[131] The Minister should be required to report back (eg every 3 or 5 years) on the extent to which environmental limits have been met, and this should be independently vetted by the Parliamentary Commissioner for the Environment.

Furthermore, the *Ministry* for the Environment should have a specific futures scanning function added to its functions. It would require the Ministry to consider and report on potential futures and implications for environmental limits. This could be included as a function and duty under the NBA, although it may be better placed in the Environment Act or Environmental Reporting Act.

The NBA should introduce a duty to monitor those matters specifically labelled as (type 1) *limits*, not just the general state of the environment, in section 9(3), as well as equivalent provisions for the duties on councils. Environmental reports should be required to outline whether those limits have or have not been infringed, and progress towards binding targets.

Evaluation

There needs to be a robust system for evaluating whether limits are set in the right place. Information from monitoring is of little use unless it is acted upon. As mentioned above, an agile process for planning and consent review needs to be put in place to achieve corrective action in a timely way. But there also needs to be a clear legal duty under the NBA to regularly evaluate limits, and for that to trigger action where limits are threatened or breached. That could be included as one of the Minister's duties in section 9.

We recommend the addition of a clear legal duty under the NBA for the Minister (and potentially others) to regularly evaluate limits. This needs to be linked to a clear trigger for corrective action where limits are threatened or breached. That could be included as one of the Minister's duties in section 9, and it could be mirrored in the drafting relevant to the functions of councils.

[129] Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at iv.
[130] See Panel Report at 496, s (1)(c).
[131] Compare Panel Report at 60.

The implications of environmental limits for the system's other roles

Because regional spatial plans under the SPA would be obliged to comply with environmental limits in the NBA and express them in a spatial sense, the broader institutional architecture around this Act and the process by which regional spatial strategies are created and implemented is important too. We support the architecture proposed by the Randerson Panel, and will investigate the general relationship between the NBA and SPA in more depth in a later piece of work. It will be crucial that limits set under the NBA cannot be undermined through regional spatial strategies.

There is also an important relationship between the setting of environmental limits and other roles that the NBA must play. The hierarchical relationship that needs to exist between limit setting and "balancing" various other objectives is obvious. There is another important relationship between limit setting and environmental enhancement. Sometimes, the achievement of limits will require active environmental enhancement (where a limit has been breached already), including the funding and resourcing necessary to make progress. That reaches out into other frameworks, such as the Local Government Act, Public Finance Act, and potentially the Strategic Planning Act.

The defence of limits under the NBA has implications for roles performed under other legislation, including the funding and resourcing necessary to make it happen in practice.

Limit setting also has implications for how the system allocates resources. In a system that does not set clear limits or caps on resource use (including a resource as a receiving environment), there is always potentially room for new users. But where a limit is clearly set, that can force the issue of how a scarce resource is to be allocated among different users (including existing and new users). Environmental harm above limits becomes a scarce commodity for which there is competition.

This is not the place to discuss allocative issues in depth. The point is that the NBA will not be able to effectively impose and maintain limits without directly addressing questions of allocation. That is particularly pressing in the context of freshwater, where limits have been exceeded in many places and existing users may need to *give up* "rights" to various degrees to reach a limit as well as to allow new entrants. For example, in May 2018 the Land and Water Forum recommended a stopgap regulatory measure to "hold the line" on freshwater quality. When a catchment is overallocated, high emitters of nitrogen that contribute most to overallocation must reduce, while at the same time providing some upward movement for those with no or little discharge – provided the overall result does not collectively contribute to a threshold being exceeded.

Such questions are inextricably bound up with unresolved issues about the Treaty relationship, compensation, subsidies and the nature of existing "rights" (including consented rights and property rights). A failure to grapple with such questions and provide a pathway for their resolution could undermine the durability of the limit-setting process by directing pressure towards the limits themselves rather than questions of reallocation.

The NBA will have to take care that a direction not to weaken "limits" as a whole does not prevent the reallocation of relative rights *within* an environmental envelope, which could actually improve

the environment as a whole.[132] Some may be expected to bear a different share of the burden – either more or less – depending on the past and present context and contribution to the problem.

An effective system of environmental limits in practice may require allocative issues to be resolved. We recommend that this happen as a matter of urgency and that the NBA resolve such issues head on.

Finally, we note that the process of RM reform does not include reform of all legislation under which limits are set. It is important to recognise that defending the minimum outcomes contained in the NBA may rely on limits set under other legislation like the Conservation Act (and various related statutes like the Wildlife Act and Marine Mammals Protection Act), the Waste Minimisation Act, the Fisheries Act, and the Biosecurity Act. These warrant reviews in their own right to ensure that (among other things) they have a well-functioning framework for limits with respect to their specific subject matter. A great many of the specific environmental limits identified by Cawthron would be at least partly beyond the jurisdiction of the RMA and NBA.[133]

Policy makers also need to be aware of frameworks that could *undermine* the defence of limits. Legislation governing the raising and spending of funds necessary to achieve environmental limits is crucial (eg the Public Finance Act, the Local Government Act). So too are development-focused acts like the Urban Development Act. If this is to remain separate from the NBA, it needs a clear link to it that makes clear that its purpose and decision-making are subject to the achievement of limits set under the NBA.

Environmental limits are imposed under a number of legislative frameworks, not just the NBA. There are also statutes that have the potential to undermine limits set under the NBA or will have unclear relationships with it. We recommend that these be reviewed so that they align with and support the NBA (and vice versa).

We conclude by reiterating that limits are not enough. By themselves, they can create a race to the bottom, and we should allow our environment to get nowhere near them. Limits are like a safety net to avoid environmental bankruptcy – and no one in their right mind wants to exist there. The system will need to strive for environmental improvements, and we need to use our laws and institutions to transform society so that it acts synergistically with the environment that sustains us. There is a wide variety of tools that can be used to incentivise positive action that benefits the environment and society more broadly, and we have looked at some of them in our RM reform work.

Environmental limits are crucial, but they are not enough. The NBA, the SPA and the wider resource management system needs to be firmly focused on the pursuit of positive outcomes as well. We support the intent of the Panel here with respect to the NBA, but note that deep societal change will be required as well. The role of government is to build support for this, not just to legislate.

[132] For example, rights could be granted to one user over another because their overall environmental footprint is less.

[133] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 143-164.

List of recommendations

We broadly support the new model proposed by the Randerson Panel, and below we summarise our recommended refinements that build on it. There will be multiple ways in which this could be achieved through specific drafting, and our recommendations are intended to broadly support the drafting process rather than providing a straitjacket of specific wording.

1. Bottom lines (a set of minimum outcomes) should be added as a statutory concept and *legislated* across the domains for which limits must be set. This could be in a new section 7A, or in a schedule to the NBA. These outcomes need to be clearly distinguished from the positive outcomes contained in section 7.

2. Bottom lines should be more targeted to the things we value than at the prevention of ecological collapse or the exceedance of tipping points.

3. Legislated bottom lines should be phrased in narrative form as substantive minimum outcomes to be defended (not just management actions), including integrating te ao Māori (and te reo Māori).

4. The values that underpin bottom lines should include the protection of human health and life, the intrinsic value of the natural world as a whole as well as indigenous species, and environmental values that New Zealanders hold dear. Some bottom line outcomes may need to be place-specific.

5. The purpose of the NBA should be strengthened so that it is clearer that environmental bottom lines, and the limits that defend them, are paramount and must not be infringed, and that limits are themselves a vital *part* of ensuring people's broader wellbeing rather than something that exists in tension with it.

6. Similarly, bottom lines and limits should be defined as an important *expression* of Treaty principles rather than something to be balanced against them.

7. The domains suggested by the Panel for which limits *must* be set are appropriate, but should be amended slightly:

    - to separate out different elements of freshwater management;
    - to specifically include estuarine environments;
    - to refer to limits, where needed to support the Climate Change Response Act, for climate change mitigation;
    - to include the quantity/existence of soil, not just its quality;
    - to include an umbrella domain of ecosystem health/functionality.

8. Legislated bottom lines should be the only substantive considerations for (1) where limits are set, and (2) which types of things (eg domains) can be treated as limits.

9. Section 8 should be revised so that the purpose of setting limits is "to defend/achieve environmental bottom lines", not to achieve the broader purpose of the NBA. The purpose of the Act should not be an operative decision-making section.

10. To be classified as a "limit", the Minister should need to be satisfied that a provision is necessary to defend or achieve a legislated bottom line.

11. Various statutory principles should influence how limits are set. These should be clearly articulated in legislation, and include precaution, participation, ecosystem based management and non-regression. Tikanga principles should also be included. More specifically:
    The precautionary principle in draft section 9(2)(g) should refer only to the *natural* environment
    The principle of integrated management in section 9 should refer specifically to ecosystems as an integrative concept when setting limits (and other functions)
    Section 9 should include the principle of non-regression.

12. We agree with the Panel that environmental limits should be set under the NBA, and that a spatial strategy should be subject to them. However, we recommend that spatial strategies have to "comply" with and "give effect" to limits, which is a slightly different formulation than the Panel's direction that spatial strategies be "consistent" with "national direction".

13. The SPA would, however, be a suitable place for high level principles around the pre-eminence of environmental limits to be expressed, beyond just the standard references to social, cultural, economic and environmental wellbeing. The proposed purpose of the SPA drafted by the Panel should be revised to achieve this.

14. Provisions that contain environmental limits should be specifically tagged as such, and that should be required by the NBA.

15. Once an environmental limit is established under the NBA, clear legal consequences should flow from that classification, including the following.

Recommended legal consequences of being classified as a limit

- Being set under a separate and more focused set of minimum outcomes that the limit is responsible for defending or achieving, not just reference to the general purpose of the Act (as mentioned earlier)
- A review or audit role for the Parliamentary Commissioner for the Environment (or other independent agency) where limits are being established or amended. In addition, or alternatively, an independent panel of experts could be established by the Minister to provide recommendations as to what limits should be set.
- A clear legal requirement (eg an addition to the implementation principles in section 9) that limits prevail in the event of conflict with other provisions
- A requirement that a consent cannot be granted contrary to an environmental limit (as recommended by the Panel)
- Enhanced monitoring requirements
- Priority attention by authorities where a limit is infringed or threatened, and a duty to take action

- A *duty* (not just a power) to review relevant resource consents where limits are threatened or infringed
- Focused attention on limits through how instruments are structured (eg a dedicated, integrated NPS-NES focusing on "limits" within the new National Planning Framework, and specific sections on limits in regional and national state of the environment *reporting*)
- A requirement not only that a consent authority *can* decline a consent where it has inadequate information, but that it *must* do so where there is a real risk of an environmental limit being infringed
- A requirement that any proposal to change a provision expressing a limit be publicly notified
- A requirement that regional spatial strategies be consistent with environmental limits (subtly different to the Panel's recommendation, because it focuses on its status as a limit rather than just its status as a provision in an NES).

16. An environmental limit should be defined in a broader way than the Panel has done. It should, in section 8, specifically include the following.

Things that should be included within the legal definition of a limit

- Binding targets where limits have been exceeded already (a clear legal distinction should be made between binding targets that reflect limits and binding targets that are set to achieve positive outcomes in section 7).
- Different "types" of limit – including not just descriptions of minimum environmental quality but also maximum amounts of *harm/pressures* and associated restrictions on *human activities* that are needed to achieve those minimum quality levels.
- Policies in NPSs where they are needed to achieve bottom line outcomes.

17. NPSs expressing limits should be required to be expressed in as much specificity as possible, so the outcome expected is clear when it comes to implementation through combined plans and assessment of consents. That requirement should be contained in legislation (eg as an implementation principle, or in provisions governing the content of NPSs).

18. If a limit is described in a qualitative way (in terms of unacceptable effects), it must be worded so that only a very low level of risk of those effects occurring is allowed. This requirement should be added to or linked in section 8 to a strengthened statutory precautionary principle in section 9.

19. A new framework for national direction should require a limits "strategy" to be embedded within it, outlining how central government intends to defend environmental limits. This would be broader than just directly setting limits through NESs.

20. The geographical scale of a limit should be determined by the nature of the environment, not the ease with which it can be implemented in a single jurisdiction (eg by a single council). This could be made clearer in legislation.

21. The NBA should introduce a requirement for decision makers to consider whether the existence of a limit means prohibited activity status is required for some things.

22. Policy makers should closely consider whether existing limits expressed in national direction – particularly those expressed through policies – warrant inclusion in primary legislation.

23. Processes for making national direction and combined plans may need to provide more detail for the specific process of setting binding targets where limits have been exceeded (given the need for a unique architecture around targets, such as timeframes, relative priorities, links to other methods, interim stepping stones etc).

24. We recommend the inclusion of an emergency order type of tool in the NBA with the specific purpose of addressing urgent environmental limits where plan making would be too slow, rather than reliance on a general regulation making power.

25. We support the measures recommended by the Panel to improve compliance monitoring and enforcement. A specific duty to enforce limits, once set, needs to be contained in the NBA. This could be added to section 9(3), although it would need to encompass not just the Minister but also councils and the EPA.

26. The NBA should introduce a duty to monitor those matters specifically labelled as (type 1) *limits*, not just the general state of the environment, in section 9(3), as well as equivalent provisions for the duties on councils. Environmental reports should be required to outline whether those limits have or have not been infringed, and progress towards binding targets.

27. We recommend the addition of a clear legal duty under the NBA for the Minister (and potentially others) to regularly evaluate limits. This needs to be linked to a clear trigger for corrective action where limits are threatened or breached. That could be included as one of the Minister's duties in section 9, and it could be mirrored in the drafting relevant to the functions of councils.

28. An effective system of environmental limits in practice may require allocative issues to be resolved. We recommend that this happen as a matter of urgency and that the NBA resolve such issues head on.

29. Environmental limits are imposed under a number of legislative frameworks, not just the NBA. There are also statutes that have the potential to undermine limits set under the NBA or will have unclear relationships with it. We recommend that these be reviewed as soon as possible so that they align with and support the NBA (and vice versa).

Suggestions for further thinking

We also offer some further suggestions for further thinking, although stop short of recommending them specifically.

4. Consideration should be given to including ways of imposing environmental limits that are consistent with tikanga, such as rāhui.

5. Policy makers should carefully consider whether limits should be limited to provisions just set by the Minister, or whether they should also include:

a. Provisions set by councils that are required to give effect to or implement limits set by the Minister (especially relevant where they are contained in an NPS); or also
b. Provisions set by councils that are more stringent than a limit set by the Minister; or also
c. Provisions set by councils that are for matters other than the mandatory domains in section 8.

6. Close consideration should be given to whether a "limit" should include some provisions contained in combined plans. This could be where those provisions are:

   (a) directly inserted by the Minister, or
   (b) flagged as necessary to give effect to limits set by the Minister.

7. If a limit were extended to some provisions in a combined plan, consideration would need to be given to exactly where that could be located within it. Limits could be constrained to just policy provisions in an RPS, or also contained in policies, rules and standards in district and/or regional plan components. Provisions flagged as limits should be beyond the reach of private plan changes.

8. Consideration should be given to whether local communities, through their councils, should retain the ability to set "limits" of their own that are not just about implementing national limits. While the Panel envisages that more stringent standards can be imposed, it is unclear if these are themselves to be regarded as limits.

9. We suggest that a "limit" should extend to at least some provisions in a combined plan (eg those needed to give effect to limits in national direction). This is because the right geographical scale (eg every catchment in the country) is unlikely to be expressed through national direction directly, and those provisions should have the status and consequences of limits.

10. Related to this, there is a potential tension between the express ability of councils to set local standards that exceed national limits (in section 8) and the obligation of councils to give effect to development-focused NPSs. This needs to be clarified.

11. Close consideration should be given to whether spatial strategies created under the SPA should be obliged to comply with environmental limits contained within combined plans. This is potentially significant, because limits may only become meaningful when they are translated to the characteristics of particular places. This may, however, cause transitional difficulties in terms of the order in which instruments are made.