Initial analysis of the Natural and Built Environment Bill and Spatial Planning Bill

Environmental Defence Society, December 2022

Introduction

1. This document outlines the Environmental Defence Society's (EDS) initial analysis of the Natural and Built Environment Bill (NBEB) and Spatial Planning Bill (SPB). The document has two purposes: to assist others in making submissions on the Bills, and to elicit feedback to inform EDS's submission. At the time of writing, submissions are due in early February. This document does not amount to a comprehensive submission, and we note some areas require further thought and investigation. Most of the points made below relate to the NBEB, being the more complex regulatory statute and in our view the one in need of most attention.

2. After some preliminary comments, this document largely progresses through the structure of the NBEB. Our initial focus has been on the purpose and principles of the Bill, as well as its framework for environmental limits, targets and outcomes.

3. We support the need for reform and see a clear case for change. Overall, we think that the two Bills represent an improvement on the Resource Management Act 1991 (RMA), with the important caveat that there are a number of issues that need to be fixed (some of which we identify in this document). Over the past five years EDS has been doing policy work laying some groundwork for reform, and we are pleased to see a number of our recommendations (and those of the Randerson Panel that itself adopted many of our recommendations) reflected in the Bills, notably in the NBEB. The RMA is no longer fit for purpose from an environmental standpoint.

4. It is paramount that the passage of the Bills through the House is not unduly delayed. We consider that, although some shortcomings are significant, these can nevertheless be fixed through reasonably targeted amendments.

5. We encourage people to provide feedback on the points below, and to provide us with other concerns they may have to inform our submission. Comment can be sent to greg@eds.org.nz and copied to manager@eds.org.nz.

Preliminary comments and overall structure

6. We note that the NBEB is very long, comprising over 800 pages and 861 sections as well as detailed schedules. We do not see length in itself as an issue (indeed, it is often preferable to provide certainty in primary legislation than relying on much longer, and less accessible, judicial interpretation through case law over time or later amendments to provide clarifications). However, we do note that the NBEB appears to be more complex than necessary, with repetitious provisions and an unnecessarily complicated drafting style.

7. We think that the NBEB would benefit from a preamble, which would provide an opportunity (as with te Tiriti settlement legislation) to provide a meaningful narrative explaining some of the key shifts in the legislation and the intent behind it. This cannot be captured in the purpose statement, which is (necessarily) legalistic in its formulation but needs some form of stable guide to interpretation anchored in the need to respond to the environmental crises facing our country.

8. Parts of the structure of the NBEB are not particularly intuitive. This is significant, not only because it makes the legislation less user friendly (it is hard to figure out where to go for the relevant provisions), but also because it means that connections between different parts are either not obvious or are in some cases lacking. For example, general provisions about environmental "limits" are contained within Part 3 concerning the National Planning Framework (NPF), making it unclear whether specific provisions (eg rules) contained within NBEB plans (including those designed to give effect to the NPF) are *themselves* also "limits" (or whether they have some other legal status).

9. Another example is the requirement for limits for "indigenous biodiversity" to be set under cl 38, but a separate and additional requirement for "significant biodiversity areas" (SBAs) to be identified and protected (tucked away in subpart 3 of Part 8 relating to "matters relevant to natural and built environment plans") without clarifying whether these areas are actually one expression of a "limit" envisaged by the Bill. The provisions on SBAs also contain a lot of matters relevant to the NPF, calling into question whether these are best located in Part 8 dealing with NBE plans.

10. The first part of the structure of the NBEB makes sense. It is logical that the core normative provisions (purpose and principles) appear first, including before the interpretation section. As in the RMA, it is then logical for a list of restrictions and duties to appear, followed by provisions relating the cascade of planning instruments (NPF, NBE plans, and consenting).

11. Part 6 does not logically fit in the structure of the Bill, and groups together quite disparate things (water conservation orders, freshwater farm plans, specific provisions about nutrients, and contaminated land). While water conservation orders warrant their own Part, these other things would be better included as subparts elsewhere (eg in provisions relating to NBE plans or consenting, under which such things are to be managed more generally).

12. Part 8, concerning matters relevant to NBE plans, should be better integrated into Part 4 concerning NBE plans themselves.

13. Part 10, concerning functions and duties of various institutions, should be much earlier in the Bill (as such provisions are in the RMA). These are foundational sections (outlining what various people have to do), and should precede provisions about the NPF and plans (describing how they should do them).

14. There should be a separate, dedicated part dealing with the framework for environmental limits and targets in an integrated way. This should appear immediately prior to provisions concerning the NPF, which would be the key mechanism (albeit not the only one, given that plans and other methods have a role to play too) for implementing them. We address our substantive concerns about limits and targets further below, but for now note that the system of "bottom line"

environmental controls do not present as a coherent system as drafted. It should be made clearer how this system within a system operates by having a Part dedicated to it, subject to its own targeted purpose. This would give the system much clearer visibility and legal status. As mentioned earlier, the provisions in Part 8 concerning SBAs (and other "environmental" places of national importance in Part 8) should form part of this more holistic Part dealing with environmental limits (describing ways in which limits and targets for indigenous biodiversity are to be provided for).

15. It makes sense for the coastal environment and subdivision/reclamation to have their own bespoke parts, as these require quite different management (including the intersection of subdivision with the property law system).

16. It makes sense for compliance and enforcement to have its own dedicated Part, following the logical progression from purpose, restrictions, planning, and consenting. For the same reason, system evaluation should be highly visible in its own Part at the end of the Bill (prior to "Miscellaneous" matters, rather than being subsumed within it).

17. Some Part 12 matters would ideally be integrated into other parts, such as information and procedural principles (into more general decision-making principles in cl 6), and additional powers of ministers (into more general provisions concerning ministerial functions, duties and powers currently in Part 10).

18. In short, we consider that the structure of the Act should roughly follow the logic of the policy cycle – the purpose (what's trying to be achieved), restrictions (what you can't do), duties and responsibilities (what you have to do), the planning cascade (NPF, plans, consenting, other tools like water conservation orders, designations and heritage orders), additional domain specific provisions (coastal and subdivision), enforcement, evaluation, and miscellaneous.

Purpose and associated provisions

19. While we are supportive of moving away from the "sustainable management" purpose of the RMA (for reasons outlined in our resource management reform policy work), we see issues with how the purpose and principles of the NBEB have been drafted.

20. Despite the use of the singular word "purpose", the NBEB actually has dual purposes, separated by the conjunction "and". These are to:

> (a) enable the use, development, and protection of the environment in a way that—
> (i) supports the well-being of present generations without compromising the well-being of future generations; and
> (ii) promotes outcomes for the benefit of the environment; and
> (iii) complies with environmental limits and their associated targets; and
> (iv) manages adverse effects; and
>
> (b) recognise and uphold te Oranga o te Taiao.

19. Subclause (a) might be described as a traditional "RMA style" purpose where activities are enabled as long as they do not infringe certain standards for environmental wellbeing. Ultimately, this purpose is reactive, because the components in (i)-(iv) are only triggered by the actions listed in the chapeau. It is quite different from statutes that, for example, aim to actively provide for the delivery of services and require "stuff to happen".

20. Subclause (b), however, is quite new, with its legal position remaining unclear. Interestingly, te Oranga o te Taiao is defined not in the purpose section, but in the interpretation section, reducing the visibility of what is a fundamental pillar of the Bill. It is defined as:

> (a) the health of the natural environment; and
> (b) the essential relationship between the health of the natural environment and its capacity to sustain life; and
> (c) the interconnectedness of all parts of the environment; and
> (d) the intrinsic relationship between iwi and hapū and te Taiao.

19. While a dual purpose is not unprecedented (the EEZ Act has one, for example), it adds uncertainty that is likely to require litigation to resolve. As well as the kind of conjunction found in the RMA ("while", which is here changed to "in a way that" in cl 3(a)), which mediates the high level relationship between use and protection, there is an additional conjunction "and" that mediates between (a) and (b).

20. Te Oranga o te Taiao is also defined extremely broadly, the conjunction "and" between cl 3(a) and (b) only adds to the lack of clarity, and there is considerable overlap between the concepts provided for in both purposes (eg the health of the environment and outcomes for its "benefit"). It provides for multiple avenues of argument. In short, the two branches have significant overlap and the relationship between them is not clear nor specified.

21. We would prefer to see a single, tightly defined purpose statement that is expressed as a hierarchy, conceptually similar to te mana o te wai in the National Policy Statement (NPS) for Freshwater Management. Its unambiguous first priority should be to uphold the life-supporting capacity of the natural environment and its intrinsic value, with use for various human wellbeings subject to that envelope. Other principles could elaborate on that (eg inter-generational equity), but a purpose outlining a clear legal relationship is needed, not more word 'soup' that includes favourite buzzwords and allows fertile ground for litigation (and the inequality of arms that often brings). We are continuing to give thought to how the purpose might be redrafted.

22. Simply inserting "enabling… protection" in cl 3(a) alongside use and development is an inappropriate and awkward solution. Aside from inviting yet another relationship to be argued over (how does one enable use, development "and" protection?), the imperative is to *ensure* protection and enhancement of the natural world, not to enable it if (for example) it "promotes outcomes" for the benefit of the "environment".[1] By comparison, it would be inappropriate for health and safety legislation to have a purpose of "enabling" people's health and safety, or for the Local Government Act to "enable" the provision of core public services.

[1] Which includes the built environment and people.

23. The Bill's purpose should then clearly list the *ways in which the Bill will achieve the purpose*, linking it to the mechanisms for actively generating or preventing change (eg setting environmental limits, establishing binding targets, and enforcing regulatory requirements). That would give a clear line of sight and accountability for actively using the tools available, while making the complex machinery of the Act in the following 800 pages (how it works) much more transparent up front. In short, the Bill should start with a clear statement of what it's wanting to achieve, followed by a clear statement of how it will achieve it. This would reflect the orientation of the legislation which is about making change, not passive management.

24. We do note that the intention is for the Bill's purpose to be less of an "operative" provision, so that decisions on plans and consents will not often need to refer to it. However, it still needs to be drafted with great care. This is because it has a strong role in shaping national direction (as well plans where national direction does not address a matter clearly), and in some cases directly shapes decisions on resource consents (eg see cl 229(3)(b)). If the purpose is not clear, it provides too much political discretion for tools to be misused. We have seen that under the RMA (for example, in the poor environmental outcomes allowed by the National Environmental Standards for Plantation Forestry).

25. While deeper reformulation is needed, and we are continuing to give thought to that, we have more specific concerns with the existing drafting. The conjunction "in a way that" in cl 3(a) is not as strong as it should be; this implies that it is only the *way* in which (ie *how*) use and development occurs that is relevant, whereas in many cases use and development should not be contemplated at all (eg where there are impacts on protected areas and outstanding natural landscapes that need to be avoided). The wording should be one of hierarchy, such as "as long as" or "provided that".

26. The purpose also implies that "protection" can be enabled only if the *way* in which it occurs does things like support the wellbeing of current generations, manages "adverse effects" (which could include *economic* impacts), and complies with targets associated with limits (which could, perversely, constrain protections from going *beyond* those associated with minimum levels of ecological integrity). This issue is a result of the anomalous inclusion of "protection" alongside the more traditional formulation of "use and development", which does not really work.

27. The phrase "promoting outcomes for the benefit of the environment" is also unusual and, in our view, awkward. Again, while deeper reformulation is needed, it would be cleaner for such a provision to simply refer to "promoting outcomes" identified under relevant clauses elsewhere in the Bill.

28. Aside from issues concerning overlap and uncertain relationships, as well as its generality, we have specific concerns about how the concept of te Oranga o te Taiao has been drafted. In particular, the recognition of the "intrinsic relationship" between iwi and hapū and te Taiao has potential to conflict with the more protective considerations in the concept. We consider that referring to the "kaitiaki" relationship would be more appropriate with kaitiakitanga defined in the Bill. Moreover, the breadth of te Oranga o te Taiao means it will need further interpretation, begging the question *who* will be charged with providing that. Potentially, further direction could be included in an overarching layer of the National Planning Framework (NPF), but it could also be found in "te Oranga o te Taiao statements" which are to be prepared by tangata

whenua. There is uncertainty about the relative weight to be given to different interpretations of the concept and the ability of the courts to pronounce upon it.

29. There appears to have been minimal thought given to how the strongly worded te Tiriti clause in cl 4 (giving effect to the principles of te Tiriti) relates to other aspects of the legislation, including allocation principles and environmental limits. It should be clarified that environmental limits and enhancement (ie associated targets), as long as correct processes involving mana whenua have been observed, are a *mechanism* for upholding the principles of te Tiriti rather than something to be challenged under cl 4.

Decision-making principles

30. It is positive that there is an express decision-making principle for precaution in cl 6(2)(b), as this was a feature that was absent from the RMA. However, a more general polluter-pays principle should be included here as well, as at present that concept is limited to the very specific context of liability for contaminated land (in cl 417). We consider that all polluters should, in principle, be required to be responsible for the pollution they cause.

31. We also consider it inappropriate and unnecessary for cl 6(c) to specifically recognise the positive effects of "using and developing the environment" as a decision-making principle, since planning authorities are already charged with actively promoting system outcomes which include various forms of use and development. The clause is particularly inappropriate because there is no equivalent decision-making principle to recognise the positive effects of protecting and enhancing the environment to achieve the outcomes.

32. We have concerns that cl 6(3), directing all persons exercising powers to provide for the mana of Māori to manage the environment according to tikanga, is unclear in scope and extremely broad. The wording is highly directive and potentially overrides other provisions such as the need to pursue positive outcomes and operate within environmental limits. In addition, it does not seem to contemplate conflicts being resolved through the NPF or NBE plans.

33. More broadly, we are not convinced that much of cl 6 is needed at all. It should include cross-cutting principles concerning *how* decisions are made (including integrated management, cumulative effects, and precaution, alongside a new polluter pays principle), but not a back door to substantive arguments about what *outcomes* receive more weight.

Outcomes

34. We have concerns that the list of system outcomes in cl 5 of the Bill has no internal weighting or hierarchy. A diverse range of potentially conflicting outcomes must be "provided for", with any conflicts to be resolved with a high degree of political discretion in the NPF or plans. Examples of conflicting matters in cl 5 include the protection and restoration of the ecological integrity of the natural environment on the one hand, and well-functioning rural areas that are responsive to people's diverse and changing needs "in a way that promotes … the use of land … for primary production" on the other. To us, there is a real risk that this will resurrect a form of "overall

broad judgement" that defined the RMA for 20 years, where there is discretion to outweigh environmental wellbeing by short term economic opportunities.

35. We understand that the intention is that strong environmental protections will instead be provided through mandatory limits specified in the NPF, and that the pursuit of the undifferentiated list of outcomes in cl 5 cannot degrade the natural environment *below* those limits. That is important (although, as explored below, we also have concerns with how this framework for limits operates) but not sufficient.

36. A system of limits (as defined in the Bill) ultimately represents the *worst acceptable outcome*. A list of outcomes, in contrast, is about improving things. The legislation needs to recognise much more strongly that some improvements are more important than others, or else we may see a race to the bottom (a push downwards to limits). Some hierarchy in outcomes would be a way to achieve that, and could be created by replicating the distinctions between sections 6 and 7 of the RMA.

Environmental limits and targets

37. We see the ecosystem for limits and targets as being at the core of the Bill.

38. It is positive that the concept of an environmental limit, and the specific identification and defence of those limits, is recognised in the Bill. The RMA was lacking a clear framework for limit setting (even if some were recognised via case law, and planning instruments *could* contain rules and policies in the nature of bottom lines). It is also positive that the purpose of setting environmental limits in cl 37 appears not to be subject to the broader (and, currently, confused) purpose of the Bill, although that is not specifically stated.

39. However, we think that the overall framework for limits and targets needs strengthening to make it effective. As mentioned earlier, this should be in a separate Part of the Bill, not embedded within the Part dealing with the NPF.

40. First of all, the terminology used in the Bill is confusing and does not reflect what people would intuitively think that "limits" are meant to be doing. This is a useful entry point to thinking about a broader range of issues with the drafting.

41. The purpose of environmental limits expressed in cl 37 is twofold: (1) to protect human health, and (2) to prevent ecological integrity of the natural environment from degrading relative to the date of enactment (for simplicity, 2023). In terms of (2), environmental limits are essentially being treated as *measurements* of the current state of ecological integrity. So unless an aspect of the environment can be shown to be necessary to protect human health, a limit will freeze a line in the sand at 2023 (even if that measurement is nowhere near sufficient to actually protect *environmental* health in degraded areas).

42. In that context we have concerns about how "interim" limits are provided for in cll 41-43. The NPF will be able to set interim limits that, effectively, set the bar for ecological integrity l*ower* than 2023 levels. This can occur where the Minister is "satisfied that the harm or stress caused

to a natural environment existing immediately before the commencement of this Part will cause continuing degrading[2] of the natural environment beyond the commencement of this Part".

43. While we understand the intent of this provision is to reflect that some biophysical harm is unavoidable given previous human activities (the impact of which has not yet been felt, such as already discharged contaminants flowing down waterways over time), it leaves considerable ambiguity and needs to be tightened. In particular, it could be interpreted as allowing existing uses of land (such as intensive agriculture or horticulture) or consent holders to continue to degrade the environment (without using powers in the Bill to curtail them) because those stresses (interpreted as *activities*) were already present at the time of enactment. The Bill would benefit from additional provisions on "when interim limits must not be set", clarifying that the concept only applies where interventions cannot be made to prevent that harm from happening.

44. Moreover, although a timeframe must be set for when an interim limit will be replaced by a corresponding environmental limit (ie returning the environment to its 2023 state), there is no guidance as to what the timeframe should be, or the extent to which that is determined by political or ecological factors. It also needs to be made clear that an environmental limit, once set/reached, cannot subsequently be undermined by the setting of a new interim limit.

45. We note more generally that throughout the Bill it is often unclear whether reference to an "environmental limit" (which is defined as those set under cll 39 and 40) includes an "interim limit" (which is set under cl 41).

46. At a higher level, environmental limits and interim limits, as currently drafted, do not function as "limits" in the more commonly accepted sense – of something that reflects a minimum *acceptable* state of the environment or its ability to function as it should (as reflected in the definition of ecological integrity). Some environments in 2023 will have clearly breached ecologically determined limits already, in the sense that they have passed tipping points set by nature, not people.

47. In light of this, it is confusing that the Bill provides for limits (current state measurements) to be "set", rather than simply "recorded" or "measured".[3] While measuring current state is important to understand our starting point and prevent things from getting worse, it would be more appropriate to call these "current state measurements". They are about understanding where we are now, not really about setting ecological limits (points we should not go beyond).

48. It is also unclear why objective, scientific biophysical measurements of current state (ie those currently described as "limits" for ecological integrity) would be ultimately set by the Minister as a political actor and not by an independent, expert group.

49. We think that an environmental "limit" should be redefined as a more absolute measure of the *minimum acceptable state of the natural environment*. We welcome feedback on whether the

[2] This term should be "degradation" as the gerund form is an awkward fit.

[3] This confusion permeates other places in the Bill too. It can be seen, for example, in the difference between the purpose of an environmental limit and its definition. Its purpose is to prevent decline in ecological integrity relative to 2023 levels, whereas its definition in cl 7 is worded in more absolute terms (a limit is "for" ecological integrity).

current definition of "ecological integrity" in the Bill could serve this purpose, allowing authorities to determine whether an aspect of the environment is exceeding an ecologically determined limit or not. Ecological integrity is defined as follows:

> the ability of the natural environment to support and maintain the following:
>
> (a) representation: the occurrence and extent of ecosystems and indigenous species and their habitats; and
> (b) composition: the natural diversity and abundance of indigenous species, habitats, and communities; and
> (c) structure: the biotic and abiotic physical features of ecosystems; and
> (d) functions: the ecological and physical functions and processes of ecosystems.

50. While there may be some value judgements involved in this assessment (ie in determining how "much" ecological integrity is sufficient to meet a limit), we note two things:

    a) the drafters have had no such qualms in taking a more absolute approach to the concept of human health (limits for human health must be set "to protect human health", not just to prevent health from declining below 2023 levels), which is a concept that is equally value-based and open to interpretation and argument;[4] and
    b) in other parts of the Bill, the concept of "ecological integrity" *is* treated as if it is an absolute, and not just relative, concept.[5]

51. As currently drafted, the idea of a minimum acceptable state for ecological integrity is, instead, provided by the Bill's provisions for setting targets. Under cl 49, targets must be set for every aspect of the environment that requires a limit to be set (ie, those aspects that require the current state to be measured). This mandatory provision for target setting is positive.

52. However, the Minister must set a "minimum level target" only if he or she is "satisfied" that current state represents "unacceptable degradation". This is a relatively weak approach for mandatory target setting where the context is, essentially, that ecological limits (in the more common sense of the word) have been infringed *already* and the natural environment is in a dire state.

53. There is considerable discretion for the Minister to determine *not* to set a minimum level target (if he or she is *not* satisfied). That phrasing is potentially important, as it removes the question of whether there *is* unacceptable degradation from an objective legal test (eg in declaration proceedings), and recasts it as whether the Minister *was* satisfied and whether all relevant considerations were taken into account (the much more difficult realm of judicial review).

54. The Bill also provides that a number of matters must be "considered" in determining whether there is "unacceptable" degradation, but these are far from directive. They include, for example,

[4] We also note that the concept of the "health" of the natural environment is an absolute one, albeit one not defined further, in te Oranga o te Taiao.

[5] For example, in cl 50(2)(c)(ii), where one consideration for the Minister in deciding to set a target is whether the current state of the environment poses a "risk of irreversible or significant harm *to ecological integrity*", not just a "reduction" in ecological integrity.

whether the state of the natural environment poses a "risk of irreversible or significant harm" to ecological integrity. That is a high bar.

55. Even if the Minister is satisfied there is unacceptable degradation, there is no clear normative guide for *where* the targets are to be set or the *timeframes* that must be set to meet them. Clause 50 considerations only relate to *whether* a target is set, not *where* it is set, how long it takes to meet, or whether it can subsequently be made less ambitious. This means that the only substantive direction for setting mandatory targets associated with limits (ie where the environment is degraded) is:

    a) To assist in improving the state of the natural and built environment (cl 47);
    b) To assist in achieving "an outcome" (cl 48(2)(c)), which as mentioned earlier provides for trade offs to be made;
    c) To be set at a level better than an environmental limit (cl 49(4)), which could, for example, be only marginally better than current state;
    d) To be achieved by a "specified time" (cl 48(2)(b)), not for that time to be determined by reference to ecological criteria or urgency.

56. In our view there should be a much clearer statement that the thing that must be achieved by setting minimum targets associated with limits is the restoration of ecological integrity (in other words, the more common understanding of what a biophysical limit actually means). There should be some means by which the decision of the Minister to set (or fail to set) these minimum level targets can be challenged in the courts, reflecting that this is a legal test and not a political decision.

57. Perhaps most significantly, there is no clear mechanism in the Bill by which a mandatory target, once achieved, *becomes* a limit (since limits are permanently defined as being current state as of 2023). This may stymie the practical ability of decision-makers to defend environmental improvements over time, including where already degraded environments are being restored. That is because the status of an environmental limit, in the sense of a clear measurement of an environmental state that cannot be made worse by human activity, is important when it comes to the other machinery of the Act, including consenting. In particular:

    a) While consent authorities cannot grant consent contrary to a limit *or* target, it is much less clear what compliance with a "target" involves, since that is a concept that is inherently about achieving something in the future;[6]
    b) There are safeguards (albeit not strong enough) in cll 44-46 concerning when the Minister cannot make exemptions from *environmental limits* (eg where an exemption would lead to an irreversible loss of ecological integrity). However, these do not apply to *targets*.[7]
    c) An activity that would breach a "limit" is a prohibited activity under cl 154(4)(a), but not one that would breach a "target". This potentially means that if an environment is significantly degraded, and is slowly improved over time to meet a minimum level

[6] For example, with what does a consent applicant have to comply if a target has been set but has failed to be reached? Is an activity contrary to a target if it would slow down progress towards meeting a target associated with a limit, or only if that target has already been achieved?

[7] Thus, if a target is achieved, this creates uncertainty as to whether an exemption *can* be granted at all, and (if it can) whether the provisions about when exemptions *cannot* be granted apply.

target, an activity that would cause that to be undone is not prohibited unless it would make it worse than at 2023. That may be particularly important when it comes to defending freshwater quality improvements made at places like Lake Horowhenua.

58. Instead of targets, we suggest that interim limits should be used as a mechanism to chart a path back from (1) "current state" measurements to (2) a state where ecologically determined limits are no longer infringed. This would more clearly distinguish the terminology of "targets" (where distinctions between "minimum level target", "mandatory targets associated with limits" and other targets to achieve outcomes is confusing and involves significant political discretion) from "limits" (where the need is for an objective and absolute test). When it comes to consenting, compliance with an "interim limit" makes much more sense than compliance with a "target associated with a limit".

59. In this revised model for limits and targets, current state measurements (where we are now), interim limits (which chart a pathway back to ecological integrity over time), and environmental limits (representing a minimum level of ecological integrity) would form one ecosystem of tools. Mandatory and discretionary "targets" would form another (to improve things beyond those minimum levels set by limits). Limits would be about taking us back to (and strictly defending) minimum acceptable outcomes, while targets would be about improving things beyond that point.

60. There should also be a clearer distinction made between limits set for human health and limits set for ecological integrity. Bundling these into the broader concept of an environmental limit makes the drafting confusing. For example, cl 40(2) states that "environmental limits" must be expressed as a minimum biophysical state or maximum amount of harm or stress, but cl 40(3) then states that environmental limits "relevant to ecological integrity" must be set to reflect the state existing as of the date of commencement. These are quite different things. Presumably, cl 40(2) is only applicable to limits set for human health, even though the provision does not say that.

61. The aspects of the natural environment for which environmental limits must be set are also overlapping and extremely general. There should be much more specific aspects for which limits must be set, including stresses like sediment and nutrients, and minimum states relating to indigenous vegetation cover. These could be contained in a schedule to the Act. This is important not just for setting limits, but also because it dictates what specifically must be measured (and therefore improves accountability). Each of these domains would also benefit from having a clearer purpose beyond just ecological integrity (for example, building on the NPS for Freshwater Management).

62. We also note that it is unclear what an environmental limit is meant to look like in the NPF or a plan (ie if one were to point to a "limit" in the document). While a limit can be expressed in a qualitative or quantitative way, it is unclear how such provisions will overlap with more familiar tools like rules, standards, policies (eg "avoid" policies) and objectives. Nor is it abundantly clear whether an environmental limit includes only a specific provision *in the NPF*, or whether some rules and policies (eg those that give effect to aspects of the NPF) in a NBE plan will themselves also be "limits" in a legal sense. As mentioned earlier, those things matter, because classification

as a limit (or something else) has direct legal consequences (eg whether an activity must be categorised as a prohibited activity).

63. Furthermore, it is not obvious whether under cl 44 (concerning exemptions to limits) a regional planning committee is required to request an exemption to a limit, by applying to the Minister, if the limit in question is one that is prescribed in the *plan* (ie a specific rule), not directly in the NPF. Arguably it is required to do so, given that in places the Bill talks about the NPF specifying a framework for limits *to be set* in NBE plans (not just for plans to give effect to limits set in the NPF).

64. Provisions about the establishment of management units, across which limits are to be measured, are also of some concern. Clause 55(2)(a) provides several considerations for authorities to decide the size and location of these units. They include whether similar areas could be grouped together for "effectiveness and efficiency". We do not consider that efficiency is a valid factor in achieving the purpose of limits and targets, which need to be focused on ecological integrity.

65. Of even greater concern is cl 55(3); the size and location of a management unit, being the basis for environmental limit setting, should not be about maximising opportunities for "appropriate offsetting". Without a well developed biobanking model, this is a recipe for some areas to be improved at the expense of considerable degradation of others while still "complying" with overall limits for indigenous biodiversity. And for issues of pollution, it may potentially create significant issues of environmental justice if harm can be averaged out across large units.

66. We also note that cl 55(4) is confusing, as it states that criteria for establishing management units do not apply to freshwater or air, but does not say which provisions *do* apply to those domains (presumably the management units are those provided for in the NPS for Freshwater Management and airsheds).

Exemptions from environmental limits

67. We have significant concerns about the breadth of provisions allowing for exemptions from environmental limits. That is especially if they allow further degradation of environmental quality relative to 2023 (where many aspects are already degraded), let alone some objective measure of minimum ecological integrity.

68. At the broadest level, we are not convinced that an exemptions framework is necessary. This is because the Bill already provides for limits to be set across management units (potentially allowing harm in one place to be offset by improvements in another), which in itself provides significant flexibility when it comes to how specific projects comply with limits. If one cannot even do that, then an activity is arguably inappropriate in all but the most exceptional situations.

69. Other concerns with the exemptions framework include the following.

a) There is the ability to provide an exemption even from an *interim* limit where we *know* the environment will be getting worse, not better, even without the exemption being granted.
b) Cl 44(4) is anomalous, as it implies that applying the effects management framework (including offsetting and redress) is a way in which limits *can* be complied with. We cannot see how providing compensation/redress for breaching a limit is in any sense of the word "complying" with that limit, as the harm remains. We also have concerns with the effects management hierarchy itself, which we are continuing to give thought to.
c) The tests for establishing an exemption in cl 45 are too broad. For example, cl 45(1) requires only the least possible net loss of ecological integrity, rather than requiring net gain.
d) Clause 45(2) allows the Minister to determine whether "public benefits" justify the loss of ecological integrity, reintroducing by stealth the idea of an overall broad judgement approach to defending environmental limits. There appears to be no guidance as to what "public benefit" means, and this could conceivably relate to economic matters rather than a truly "exceptional" circumstance or one of "national urgency". The breadth of this test for exemptions contrasts with the more specific range of "important" activities that can be granted an exemption from the effects management hierarchy in cl 66 (protecting places of national importance) and cl 565 (protecting highly vulnerable biodiversity areas), despite the fact that the defence of broader environmental limits is arguably of *more* significance.
e) Exemptions are subject to a time limit, but this is whatever the Minister "thinks appropriate in the circumstances". For large infrastructure, this may conceivably be for the life of the project.
f) There are circumstances where exemptions must not be granted in cl 46, but these all rely on what the Minister "thinks" (itself an unusual drafting choice), rather than what the law requires. That includes the environment being "unacceptably" degraded, or where an exemption would lead to an "irreversible" loss of ecological integrity.

70. Our overall sense is that while the provision for limits is positive, the Bill then establishes multiple pathways via which limits can be bypassed or weakened: through broad management units; broad exemptions to limits; the setting of interim limits; the lack of reference to compliance with limits when it comes to decision making criteria for designations;[8] separate exemptions for impacts on significant biodiversity areas; and the potentially broad use of an effects management framework that allows offsetting and "redress" (compensation).

71. There is also an excessively broad ability for the Minister to allow large infrastructure projects to go through a fast-track consenting process, which lacks some of the safeguards that were present in the Covid-19 response legislation on which it has been modelled (eg the requirement to invite comment from specified environmental organisations).

[8] Curiously, resource consents must not be granted contrary to a limit or target, but this is not replicated in decision-making on designations.

Protection of places of national importance

72. It is positive that the Bill requires the identification and protection of "places of national importance" on largely scientific and objective grounds,[9] including significant biodiversity areas (cl 561) and highly vulnerable biodiversity areas (cl 563), from more than trivial impacts. As mentioned earlier, the Bill should make clearer how this mechanism relates to the concept of environmental limits (ie whether significant biodiversity areas are a means of setting a limit for indigenous biodiversity).

73. However, it is concerning that the requirement to identify significant biodiversity areas does not apply in the coastal marine area (particularly inshore areas) or freshwater environments. This is somewhat softened by requiring the avoidance of effects *even if an area is not identified in the plan*, but it would be much more appropriate for at least inshore areas to be identified as part of the planning process.

74. Of greater concern is that there are broad exemptions possible under cl 559(1)(a), where the obligation to avoid more than trivial impacts on significant biodiversity areas does not apply. For a start, the drafting here is highly confusing, as cl 559 refers to exemptions made under cll 64-67, which in turn provide a test for establishing exemptions *from the entire effects management hierarchy* (including offsetting and redress) and not just exemptions from an obligation to *avoid* impacts (as implied by cl 559). This creates some uncertainty as to what an exemption is actually allowed to authorise (eg whether it can waive the requirement for offsetting or redress).

75. Moreover, the kinds of activities that can benefit from an exemption are wide. They include activities as broad as "subdivision", where national benefits "outweigh adverse effects", "activities on Māori land", and activities managed under other legislation which provides an "appropriate level of protection". The latter is of particular concern when considered in light of the Fisheries Act or Urban Development Act, which do not necessarily provide robust protections but may be considered "appropriate" by the Minister.

76. Exemptions (from the requirement to avoid more than trivial effects in significant biodiversity areas) should be limited to a much more targeted range of activities, such as essential infrastructure. Moreover, it should be made clear in cl 64 that the effects management framework still applies to activities having an exemption; we see no reason why an exemption from the framework itself would ever be contemplated or needed, given that its minimum requirement is to provide redress/compensation and does not prevent essential projects from progressing.

77. Finally, we note that places of national importance include outstanding natural landscapes (ONLs). It is positive that this comes with an express obligation for ONLs to be identified in plans (cl 556). However, it is unclear what happens if there is a failure to do so (and the resources and time required to do so may be significant). The obligation to avoid more than trivial impacts on the attributes of an ONL applies, under cl 559(2) only if it *is identified* in the plan, not if it meets the criteria for an ONL. That is of particular concern given that it may take some time for plans to go through this process (and potentially even longer if the first iteration of the NPF does not

[9] With the partial exception of the coastal marine area, where representativeness does not apply as a criterion and is therefore of some concern.

include criteria for assessment), and in the meantime projects (including large projects anticipated in a regional spatial strategy) may require assessment.

Other aspects of the NBEB

78. We are continuing to give detailed thought to a number of other aspects of the Bill, and provide a scattering of preliminary thoughts below.

79. It is positive that cl 53(b) requires the NPF to enable monitoring data on limits and targets to be aggregated at a national level, but this will require considerable investment and effort to achieve in practice.

80. It is positive that appeal rights have been introduced with respect to notification decisions on resource consents.

81. We are not convinced that a separate fast track consenting process is necessary, given other improvements to process under the Bill. Particularly concerning is the broad discretion given to the Minister to determine whether the process is "appropriate", and to promulgate regulations specifying who shall (and, consequently, cannot) be invited to comment on proposals. There are questions around how an independent consenting panel is appointed to determine applications that go down this track.

82. It is inappropriate for the dual track call in process to remain in the Bill. Matters that are called in by the Minister on the grounds of national significance should proceed only to the Environment Court, not to a board of inquiry hand-picked by the Minister.

83. We have concerns about provisions relating to the protection of urban trees, and the constraints on protecting groups or classes of trees.

84. The ability to extinguish or constrain existing use rights and land use consent is an improvement on the RMA, notably when it comes to activities having an adverse impact on the natural environment. However, there may be deficiencies when it comes to the ability to extinguish use rights on the grounds of climate change adaptation and managed retreat, notably where land is left incapable of reasonable use.

85. Provisions concerning contaminated land are an improvement on the RMA. Notably, it is positive that there is a clear directive that a landowner is responsible for managing the land (to make sure it does not exceed a limit or unacceptable risk to human health or environment), and that the polluter must pay for remediation, as well as clear identification of the Environmental Protection Authority as the lead agency where contamination is nationally significant.

86. A lot of uncertainty remains about allocation issues, although it's positive to see the inclusion of specific principles for allocation.

87. With respect to management of the coastal marine environment:

a) The ability for the Minister of Aquaculture to intervene and change an NBA Plan (without going through the normal plan change process) has been retained in cll 851-852. Such provisions should be removed, as it represents ministerial overreach and undermines the functions of the regional planning committee.
b) The minimum consenting period of 20 years has been retained in the Bill for aquaculture operations (cl 267). This should be removed, with the period subject to the discretion of the consent authority. New innovative methods may need a shorter term consent for trials, and if farms are sited in inappropriate places they may need a short term consent to enable transition to a new site.
c) The "undue adverse effects" test has been carried over to the NBA whereby aquaculture operations are constrained by their impacts on the fishing industry (cll 477-480). We consider that this should be removed and activities instead be considered on their merits and impacts on the environment, rather than seeking to protect existing sectors that arguably have more significant overall impacts.

88. Of particular importance will be provisions relating to the effects management hierarchy, especially their application to protected areas (notably significant biodiversity areas). We have concerns about the breadth of exemptions allowed to this hierarchy, as well as the potential for it to be used as a tool to offset and compensate rather than avoid adverse effects even when it *is* used.

89. We also have concerns about the use of "plan directed" alternative dispute resolution, and the potential for this to constrain access to justice in the courts for environmental advocates.

90. How the NBEB is intended to interact with the Climate Change Response Act remains unclear. In particular, while climate change mitigation is referred to as an outcome (among many others and not in hierarchy), the relationship between emissions reduction plans (ERP) and NBEB instruments (the NPF, plans and consents) is weak. For instance, plans must not be "inconsistent with" the ERP, and it is not mentioned specifically in consenting provisions.

The Spatial Planning Bill

91. Compared to the NBEB, the SPB is short and reasonably straightforward. We see no significant issues with its purpose, which includes assisting to achieve the purpose of the NBEB and providing for other "planning" legislation to be more integrated.

92. There should, however, be more specific recognition that regional spatial strategies must not be contrary to environmental limits or targets, not just that they must give effect to the NPF. This is important because some environmental limits (and the identification of places of national importance, including ONLs and significant biodiversity areas) may only crystallise in plans,[10] with the NPF simply providing direction for *how* they are to be set. Spatial strategies will no doubt need to be amended as NBE plans provide more detail about environmental constraints, so the direction of travel will need to work both ways (particularly in a transition period where the information needed to support protections in a spatial strategy may not exist until an NBE

[10] Indeed, for ONLs and significant biodiversity areas these are specifically required to be identifies in *plans*, not the NPF (only criteria for doing so are to be included in the NPF).

plan is prepared). Ideally, spatial strategies (which may well be more focused on infrastructure and development) would *follow* after the assessment of environmental constraints and limits in NBE plans.

93. It should also be clarified that being consistent with a regional spatial strategy does not require projects identified in that strategy to be classified as permitted or controlled activities, or necessarily to be eligible for fast track consenting. There should be no expectation of consent. While they might be anticipated in a spatial strategy, that does not mean that their effects will be acceptable from an environmental perspective. That is particularly important because the process by which they are identified in spatial strategies lacks the rigour of regulatory processes under the NBEB (including appeal rights).

94. We would also like to see more specific involvement by the Department of Conservation in the production of regional spatial strategies (it should be a permanent member of regional planning committees), as an advocate for nature.

95. It would also be useful to make provision for a *national* spatial strategy under the SPB (not just cross-regional strategies), to ensure that central government is able to take a coherent approach to environmental issues having a spatial component (like establishing biodiversity corridors to improve ecological connectivity) and to ensure nationally significant infrastructure projects (like wind farms) go in the right places.

96. Another potential issue is that plans made under the NBEB do not have to be consistent with a regional spatial strategy made under the SPB in certain circumstances. This is a positive thing if (for example) the NBE plan imposes new environmental limits based on updated information or new environmental harm. However, if there has been a "major economic event" (eg something requiring stimulation of the economy), this should not allow spatial protections embedded in the strategy to be undermined by a *less* protective NBE plan (a risk given the lack of hierarchy in the outcomes contained in cl 5 of the NBEB).

Concluding comments

97. While reform is necessary, and we think the Bills represent an improvement on many aspects of the RMA, our support is qualified. There are numerous aspects that require attention, most notably in the NBEB's framework for setting limits, targets and outcomes. We are confident that these can be addressed through the parliamentary process.