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Environmental Defence Society submission on the Natural and Built Environment Bill and Spatial Planning Bill

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1. Introduction

1. The Environmental Defence Society (EDS) thanks the Environment Select Committee for the opportunity to make a submission on the Natural and Built Environment Bill (NBEB) and Spatial Planning Bill (SPB).

2. EDS is a not-for-profit organisation dedicated to achieving good environmental outcomes for all New Zealanders. It is active in capacities as a litigator, a policy think tank, and a conference organiser. It has dedicated considerable resource over the past five plus years looking at the future of the resource management system in Aotearoa New Zealand. Phases 1 and 2 of this work were key inputs required to be considered by the Government's resource management independent review panel, chaired by the Hon Tony Randerson KC. The panel's recommendations, in turn, formed much of the policy basis behind the Bills currently before the Committee.

3. EDS has also been active in advising on various matters relating to the development of the Bills and wider resource management reform package. We are pleased to see that some of the concerns we have raised over the years have been addressed in the Bills, although a number of concerns remain outstanding.

4. Most of our comments relate to the NBEB, being the more complex regulatory statute and in our view the one in need of most attention. We outline the more detailed structure of our submission below. Throughout our submission we provide blue summary boxes that draw out key points. We intend to provide more detailed solutions in the form of specific tracked drafting changes at a later date.

2. Elements that we support

5. EDS supports the need for reform, and we see a clear case for change. The Resource Management Act 1991 (RMA) is no longer fit for purpose from an environmental standpoint.

6. The Bills in their current form need substantive improvements. With the reasonably targeted (although still, in some cases, substantively significant) amendments outlined in this submission, the Bills would represent an improvement on the RMA and would be supported by EDS.

7. EDS's overriding concern is that the Bills need to be fit for purpose in ensuring good outcomes for the natural environment. Ultimately, a thriving natural environment benefits people as well, given that we depend on it, not just for wellbeing, but for survival. It is critically important to recognise that, despite much rhetoric in the media around the cost saving and enabling aspects of the Bills, they are at their heart about protecting and enhancing Aotearoa New Zealand's natural environment. The NBEB, in particular, will be the country's core environmental legislation, and the Committee needs to think of it as such.

8. Despite the need for significant amendment, the passage of the Bills through the House should not be delayed. We consider that the shortcomings of the legislation can be addressed through the parliamentary process without having to go back to the drawing board.

The NBEB needs to be thought of as an environmental statute, not a development enabling statute. It has significant flaws that require correction. However, it is possible and desirable to do this through the parliamentary process, and the legislation should proceed.

9. Although they will reappear in more detail as we provide comment on the specific provisions of the Bills below, we wish to flag the following high-level elements of the Bills that we think are, conceptually, steps in the right direction:

   a. The recognition of environmental limits, beyond which environmental harm cannot occur.
   b. Mandatory targets for environmental restoration and improvement.
   c. A shift from managing the effects of activities to making things *better* (pursuing positive outcomes).
   d. A stronger framework for water conservation orders.
   e. A clearer allocation of responsibility for contaminated land.
   f. A philosophical shift towards making it clearer in plans (and in the law itself) what is and is not allowed, rather than relying heavily on consenting.
   g. The ability to cancel or review duration of consent as a result of non-compliance or where defence of environmental limits requires it, and to override existing use rights for similar reasons.
   h. Fewer plans and a more efficient plan-making process.
   i. More independent input when setting environmental safeguards.
   j. A more nuanced, graduated and robust system for compliance and enforcement (including restrictions on being able to use insurance to pay fines/penalties).

The reform bills have positive aspects that form reasonably strong "bones" compared with the RMA, and these should be retained.

3. High-level issues

10. We also wish to flag some conceptual or cross-cutting elements that are problematic and require attention at the big picture level. It is important to put our later comments on specific drafting issues in this context:

    a. The NBEB contains multiple mechanisms by which environmental protections (including supposedly firm environmental limits) can be undermined, particularly when it comes to large infrastructure projects;
    b. There is no clear hierarchy, or even relationship, between the multiple outcomes the legislation is trying to achieve, leaving potentially significant conflicts between environment and development to be resolved later on, and risking a system in which development pressures constantly push downwards towards minimum acceptable outcomes.
    c. There are too many undefined, conflicting and overlapping concepts that will require litigation. The NBEB needs to be simpler.
    d. There is too much scope for Ministerial discretion, especially when it comes to creating carveouts and exceptions to environmental protections.
    e. In many places the drafting is unclear and inconsistent, making the law hard to follow and understand.
    f. There are too few mechanisms by which decision-makers can be held accountable for failure to progress towards "making things better".

EDS's overall concern is that the reform Bills provide excessive opportunities for seemingly strong environmental protections to be undermined through exceptions, carve outs and unclear drafting.

4. The overall length and structure of the legislation

11. 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 and if itself, as an issue. Indeed, it is often preferable to provide certainty in primary legislation rather than relying on much longer, and less accessible, judicial interpretation through case law over time. Complex issues sometimes require complex law.

12. However, the NBEB is more complex than necessary, which is partly due to structural choices (eg related provisions being separated by hundreds of clauses),[1] repetitious provisions and an unnecessarily complicated (and often inconsistent) drafting style. For example:

    a. The NBEB provides for confusingly worded concepts like "exemptions to limits" and "limits to exemptions".

    b. Schedules 3 and 4 (dealing with offsetting and redress) use language in a loose and inconsistent manner (where "offsetting" is defined as a form of "redress", even though both concepts are meant to be quite separate steps on a hierarchy).

[1] Such as those related to protection of significant biodiversity areas and the framework by which exemptions to impacts on those areas are to be granted.

c. Terms like "sustainability", the "ethic of stewardship" and "compensation" are used without definition.

d. The definition of "usual consenting pathway" in cl 315(2) includes both the "standard consenting process" and (confusingly) the process for notices of requirement for designations, even though a designation is not a "consent".

e. While cl 56(1)(a) provides that the National Planning Framework (NPF) must "include strategic direction on … how decision makers are to achieve the system outcomes", cl 57(1)(a) then also provides that the NPF "must include content that provides direction … for each system outcome". While those may be subtly different things,[2] it is not obvious from the drafting what, if any, such differences are meant to be.

13. Instances of poor drafting and structural choices appear throughout our submission, but we flag here that careful attention needs be paid to how drafting can be simplified across the NBEB.

The NBEB uses drafting and concepts that are unnecessarily complex, overlapping and unclear.

14. We turn now to the structure of the NBEB in more detail. It is useful to outline first, in a snapshot, what its current structure looks like.

Part 1: Purpose and related matters (including listing multiple system outcomes).

Part 2: Duties and restrictions (what people must, and cannot without permission, do), including when existing uses can continue or must stop.

Part 3: The NPF (which includes the core provisions on environmental limits, targets, the effects management framework, and other things the NPF can contain and direct), and a link to Schedule 6 dealing with the process for preparing and changing the NPF.

Part 4: Natural and built environment plans (NBE plans) (what they must/can contain), and a link to Schedule 7 dealing with the process for preparing and changing those plans.

Part 5: The consenting framework (including standard and fast-track processes (and call in), decision-making criteria, and dispute resolution), and related "authorisations" like certificates of compliance, certificates of existing use, and permitted activity notices.

Part 6: Additional provisions relating to particular domains. This is necessary because such provisions relate only to those domains, and interact with, but are separate to, the more general planning and consenting framework. They include water conservation orders, freshwater farm plans, provisions relating to fertiliser use, and contaminated land (mainly focused on liability/responsibility for sites).

[2] In that strategic direction may relate to proactive or complementary non-regulatory measures, whereas "content that provides direction for each system outcome" may refer to more traditional RMA-style policies and/or rules.

Part 7: Provisions only relevant to the coastal marine environment, including:

Allocation framework for rights to apply for consent to occupy the coastal marine area;

Establishment of aquaculture zones (dealing with the relationship between NBE plans and the Fisheries Act); and

Coastal tendering (essentially, allocation of rights to reclaim, drain or extract material).

Part 8: Other matters "relevant" to NBE plans: designations and heritage protection orders (both familiar from the RMA), and the protection of places of national importance (new).

Part 9: Provisions specific to subdivision and reclamation (partly necessary because of the need to manage the intersection between resource management and property law systems).

Part 10: Outlining the functions, powers and duties of various public authorities, as well as subparts dealing with mana whakahono a rohe arrangements and the new Freshwater Working Group.

Part 11: Compliance and enforcement.

Part 12: Miscellaneous provisions (including a new framework for evaluation of system performance).

15. Much, but not all, of this resembles the basic structure of the RMA. However, we observe the following things about the NBEB's structure:

    a. The first 6 Parts of the Bill might be called the "general" planning framework, which for the most part applies to all activities/resources within the scope of the Bill. This sets out a logical cascade of instruments: from purpose and principles, to national direction, to plans, to consenting.

    b. Parts 10 (functions, powers and duties) and 11 (compliance and enforcement) are also of general application, as is most of Part 12 (miscellaneous provisions).

    c. Parts 7, 8 and 9 provide more targeted *additional* provisions for particular domains and places (contaminated land, coastal issues, subdivision, freshwater, protected areas) that sometimes do not connect well to the more general provisions concerned with planning and consenting.

16. We also note that the consenting provisions of the Bill are extensive, comprising sections 152-377, whereas most procedural provisions concerning NPF and plan making are instead contained in schedules. Consideration should be given to bundling up parts of the consenting provisions in one or more self-contained schedules to reduce the overall complexity of the Bill.

Consenting process takes up a large part of the Bill and much of this content would be better contained within schedules.

17. The first part of the structure of the NBEB makes sense. It is logical that the core normative provisions (purpose and principles) appear first. As in the RMA, it is then logical for a list of restrictions and duties to appear, followed by provisions relating to the cascade of regulatory instruments (NPF, NBE plans, and consenting). It would be more logical for designations to follow consenting provisions, as they effectively fill the same kind of place in the system (replacing the need for a land use consent), rather than being placed much later in Part 8.

Provisions concerning designations should follow those for consenting, in a new Part following Part 5.

18. Other parts of the structure of the NBEB are not intuitive. This is significant, not only because it makes the legislation less user-friendly (it is hard to figure out where to go to find all relevant provisions), but also because connections between different parts are not obvious (or are in some cases weak or entirely absent). For example:

    a. Quite general provisions about environmental "limits" (eg their purpose) are contained within Part 3 concerning the NPF, making it unclear whether specific provisions (eg rules) contained within NBE plans (including those designed to give effect to the NPF) are *themselves* also "environmental limits" (or whether they have some other legal status). The relevance of environmental limits extends well beyond the NPF, making their location in Part 3 an uneasy fit.

    b. General "resource allocation principles" in cl 36 (in Part 3) also seem an inappropriate fit for a part dealing only with the NPF. Those principles are relevant to allocation well beyond what the NPF does, including in plan making and consenting decisions (where most allocation decisions are likely to be made). They should be better integrated into Part 1 of the Bill.

    c. There is a requirement to set environmental limits for "indigenous biodiversity" under cl 38 (relating to the NPF), but a separate and additional requirement to identify and protect "significant biodiversity areas" (SBAs) in subpart 3 of Part 8 ("matters relevant to natural and built environment plans"). Because these are so disconnected, it is not clear whether SBAs are (or can be) themselves "limits" for biodiversity. The location of SBA provisions is also misleading, as the framework for protected areas like SBAs cuts across much more than just NBE plans (for example, there is a role for the NPF, and they are intimately linked to consenting because protections "bite" when there is an "activity").

19. More generally, it is not clear why Part 8, concerning matters relevant to NBE plans, is not integrated into Part 4 concerning NBE plans themselves (or a part immediately following that).

20. We address our substantive concerns about limits and targets further below, but for now note that this new system of "bottom line" environmental controls, as drafted, does not present as a coherent system. There should be a separate, dedicated part dealing with the framework for environmental limits and targets in an integrated way, so it is clearer how limits and targets are intended to work across all tools (not just the NPF, but also plans, consents and designations). We note that the exposure draft of the Bill had more content relating to limits and targets (eg their purpose and the things for which they need to be set) in its purpose and principles sections.

21. A separate Part for limits and targets should appear immediately prior to provisions concerning the NPF. This would give the system much clearer visibility and legal status. Provisions currently in Part 8 concerning SBAs (and other "environmental" places of national importance such as Highly Vulnerable Biodiversity Areas) should be more clearly linked to this new Part, because they are intended to be place-based limits (is strict protections).

Core provisions for environmental limits/targets, allocation, and protected areas should be found in more visible and cross-cutting places than at present. A dedicated Part 3A is needed for limit/target setting, which can then be cross-referenced in other provisions concerning the content of the NPF and plans, and protection of particular places like SBAs.

22. It makes sense for aspects of the coastal environment and subdivision/reclamation to have their own bespoke parts, as these require additional forms of management (including how subdivision interacts with the property law system). However, most of the provisions relating to the coastal environment in Part 7 (primarily concerning allocation methods for coastal space and other resources) could be integrated more closely into provisions concerned with allocation of resources more generally.

Many provisions concerned with the coastal marine area could be moved from Part 7 to more general provisions concerned with the allocation of resources in plans.

23. Part 10, concerning the general functions and duties of various institutions (eg Ministers, councils, planning committees, the National Māori entity), would be better placed much earlier in the Bill (as equivalent provisions are in the RMA). These are foundational sections (outlining what various parties have to do) and should precede provisions about the NPF and plans (which would then describe *how* they should do things).

24. It makes sense for compliance and enforcement to have its own dedicated Part, following the logical progression from purpose, restrictions, planning, and consenting. The enforcement functions of the Environmental Protection Agency (EPA) should be contained in the broader sections dealing with functions and powers of public authorities (currently in Part 10), which could then be cross-referenced in Part 11 concerning compliance and enforcement. It should be obvious, when looking at a Part concerned with institutions' functions, what all those functions are.

25. For the same reason, system evaluation should be highly visible in its own Part at the end of the Bill (located prior to "Miscellaneous" matters, rather than being subsumed within it).

26. Some other Part 12 matters should also be better integrated into other Parts and provisions, such as information and procedural principles (which would be better placed with the more general decision-making principles in cl 6).

The EPA's general functions should all be located in Part 10, rather than being split across Parts 10 and 11. System evaluation provisions should have their own dedicated Part. Information and procedural principles at the end of the Bill should be integrated into decision-making principles in cl 6.

27. In short, we consider that the structure of the Bill should roughly follow the logic of the policy cycle – the purpose (what is trying to be achieved), restrictions (what you cannot do), duties, functions, powers and responsibilities (what people and authorities have to do), the planning cascade (NPF, plans, consenting, other tools like designations, heritage orders, water conservation orders, freshwater farm plans), additional domain specific provisions where necessary, enforcement, evaluation, and miscellaneous.

28. We also 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, given that it provides a legal test) legalistic in its formulation. Yet the legislation needs some form of stable guide to interpretation anchored in the need to respond to the environmental crises facing our country. This would help people understand *why* there are 800 pages of detailed law.

5. More detailed comments on the NBEB

29. In this section of our submission, we structure our comments largely by progressing through the provisions of the NBEB in order.

30. Before we do so, we note several definitional matters that should be addressed.

    a. The definition of "cultural heritage" has some ambiguity when it comes to "architectural" qualities, and the extent to which this requires protection of amenity and character. There is also some uncertainty around the meaning of "cultural landscapes" which is not defined. Do these include, for example, volcanic cones and viewshafts? And how do they relate to strong restrictions on how scenic views can be considered elsewhere in the Bill (eg cl 108(b))?

    b. The definition of "infrastructure" specifically needs to encompass "green infrastructure" and "ecological infrastructure" which should also have appropriate definitions. It is vital that the provision of infrastructure (which has broad exemptions throughout the Bill designed to smooth the path to construction) is conceived of as including the basic life-supporting structures and networks that sustain people and ecosystems.

    c. The definition of "intrinsic values" needs to encompass the intrinsic value of threatened and protected species, not just the ecosystems of which they are a part.

    d. There is no need, and it is confusing, to define "polluter" in the interpretation section by reference to cl 424, as cl 424 defines polluter *only with respect to contaminated land*.

    e. "Natural environment" should not be defined with reference to "resources". It would be sufficient simply to list these things (eg land, water, air, soil and so forth).

    f. The definition of a "consent authority" should be constrained. At present, this is defined as a "local authority or other person". Presumably this is intended to encompass entities like consenting panels (which determine applications that are subject to the fast-track

consenting process) and public authorities to which councils can delegate their functions under cl 650. However, the broad definition leaves the concerning possibility that a consent authority could be a Minister. It should be clarified that this is not the case.

5.1 Part 1 - The NBEB's purpose and principles

31. Part 1 of the NBEB outlines its purpose and what might be called its core "principles" (what it is aiming to achieve, and what decision-makers must be guided by when making decisions). Clause 3 of the NBEB outlines the Bill's purpose.

32. The first thing to note before looking at the actual drafting of the purpose is that, like section 5 of the RMA, this provision has significant legal importance. Unlike some other statutes, where a purpose section or long title simply explains to the reader what the legislation does or why it has been enacted, cl 3 will be "operative", in the sense that at least some decision-makers[3] will be required to consider its meaning when making discretionary decisions.[4] Clear drafting therefore matters, to avoid the issues that have plagued the vague wording in Part 2 of the RMA and required years of litigation (still ongoing) to resolve in both the planning and consenting contexts.

33. If the purpose is not clear, it enables political discretion for tools in the legislation to be used in inappropriate ways. We have seen that under the RMA (for example, in the poor environmental outcomes allowed by the National Environmental Standards for Plantation Forestry).

It is important that the purpose of the NBEB is clear, because it will be a legal test and not just an aspirational statement.

34. The second thing to note is that the approach to purpose and principles under the NBEB is quite different to the RMA in a *structural* sense.

35. Part 2 of the RMA has a single purpose in section 5 (sustainable management) followed by "principles" in section 6 (matters of national importance to be recognised and provided for) and section 7 (other matters to be given particular regard). Essentially, sections 6 and 7 elaborate on the same content as the purpose of the Act, creating a form of hierarchy between core "protective" matters in section 6 and other matters (some protective and some not) in section 7. This has caused confusion, as it is not clear why some matters are in section 6, others are in section 7, and still others are found only in section 5. There has also been argument over why a number of "development" focused outcomes (eg housing) are not included anywhere, leaving their relative weight in decision-making unclear where conflicts with protective matters arise.

[3] Notably the Minister in preparing the NPF, but also planning committees and consent authorities if matters are not clearly provided for in the NPF or (in the case of consents) in plans.

[4] 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 or consents where national direction does not address a matter clearly), and in some cases it will directly shape decisions on resource consents (eg see cl 229(3)(b)).

36. The NBEB takes a different approach through Part 1. It has a purpose statement in cl 3, which introduces general concepts (like te Oranga o te Taiao). But instead of splitting its "principles" between two different sections with different weighting (like sections 6 and 7 of the RMA), it provides for three things:

    a. The first is a list of "system outcomes"[5] in cl 5. Essentially, these state in more detail what the Bill (and decision-makers under it) are seeking to achieve. System outcomes span some aspects of sections 6 and 7 of the RMA, but these no longer have a hierarchy. The list also includes many things on which the RMA was silent, including development-focused outcomes, meaning that its conceptual foundation is quite different from Part 2 of the RMA in two senses. First, it aims to pursue positive change rather than just manage adverse effects. Secondly, it expressly invites conflicts between environmental and development outcomes to be balanced and resolved by planners. Curiously, the Bill now has three express (albeit high level) principles relating to resource allocation (sustainability, efficiency and equity), but these are buried among provisions relating to the NPF rather than included in cl 5 outcomes.

    b. The second element of Part 1 is the decision-making principles in cl 6. These are not about the substantive outcomes to be pursued, but rather the *ways* in which the Minister and planning committees must pursue them (eg to do so in a precautionary manner, to consider cumulative effects, and to provide for integrated management). These do not have a clear equivalent in the RMA, where such principles tend to be embedded in the matters in sections 6 and 7 or elsewhere.[6] The decision-making principles in the NBEB are complemented by procedural and information principles, inappropriately located at the back of the Bill (in cl 804 and cl 805).

    c. The third core element is the framework for environmental limits and associated targets. These are designed to be hard lines in the sand beyond which further environmental harm cannot occur (or, for targets, lines that need to be achieved in the future). Surprisingly, the need to comply with limits and associated targets is recognised in the *purpose* of the Bill, but, unlike outcomes, the actual framework for limits (their purpose and what they must cover) is, as mentioned earlier, included in Part 3 concerning the NPF rather than Part 1.

       The RMA had no clear equivalent for limit setting. Some limits were inferred by interpreting the word "while" in section 5 in a strict manner, while others have been inferred from directive policies that use the language of "avoiding" adverse effects. Explicitly tying the purpose of the NBEB to the need to comply with limits and targets, and making these a new legal concept, is a positive step forward.

37. A fourth normative element of Part 1 is the te Tiriti o Waitangi clause (cl 4). This now requires all persons exercising powers, duties and functions under the legislation to *give effect to* the principles of te Tiriti (as opposed to *have regard to* under the RMA).

    a. As under the RMA, the relationship between this clause and the broader purpose and principles/outcomes is left unclear. The Conservation Act 1987, which uses the same

[5] meaning outcomes listed in the primary legislation, as opposed to framework outcomes created in the NPF.
[6] Or, in the case of precaution, not at all.

wording of *give effect to*, demonstrates how leaving this relationship unclear can cause considerable issues, delays and legal action when it comes to creating planning instruments and assessing consent applications (or concessions in the case of the Conservation Act).

b. In the NBEB, leaving the relationship unclear could cause problems when it comes to setting environmental limits (eg can te Tiriti principles influence where limits are set, despite their clear statutory purpose?) and making allocative decisions given that the Bill now includes express allocative principles (eg what if there is tension between efficiency, equity, sustainability and te Tiriti?).

c. In our view it should be clarified that environmental limits and enhancement (ie associated targets) are a *mechanism* for upholding the principles of te Tiriti (as long as correct processes involving mana whenua have been observed), rather than something to be challenged under cl 4. We do not comment on the implications of cl 4 for allocation of resources and consider that this a matter to be resolved between Māori and the Crown (indeed, there is a process in cl 689 and following with respect to freshwater allocation).

The structure of Part 1 of the NBEB is quite different to the equivalent Part 2 of the RMA. Rather than a purpose followed by a hierarchy of (essentially) things to be protected in sections 6 and 7, it has a purpose followed by (1) a non-hierarchical list of protective and development outcomes and (2) a set of decision-making principles. The purpose also refers to the setting of environmental limits, but this is explained elsewhere in the Bill. The NBEB's te Tiriti clause is also stronger than the RMA.

5.2 The NBEB's purpose clause

38. The NBEB's purpose is quite different to that of the RMA. While we are supportive of moving away from the "sustainable management" purpose of the RMA (for reasons outlined in our previous resource management reform policy work), we see issues with how the purpose of the NBEB has been drafted.

39. Despite the use of the singular word "purpose", the NBEB actually has dual purposes in subclauses (a) and (b), separated by the conjunction "and". These are (with our emphases in bold) 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.

40. 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.[7] 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".

41. Subclause (b) is quite new, with its legal relationship with (a) left unclear. Interestingly, te Oranga o te Taiao is not defined in the purpose section (as it was in the earlier exposure draft of the Bill), but n the interpretation section, reducing the visibility of what is a fundamental pillar of the legislation. 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.

42. While a dual purpose is not unprecedented (eg it can also be found in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act)), it adds uncertainty that is likely to require litigation to resolve.[8] As well as including 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 the two purposes in (a) and (b).[9] It is unclear what this means in practice (eg do both purposes have to be complied with to be lawful?).

43. There is also considerable overlap between the concepts contained in these two purposes (eg the "health of the natural environment" in te Oranga o te Taiao and outcomes for the "benefit of the environment" in cl 3(a)), making the relationship even more opaque.

> The language and concepts used in the purpose of the NBEB are vague and overlapping. They will create uncertainty and invite litigation and conflict.

44. Because the RMA has been criticised as being reactive (addressing harm only when activities are proposed rather than actively improving environmental wellbeing), it is interesting that the NBEB has included "protection" in the chapeau of cl 3(a). Presumably this is to recognise that the point of the legislation is partly to proactively *do* protection, rather than just managing adverse effects. That is a positive step.

45. However, simply inserting "enabling… protection" alongside use and development is an awkward way to achieve this, for three reasons:

    a. It invites yet another relationship to be argued over (how does one enable use, development "and" protection where those things come into conflict?).

[7] A difference is that "protection" is also enabled.
[8] More conflicts are likely in the contexts to which the NBEB applies.
[9] The dual purposes of the EEZ Act are clearer, in that the pollution prevention purpose more clearly applies to particular activities (discharges and dumping), whereas the NBEB's purposes have considerably more overlap.

b. The imperative is really to *ensure* protection and enhancement of the natural world, not to *enable* it alongside development. 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 2002 to "enable" the provision of core public services.

c. The structure of cl 3(a) is geared towards *constraining* the things enabled in the chapeau (use and development) by protecting the things in (i)-(iv). The Bill should not be constraining environmental protection as its core purpose; current drafting implies that "protection" of the environment 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, given that the definition of "environment" includes people and communities), and complies with targets associated with limits (which could, perversely, constrain protections from going *beyond* those associated with minimum levels of ecological integrity).

46. The phrase "promotes outcomes for the benefit of the environment" is also awkward. Again, while deeper reformulation of the purpose is needed, it would be cleaner for such a provision to simply refer to "promoting outcomes" identified under relevant clauses elsewhere in the Bill (eg cl 5). Otherwise, it may invite endless arguments about whether outcomes are "benefiting" the environment or not, and the extent to which this term is referring to the natural environment or the broader environment (eg buildings, infrastructure, people and communities).

47. The conjunction "in a way that" in cl 3(a) is not as strong as it should be. For one, it 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 (ONLs) that need to be avoided). While we think deeper redrafting is required, failing that, the wording should be one of hierarchy, such as "as long as" or "provided that".

The inclusion of "protection" in the chapeau of cl 3 creates confusion and does not work, nor does the phrase "promoting outcomes for the benefit of the environment". The key phrase linking development and protective considerations ("in a way that") is not strong enough. Drafting improvements are required, and we will be providing this in due course.

48. Aside from its relationship with other parts of the purpose, we have concerns about how the concept of te Oranga o te Taiao has itself 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 something like the "kaitiaki" relationship would be more appropriate. Kaitiakitanga is already defined in the Bill and its meaning has been traversed through case law under the RMA.

49. Moreover, the breadth and generality of te Oranga o te Taiao leaves it open to interpretation, begging the question – *who* will be charged with interpreting it? Clarification could be included in an overarching layer of the NPF, but the Bill also provides for "te Oranga o te Taiao statements" to be prepared by tangata whenua. Such statements are appropriate as a means for iwi and hapū to influence decisions, but they create some uncertainty about the relative

weight to be given to different interpretations of the concept and the ability of the courts to pronounce upon it.

The concepts within te Oranga o te Taiao are too broad and vague, and risk undermining the protective intent of the reforms.

50. In summary, we see two kinds of issues with the NBEB's purpose: (1) in places it is vague and there are considerable overlaps between its concepts; and (2) it introduces multiple, insufficiently directive conjunctions that create uncertain relationships between its different elements. That triples the potential for argument seen under the RMA, which has been focused on the single term "while".

51. 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 those things. Other principles could then elaborate on that (eg inter-generational equity), but a purpose outlining a clear legal relationship is needed, not "word soup" that allows fertile ground for litigation (and the inequality of resources that often brings).

52. The Bill's purpose should then be followed by a clause outlining the *ways in which the Bill will achieve the purpose*, linking it to the operative mechanisms in the legislation (eg setting environmental limits, establishing binding targets, and enforcing regulatory requirements). That would give a clear line of sight between the purpose and the deployment of tools to achieve it, while making the complex machinery of the Bill in the following 800 pages (how it works) much more transparent up front.

53. As mentioned earlier, we intend to provide specific recommendations for drafting at a later date.

A simpler and stronger purpose statement is required, modelled on the hierarchy in te Mana o te Wai. It should be followed by a clear indication of *how* that purpose is to be achieved, including by requiring compliance with limits, pursuing positive outcomes, and protecting particular high value areas.

5.3 System outcomes

54. As described above, one core part of the purpose of the NBEB is to enable use, development and protection that "promotes outcomes". There are three kinds of outcomes contemplated by the Bill: system outcomes (those listed in cl 5), framework outcomes (those to be contained in the NPF) and plan outcomes (those to be contained in NBE plans).

55. System outcomes are the starting point for the more specific outcomes that can be contained in the NPF and plans. Clause 5 is reproduced below. As mentioned earlier, this is quite different from sections 6 and 7 of the RMA, in that it includes both protective and development/use focused outcomes.

5 System outcomes

To assist in achieving the purpose of this Act, the national planning framework and all plans must provide for the following system outcomes:

(a) the protection or, if degraded, restoration, of—

(i) the ecological integrity, mana, and mauri of—

(A) air, water, and soils; and

(B) the coastal environment, wetlands, estuaries, and lakes and rivers and their margins; and

(C) indigenous biodiversity:

(ii) outstanding natural features and outstanding natural landscapes:

(iii) the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins:

(b) in relation to climate change and natural hazards, achieving—

(i) the reduction of greenhouse gas emissions:

(ii) the removal of greenhouse gases from the atmosphere:

(iii) the reduction of risks arising from, and better resilience of the environment to, natural hazards and the effects of climate change:

(c) well functioning urban and rural areas that are responsive to the diverse and changing needs of people and communities in a way that promotes—

(i) the use and development of land for a variety of activities, including for housing, business use, and primary production; and

(ii) the ample supply of land for development, to avoid inflated urban land prices; and

(ii) [sic] housing choice and affordability; and

(ii) [sic] an adaptable and resilient urban form with good accessibility for people and communities to social, economic, and cultural opportunities; and

(d) the availability of highly productive land for land-based primary production:

(e) the recognition of, and making provision for, the relationship of iwi and hapū and the exercise of their kawa, tikanga (including kaitiakitanga), and mātauranga in relation to their ancestral lands, water, sites, wāhi tapu, wāhi tūpuna, and other taonga:

(f) the protection of protected customary rights and recognition of any relevant statutory acknowledgement:

(g) the conservation of cultural heritage:

(h) enhanced public access to and along the coastal marine area, lakes, and rivers:

(i) the ongoing and timely provision of infrastructure services to support the well-being of people and communities.

56. Our primary concern is that this list has no internal weighting or hierarchy. A diverse range of potentially conflicting outcomes must all be "provided for", with any conflicts to be resolved with a high degree of political discretion in the NPF or plans. With a vague purpose statement in cl 3 (see earlier), it is not clear how that discretion is meant to be exercised. 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 blighted the RMA for 20 years, where there is discretion to outweigh environmental wellbeing by short term economic opportunities. This inevitably leads to persistent environmental degradation.

57. Environmental limits are meant to be a separate mechanism to guard against trade-offs that produce environmental degradation, preventing harm beyond a certain point. However, there are shortcomings in the Bill's system of environmental limits and targets (discussed in the following section of our submission).

58. Moreover, even if these shortcomings are rectified and a proper system of environmental limits holds firm,[10] those limits ultimately only represent the *worst acceptable outcome*. A list of outcomes, in contrast, is about the things that need to be improved. 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 environmental bottom (a constant push downwards to limits).

59. Creating a legal hierarchy in outcomes would be one way to do that. This could be achieved by replicating the distinctions between sections 6 and 7 of the RMA, requiring some matters to be recognised and provided for and others to be given particular regard. Alternatively, some outcomes, such as the protection and restoration of the ecological integrity of various domains in cl 5(a), could be "secured" or "ensured" whereas others could be "provided for" or "pursued".

60. This clearer hierarchy could, for some things, better reflect the machinery of the Bill (what it does in practice). For example (as discussed later in our submission), the Bill prevents more than trivial impacts on ONLs unless an exemption is granted. Although these provisions require attention for other reasons, they still represent a relatively strict approach to ONL protection that is not captured in the outcomes listed in cl 5 (where, on the face of it, the protection of ONLs can be traded off against things like housing supply and rural development).

61. It is also curious that all outcomes in cl 5 are said to be equal, yet broad exemptions in the machinery of the Bill are essentially allowed only from obligations to provide for protective outcomes. For example, exemptions can be granted from the obligation to protect ONLs, areas of significant biodiversity, and environmental limits (which protect ecological integrity),

[10] As discussed below, the Bill defines limits as being the current state of the environment at the point of enactment, so in many cases these limits will be *worse* than the minimum acceptable outcome. A system of minimum level targets therefore is provided for, but this also has weaknesses.

all of which are important outcomes listed in cl 5. But there is no equivalent mechanism by which an exemption can be granted to the obligation to provide for things like the ongoing provision of infrastructure (eg if it would fail to enable managed retreat), or the ample supply of land for development (eg if it would impact on ONLs, particularly in places like Queenstown). This risks creating an unbalanced playing field between cl 5 outcomes in practice, because numerous "one off" legal pathways are created for environmentally harmful activities to undermine protective outcomes, but not (with the limited exception of application-based water conservation orders) for protective measures to override development outcomes.

62. Significant weight also needs to be given to climate change adaptation relative to other outcomes (notably urban development). This has been vividly highlighted by the recent Auckland floods and widespread impacts of Cyclone Gabrielle. As discussed later in our submission, it is by no means clear that there is a sufficiently directive approach to extinguishing or altering existing use rights in areas vulnerable to climate change (eg flooding, slips and erosion). Such powers do not have to be used (there is a lot of discretion), and there are constraints on what they can achieve without associated compensation. It is also unclear whether adaptation measures can be reflected in "limits" that must be complied with in plans and consents (and even if they can,[11] these are not *mandatory* limits).

63. It is also important to recognise that adaptation is not just about ensuring that vulnerable activities (eg residential development) are located out of harm's way. It is equally important to ensure that the impact of other activities on those that are vulnerable, due to the increasing impact of climate change, is reduced or removed. In particular, the clearfell harvesting of plantation forestry (and consequent destabilisation of soils and presence of forestry slash) should not be allowed in catchments/locations where it will create unacceptable risks to downstream communities and economic activities such as farming.

64. All this means that there needs to be a very clear direction in cl 5 system outcomes that the NPF and plans must achieve effective adaptation to climate change risks. At present, the lack of hierarchy in cl 5 means that plan makers could still choose to prioritise the provision of *new* housing and infrastructure (eg in vulnerable coastal areas or floodplains) over climate resilience, and choose not to use new powers to extinguish *existing* use rights (which may be politically and financially challenging). There is no strong legal push to address the issue, and our view is that the political drivers will be insufficient to spur action until it is too late. This is evidenced by the current situation where new housing is still being built in floodplains including within the Auckland region.

65. Indeed, where existing communities are vulnerable to climate change and need to be moved or altered, cl 5(i) (providing for the "ongoing" provision of infrastructure) may directly conflict with cl 5(b)(iii) (which aims to reduce risks from the effects of climate change). A trade-off approach to adaptation is no longer acceptable, especially given the very real consequences to life and property from flooding which we have seen recently in Auckland and elsewhere.

[11] In other words, if adaptation measures fall within the "purpose" for which limits can be set under cl 37, which include protection of human health and preventing declines in ecological integrity.

66. As discussed later in our submission, changes to cl 5 need to be accompanied by much more directive provisions when it comes to plan making (when prohibited activity status for development must be conferred and when permitted status cannot be conferred), consenting (when consent cannot be granted), and the review/cancellation of existing consents and existing use rights (to facilitate managed retreat).

67. There also needs to be a stronger recognition that *synergies* between different outcomes are to be pursued or preferred where practicable. At present, cl 57(1)(b) requires the NPF to include content that provides direction "for the resolution of conflicts about environmental matters, including those between or among the system outcomes". This invites political prioritisation of outcomes rather than legal direction to ensure (or even encourage) that multiple outcomes are achieved at the same time. For example, this approach could see:

    a. The perpetuation of traditional modes of infrastructure (eg concrete pipes) at the cost of ecological wellbeing, rather than encouraging nature-based solutions (eg wetland planting and "sponge cities") that can provide the same services while improving environmental outcomes.

    b. The protection of urban trees being traded off in the interests of increasing housing supply, in an effort to minimise costs (eg where established trees are in awkward positions on a site slated for intensification).

    c. The economic benefits of intensive dairying and irrigation outweighing the imperative to restore ecological integrity, rather than primary production shifting to modes that can actually enhance ecological systems (regenerative farming).

    d. The need to improve the resilience of the "environment" (which includes the built environment) to climate change risks being used to justify the construction of seawalls rather than enabling managed retreat and the preservation of coastal margins and their habitats.

68. In short, synergistic approaches, where nature and people both benefit, could see a transformation in *how* industries operate, not just whether existing modes of doing things should take priority over the harm they cause. In fact, such a transformation is imperative if Aotearoa New Zealand is to retain a healthy natural environment. For example, there are significant synergies between urban tree cover and housing intensification, and these two things are by no means incompatible if they are planned well together.[12]

Clause 5 outcomes need a hierarchy in which core protective considerations receive more weight than other matters. There also needs to be strong recognition of the need to seek out and prefer synergistic outcomes, where environmental and human wellbeing are both promoted. Otherwise, the risk is that decisions balance economic considerations against environmental ones and push constantly downwards on an already fragile system of limits, leading to persistent environmental degradation.

[12] See Denser and greener cities: Green interventions to achieve both urban density and nature - McDonald - 2023 - People and Nature - Wiley Online Library

Particularly important will be the elevation of measures to adapt to climate change/natural hazards, to make plain (1) that new development/activities (whether through permitted activities enabled by zoning or consenting decisions) strictly cannot occur in high hazard zones, and (2) that existing uses that are at high risk must be altered or extinguished in a way that addresses the risk (including through managed retreat).

69. We have concerns that cl 5 does not adequately address urban outcomes (including environmental outcomes in urban areas). We understand that the term "amenity", contained in the RMA, has been deliberately avoided because of its association with NIMBY arguments against urban change and intensification. That motivation is understandable. However, we do not think that "well functioning urban and rural areas that are responsive to the diverse and changing needs of people and communities" and "an adaptable and resilient urban form", among other things, adequately reflect the kinds of concerns that make urban planning an important discipline or cities liveable.

70. As we discussed in our previous work on resource management reform in the urban context, there should be recognition of principles of good urban design, including their importance for environmental enhancement and climate change adaptation in cities.[13] The lack of such principles has been a criticism of the RMA and should be remedied, not made worse, under the NBEB. Urban planning is about much more than providing housing and infrastructure.

71. More specifically, we have concerns that removing amenity from cl 5 ignores some particularly vital aspects of the concept. Amenity is about much more than preserving low density suburban streets and preventing change. It also encompasses issues around how people experience a place, including aspects like odour and noise that can be deleterious to human health (as well as to other species). We find it anomalous, for example, that there remains a specific duty to avoid unreasonable noise in cl 15 of the NBEB and yet there is no associated normative direction in cl 5 (ie there are no outcomes dealing with noise other than the general "well-functioning urban areas"). Environmental limits also do not have to be set for noise under cl 38, even though such limits would fall squarely within the purpose of protecting human health.[14] This leaves a significant hole.

72. The absence in cl 5 of system outcomes relating to odour is even more anomalous, especially because there does not appear to be an equivalent general duty in the Bill to avoid unreasonable odour (as there is in cl 15 for noise). Odour is one of the most frequent causes of complaint under the RMA, in both urban and rural contexts, and needs to be clearly recognised in system outcomes (and therefore in what plans are compelled to deal with). Recreation and the amenity values of the natural environment (eg green space) are elements that are conspicuous by their absence from the NBEB. This will impact on the ability of people

[13] https://eds.org.nz/resources/documents/reports/reform-of-the-rm-system-the-urban-context-summary-report/

[14] In fact, more broadly, there is no clear authorising mechanism through which environmental limits to protect human health can be made unless they are made for an "aspect of the natural environment", leaving the issue of noise somewhat vague – is noise in an urban environment part of the natural environment or not?). Of course, rules and standards can clearly be made to control noise under cl 15, but such provisions do not have the legal status of a "limit", which may be important (eg consents cannot be issued *contrary to* a limit).

to advocate for important outcomes in planning processes, since there are few obvious hooks on which to base such arguments.

73. The removal of "amenity" from cl 5 outcomes and the definition of "environment" also creates uncertainty about the relationship with other provisions that have been copied over from the RMA, and which recognise the importance of some aspects of amenity. For example, assessments of environmental effects, under cl 7 of schedule 10, have to identify effects on resources having "aesthetic", "recreational" or "other special" value. These fit squarely within the definition of the environment under the RMA but have been excluded from the NBEB's definition of environment. Thus, although such effects must be identified under schedule 10, it is arguable they cannot then be given weight when considering consent applications against the policies and outcomes in a plan (which cannot engage with them).

74. Similarly, cl 112 allows environmental contributions to be required by a rule, including for the purpose of providing an incentive for "good environmental design". This creates a conflict, given that cl 5 deliberately eschews reference to such things. And while under cl 700(1) the Environment Court is still empowered (as under the RMA) to issue enforcement orders requiring a person to cease an activity having an adverse effect on the "environment", the removal of amenity and aesthetic conditions from that definition calls into question the lawfulness of any order that sought to stop things like the build-up of rubbish on private property, the display of offensive symbols, or potentially even the creation of noise or odour. We consider that such terms should be reinstated both in the definition of environment and as a cl 5 outcome. The term "amenity" could then be defined in a way that excluded more targeted things, such as arguments against urban change/renewal/intensification.

75. The definition of ecological integrity should also be amended, given that its protection and enhancement are core elements of cl 5. Ecological integrity is defined as:

> 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.

76. In particular, the "ability" to maintain various aspects of ecosystems is not strong enough. An ability to do so is by no means the same thing as *actually* supporting and maintaining it, and it potentially implies the ability to do so *in the future* (eg through offsetting and compensation/redress) rather than now, inviting degradation in the meantime.

77. We consider that the statutory "hook" provided for Fish and Game to litigate under the RMA, focused on the habitat of trout and salmon, should be retained in modified form. As explained further in our forthcoming report on environmental advocacy settings needed to support the new system, it is important that the hook continue to support the advocacy function of Fish and Game as a key freshwater advocate. Game fish generally require high levels of water quality, which, in effect, acts as a specific and measurable metric. To ensure that the tension

between indigenous and introduced species can continue to be worked through, a new statutory hook in cl 5 should be focused on levels of environmental quality that would be necessary to protect the habitat of trout or salmon, not the protection of the habitat/fish per se.

78. The drafting of other terms in cl 5 should also be amended. In particular:

a. Clause 5(c)(i) should refer to "purposes" rather than "activities", as land can be used for things (eg environmental restoration) that do not always involve people "doing" activities on it.

b. Clause 5(c)(ii) should refer to "development capacity" rather than "land", as the latter may imply a *larger* physical envelope of land supporting urban sprawl, rather than increasing land supply through intensification. Development capacity is already defined and well understood in the NPS for Urban Development.

c. The "supply of land for development" should refer only to *urban* development, to ensure it is not used to justify the release of more land for any kind of development (eg clearance of indigenous cover for intensive agriculture).

d. Clause 5(c) should have an additional sub-clause highlighting the need for "opportunities to enhance ecological integrity/environmental wellbeing" and "people and communities' connection to nature and green space".

e. In cl 5(d) the "availability of highly productive land for land-based primary production" should not be used as a justification for expansion of intensive primary production into areas where it is not suitable for environmental reasons; instead, it should refer to the actual issue of protecting productive land *from urban and lifestyle encroachment*.

79. We have concerns that "infrastructure services" in cl 5(i) is too broad, as infrastructure is defined as including structures required to support the functioning of communities. For rural communities, that could arguably include provision of things like irrigation infrastructure that can support the economic wellbeing of rural communities at the expense of the environment.

80. Finally, we consider that the list of outcomes in cl 5 should include fulfilling the country's international obligations with respect to environmental protection.

The wording of some outcomes in cl 5 requires amendment to make them more targeted. Additions are needed too, including principles of good urban design, aspects of amenity like noise and odour, and levels of freshwater quality necessary to support habitats of trout and salmon.

5.4 Decision-making principles

81. Clause 6 of the NBEB provides a number of decision-making principles. These are about *how* decisions are made, rather than the outcomes being sought by decisions.

82. We support the inclusion of decision-making principles but have concerns about how they have been drafted and what is included and excluded. Clause 6 provides as follows:

6 Decision-making principles

(1) To assist in achieving the purpose of this Act, the Minister and every regional planning committee, in making decisions under the Act, must—

(a) provide for the integrated management of the environment; and
(b) actively promote the outcomes provided for under this Act; and
(c) recognise the positive effects of using and developing the environment to achieve the outcomes; and
(d) manage the effects of using and developing the environment in a way that achieves, and does not undermine, the outcomes; and
(e) manage the cumulative adverse effects of using and developing the environment.

(2) If, in relation to making a decision under this Act, the information available is uncertain or inadequate, all persons exercising functions, duties, and powers under this Act must favour—

(a) caution; and
(b) a level of environmental protection that is proportionate to the risks and effects involved.

(3) All persons exercising powers and performing functions and duties under this Act must recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of te taiao in accordance with the kawa, tikanga (including kaitiakitanga), and mātauranga in their area of interest.

83. 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 and had to be inferred through case law. However, this should be formulated in the same way as under section 34 of the EEZ Act, where it has proven reasonably robust through interpretation in the courts: "If, in relation to the making of a decision under this Act, the information available is uncertain or inadequate, [persons] must favour caution and environmental protection."

84. The principle would also benefit from a reference to *risk* and not just *uncertainty* in information. Information can be adequate and clear, but substantial risk of harm can remain.

The precautionary principle in the Bill should be modelled on that in the EEZ Act, and include reference to risk as well as uncertainty.

85. We 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 (including various forms of use and development). The clause is particularly inappropriate because there is no equivalent decision-making principle requiring the positive effects of protecting and enhancing the environment, to achieve the outcomes, to be recognised.

86. We also 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 extremely broad and could be used to justify environmental degradation despite other protective provisions (including environmental limits). The wording is highly directive and not subject to provisions that allow other things, like the list of outcomes, to have conflicts resolved through the NPF or NBE plans.

87. Clause 6(3) is also unclear in scope, in that it potentially could be interpreted as directing the transfer of the decision-making/regulatory power of planning committees under cl 650.[15] Such things are appropriate in the right circumstances to give effect to the principles of te Tiriti, but should be done in a clearer way. If the intention is for cl 6(3) and cl 650 to be linked, that should be made plain.

88. More broadly, we are not convinced that much of cl 6 is needed at all. It should include truly cross-cutting principles concerning *how* decisions are made (including integrated management, cumulative effects, and precaution), but not act as a back door to substantive arguments about what *outcomes* receive more weight. We get the impression that it is being used here inappropriately as an opportunity to strengthen the direction with respect to development outcomes.

Clause 6 decision-making principles need to be more narrowly focused and should not be used as a way to reinforce the development outcomes already provided for in cl 5 outcomes. It needs to be clarified what cl 6(3) means in practice when it comes to transfer of planning committee powers, and how it relates to associated environmental obligations.

89. A more general polluter-pays principle should be included in cl 6, 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 made responsible for pollution generated by them. That includes where environmental impacts have tangible impacts on health (such as air pollution), when it comes to determining who pays for cleaning up waterways, and where the coastal environment and communities are impacted by slash, erosion and sedimentation generated by forestry activities (as has happened on several occasions in Tairāwhiti). A polluter-pays principle should be linked to a legal cause of action to obtain compensation for those impacted by pollution).

90. Clause 6 should also include a new principle of non-regression; whereby once higher environmental standards have been achieved (eg through achieving minimum level targets) they cannot subsequently be breached unless there is some kind of robust public interest test met. This is particularly important when it comes to environmental limits, as discussed further below in our submission.

91. The principle of environmental justice should also be more clearly spelt out either in cl 6 or cl 5. This should recognise that it is unjust for environmental degradation to be concentrated in areas of high deprivation or vulnerability. If it is not included, there is a risk that the ability to

[15] This may in fact be the intention, since cl 650(3)(c) does not apply to transfers to iwi or hapū. Clause 650(3)(c) outlines the reasons that a transfer of powers can be allowed, including the transferee representing the appropriate community of interest, greater efficiency, and technical or special capability or expertise.

"average out" harm, when setting and assessing compliance with environmental limits, could see significant variation in environmental quality between different communities (see later in our submission on limits).

Clause 6 should have three additional principles included: a polluter-pays principle of general application, a principle of non-regression, and the principle of environmental justice.

5.5 Duties and restrictions

92. Clauses 13 to 16 of the NBEB outline duties applying to all persons when "carrying out activities under this Act". Some of these reflect those in the RMA, while other elements are new. (We note that broader functions, duties and powers of *public authorities* are contained later in the Bill). Clauses 13 and 14 provide:

> **Subpart 1—Duties applying to all persons when carrying out activities under this Act**
>
> **13 Environmental responsibility**
>
> Consistently with the ethic of stewardship, every person has a responsibility to protect and sustain the health and well-being of the natural environment for the benefit of all New Zealanders, including as required by in section 14.
>
> **14 Duty to avoid, minimise, remedy, offset, or provide redress for adverse effects**
>
> (1) Every person has a duty to avoid, minimise, remedy, offset, or take steps to provide redress for any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with—
>
> (a) any of sections 26 to 30:
> (b) any applicable limits or targets:
> (c) a framework rule, a plan rule, a resource consent, or a designation.
>
> (2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.
>
> (3) However, subsection (2) does not limit the following powers:
>
> (a) the power conferred by section 700 to make an enforcement order:
> (b) the power conferred by section 708 to serve an abatement notice.

93. It is positive that there is, under cl 13, a new "environmental responsibility" on every person to protect and sustain the health and wellbeing of the natural environment. We note that it is unclear how (or whether) this will make an impact in practice or be enforceable, as (despite the heading of subpart 1 of Part 2) this is framed as a "responsibility" rather than a "duty". However, its presence is positive. To simplify the concept, the phrase "consistently with the ethic of stewardship" could be removed.

Clause 13 is a positive step and should be retained in a simplified form.

94. Under cl 14, the phrase "take steps to" provide redress should also be removed, as the duty seems somewhat pointless if the steps taken to provide redress do not actually provide it. More broadly, we have concerns that providing a minimum level duty to provide redress is too weak. This has potential to allow someone to purchase the right to have adverse effects on the environment rather than counteracting the actual harm. This will lead to ongoing environmental degradation. Reference to redress should be removed from cl 14.

95. While the continuation of the RMA's general duty on all persons to address adverse effects, in cl 14 of the Bill, is positive, its enforceability should be strengthened. At present, the duty is not of itself enforceable against any person, and no one is liable to any other person for a breach of it. While abatement notices and enforcement orders can be issued (as under the equivalent RMA duty), the ability to take direct action in the courts should be extended to selected environmental groups (for example, those listed in Covid-19 fast track consenting legislation) and those whose health has been directly impacted by breaches of the duty. We note that the right for individuals to ask their governments for compensation over health damages due to air pollution is currently being discussed at the European Union level, as part of a wider revision of the bloc's air quality and industrial emission rules.[16]

Clauses 14 is positive and should be retained with some drafting changes (including removing the word "redress" from the duty). However, the enforceability of the general duty in cl 14 should be strengthened, allowing action to be taken by selected environmental groups and those actually impacted by adverse effects.

96. With respect to clauses 17-25, which impose restrictions on various activities and largely mirror the RMA, we consider the drafting broadly appropriate. That said, we note the following things:

a. It is notable that the RMA only restricts the removal of natural material from the *common marine and coastal area*, whereas the NBEB restricts this from *all* the coastal marine area (under cl 19(1)). This is positive, as it recognises the public interest in private marine title.

b. It is interesting that a number of restrictions in the clauses say that activities cannot occur unless expressly allowed by a "plan rule". The RMA takes a slightly different approach: they cannot occur unless expressly allowed by a "rule in a regional plan *as well as* a rule in a proposed regional plan for the same region (if there is one)". Under the NBEB, a plan is defined as *including* a proposed plan, but the meaning of the provisions are still subtly different; by referring to compliance with "a" plan rule, it means people can pick and choose a rule in a plan (either an operative or proposed one). This undermines the intent of having proposed plan rules taking legal effect from the point of notification if people can still point to an operative rule that is more lenient.

[16] See Brussels aims to flip burden of proof for some pollution lawsuits – POLITICO; Procedure File: 2022/0104(COD) | Legislative Observatory | European Parliament (europa.eu); Procedure File: 2022/0347(COD) | Legislative Observatory | European Parliament (europa.eu)

c. With respect to restrictions on harmful substance discharges in the coastal marine area, it is notable that cl 24(2)(b)(iv) now refers to impacts on "life", not just on "aquatic life" as in the RMA. That is a positive thing, not least because it encompasses human life.

d. We consider that in cl 24(2)(b) and cl 24(4)(b), the term "reasonable mixing" should be removed. There should be an expectation that express authorisation is required (via consent or permitted activity status) where there is likely to be significant effects on life (including human life), irrespective of whether there has been reasonable mixing or not.

e. Moreover, it is alarming that cl 24(2)(b) and cl 24(4)(b) appear to exclude NBEB jurisdiction entirely for discharges of harmful substances where there is anything less than "significant" effects on "life". This begs the question, what less than significant impacts on human "life" might this authorise (anything less than death?) without the need for any authorisation? It is also unclear how this lack of jurisdiction interacts with the clear purpose of limit setting, which is to "protect human health" and to prevent levels of ecological integrity from declining relative to 2023 levels. At a minimum, it should be made plain that the NPF and plans have *jurisdiction* to control discharges in the coastal marine area even if the matters in cl 24(2)(b) provide for them as default permitted activities.

f. Clearer jurisdiction should be conferred, when it comes to restrictions on land use, to control building design standards for environmental reasons. This would go some way to remedying deficiencies under the Building Act 2004.

While the general restrictions imposed by clauses 17-25 resemble those in the RMA, and are appropriate, several targeted changes should be made to strengthen them. Most important is requiring people to comply with plan rules in *both* an operative *and* proposed plan, to ensure that the latter actually has legal effect as intended.

5.6 Environmental limits and targets

97. We see the framework for mandatory environmental limits and associated targets as being at the core of the Bill. For this reason, we spend a substantial part of our submission on this topic.

98. In summary, while we see the recognition of environmental limits as positive, the conceptualisation in the Bill is flawed and needs to be revisited. The Bill also provides too many pathways by which limits can be bypassed or weakened, including:

a. By establishing broad management units based partly on efficiency (where harm in one place can be offset in another).
b. By creating broad exemptions to limits (which rely heavily on ministerial discretion).
c. By setting interim limits (allowing current state to get worse before it gets better).
d. By failing to provide for minimum targets to become limits as they are achieved.

99. Below, we outline the key statutory provisions. We then look in more depth at the following issues:

a. Positive features of limits that need to be retained and strengthened.
b. Interim limits.
c. The Bill's conceptualisation of environmental limits.
d. Targets associated with limits.
e. The setting of management units.
f. Exemptions to limits.
g. Miscellaneous matters that require attention.

37 Purpose of setting environmental limits

The purpose of setting environmental limits is—

(a) to prevent the ecological integrity of the natural environment from degrading from the state it was in at the commencement of this Part:
(b) to protect human health.

38 Environmental limits

(1) Environmental limits must be set in relation to the following aspects of the natural environment:

(a) air:
(b) indigenous biodiversity:
(c) coastal water:
(d) estuaries:
(e) freshwater:
(f) soil.

(2) Environmental limits may be set for any other aspect of the natural environment in accordance with the purpose of setting environmental limits.

39 How environmental limits are to be set

The responsible Minister may, in the national planning framework,—

(a) set environmental limits; or
(b) prescribe the requirements for environmental limits to be set in plans, including—
(i) setting requirements for the process to be followed:
(ii) setting out the substantive requirements.

40 Form of environmental limits

(1) An environmental limit must be expressed as relating to the ecological integrity of the natural environment or to human health.

(2) Environmental limits must be set as—

(a) a minimum biophysical state for a management unit; or
(b) the maximum amount of harm or stress to the natural environment that may be permitted in a management unit.

(3) Environmental limits relevant to ecological integrity must be set to reflect—

(a) the state existing in a management unit at the commencement of this Part; or
(b) the amount of harm or stress occurring to the natural environment in a management unit at the commencement of this Part.

(4) An environmental limit may be—

(a) qualitative or quantitative:
(b) set at different levels for different management units:
(c) set in a way that integrates more than 1 of the aspects of the natural environment listed in section 38(1).

Building on the positive features of the limits framework

100. It is positive that the concept of an environmental limit, and the need to specifically identify and defend such 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* and do contain some rules and policies in the nature of bottom lines, including the New Zealand Coastal Policy Statement (NZCPS)). It was never clear under the RMA whether any given provision was intended to be an inflexible bottom line or not, so creating a clear category of provision called a "limit" is a step forward.

101. 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) purposes of the Bill, although this is not specifically stated and might still be inferred (eg to argue that Te Oranga o te Taiao can be used to justify infringing environmental limits, despite cl 37). This is one reason why a clearer purpose statement for the Bill is needed.

102. It is also a good thing that environmental limits *must* be set for particular domains under cl 38(1). This prevents the politically difficult things (eg indigenous biodiversity) from being ignored or put on the slow track.

103. To reflect this clear policy intent, however, cl 39 should be amended to clarify that the responsible Minister *must* (not *may*), in the NPF, *either* set environmental limits *or* prescribe requirements for plans to do so. At present, the drafting is unclear as to whether the Minister can choose to do *neither* of those things and leave limit setting entirely up to regional planning committees (or, even worse, not require limits to be set at all). This ambiguity in current drafting has the potential to contradict the clear statement in cl 38(1) that limit setting is mandatory.

104. Moreover, the aspects of the natural environment for which environmental limits must be set are overlapping and extremely general. We recommend that there be more specific

aspects/attributes for which limits must be set, including known stresses like sediment, nutrients, and pesticides,[17] as well as minimum states relating to things like indigenous vegetation cover. These could be contained in a schedule to the Bill. This is important, not just for setting minimum acceptable states/pressures for the things that matter, but also because it dictates what baselines must be *measured* (and therefore improves accountability). Each of these domains would also benefit from having a clearer purpose beyond just "ecological integrity" (eg building on the NPS for Freshwater Management, which has a clear normative frame based on te Mana o te Wai).

105. Leaving all this to the NPF (where the Minister, not the independent Limits and Targets Panel, has the dominant decision-making role) could produce significant gaps, risking that limits and minimum level targets are set only for attributes that are politically palatable or those that require least cost to measure/monitor. Mandatory attributes for which limits/minimum level targets must be set could, in a schedule to the Bill, reflect or build upon those already identified in the NPS for Freshwater Management and potentially other existing pieces of national direction. That would make it much clearer in primary legislation how existing national direction imposing "bottom lines" and "avoid" policies would translate into the new system for limits and targets. Shifting key content of the NPS for Freshwater Management (and potentially other existing NPSs providing "framework" type provisions) to a schedule of the Bill, would help prevent later iterations of the NPF undermining the hard-won "limit setting" protections in existing national direction.

106. We also note that many limits will need to be place-based. For example, the ecological integrity of a particular estuary will be dependent on a huge variety of stressors (eg nutrients, sediment, removal of material, climate change) arising from different activities (eg fishing, urban development, forestry harvesting). An estuary also has domains (eg freshwater, coastal-marine, biodiversity) that can overlap. The Bill should clearly allow for place-based (not just individual attribute-based) limit setting to happen, to ensure that various kinds of environmental attributes are designed to come together to make an actual difference in a particular area. In other words, the integrity of a place needs to come first, and the various domains and attributes for which limits are set need to follow.

107. Limit setting also needs to be clearly linked to the funding that will, in many cases, be needed to complement regulatory controls. Limits may not be defended in practice if (for example) there is a failure to do things like pest control or riparian planting. It would be useful to provide a clearer link between limit setting under the NBEB and implementation plans made under the SPB.

It is positive that the NBEB provides a specific framework for setting environmental limits and targets, and that these *must* be set. Some drafting needs to be clarified to reflect the policy intent better (notably that limits are mandatory), and there should be more specificity in primary legislation about what stresses/pressures limits need to be set for. The importance of interactions between different domains/attributes, at place, should be recognised more clearly when setting limits.

[17] On European Union legal efforts to reduce pesticide use and its impacts on pollinators, see: EU plan to halve use of pesticides in 'milestone' legislation to restore ecosystems | Pesticides | The Guardian.

108. 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 (eg a new Part 3A), not embedded within the Part dealing with the NPF.

109. Most fundamentally, 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 observation is a useful entry point to discussing a broader range of issues with the drafting, because they flow from the unusual (and sometimes inconsistent) way in which limits have been defined:

a. The purpose of environmental limits expressed in cl 37 is twofold: (1) to prevent the ecological integrity of the natural environment from degrading from the state it was in at the commencement of the Part, and (2) to protect human health.

b. The distinction between these two purposes is significant. In terms of (1), environmental limits are essentially being treated as *measurements* of the current state of ecological integrity of the natural environment. They represent a baseline measurement.

c. Unless an aspect of the environment can be shown to be necessary to protect human health, an "environmental limit" will permanently be a line drawn in the sand at 2023 (even if that measurement is nowhere near sufficient to actually protect environmental health in degraded areas). Thus some environmental limits might reflect pristine environments, while others might be severely degraded.

d. That is an unusual way to conceive of an environmental limit. As well as being confusing, it creates a number of legal issues. We return to these in a moment.

Interim limits

110. While this is not the end of the story when it comes to the limits framework (limits are also accompanied by mandatory targets for *improving* environments where they are degraded), it is worth pausing here to consider *interim* limits provided for in clauses 41-43. These provisions provide (with our emphases in bold):

41 Interim limits for ecological integrity

(1) The national planning framework may, in prescribing environmental limits in relation to ecological integrity, also prescribe 1 or more interim limits in conjunction with that environmental limit.

(2) Despite section 40(3), an interim limit for ecological integrity may be set as—

(a) a state in a management unit that is more degraded than it was at the commencement of this Part; or
(b) an amount of harm or stress occurring in a management unit to the natural environment that is worse than the amount existing at the commencement of this Part.

(3) Subsection (1) applies if the responsible 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 of the natural environment beyond the commencement of this Part.

42 Interim limits for human health

(1) The national planning framework may, in prescribing environmental limits in relation to human health, also prescribe 1 or more interim limits in conjunction with that environmental limit.

(2) Subsection (1) applies if the responsible Minister is satisfied, in relation to the specified aspect of the natural environment,—

(a) that its state existing at the commencement of this Part is degraded below the level required to protect human health; or
(b) that the existing harm to, or stress on that aspect of the natural environment is too great to provide for the protection of human health.

43 Setting interim limits

(1) The national planning framework may prescribe an interim limit for ecological integrity or for human health by—

(a) requiring limits to be prescribed in plans; and
(b) prescribing how a regional planning committee must decide on the limit to set for its region (which may include setting substantive requirements or process requirements or both)

(2) In prescribing an interim limit, the national planning framework or a plan—

(a) must specify when the interim limit is to be replaced by a related environmental limit; and
(b) may specify when a more stringent interim limit is to apply.

(3) The details specified under subsection (2) may refer to a specific date or event.

(4) An interim applies until it is replaced by a related environmental limit.

111. The upshot is that the NPF will be able to set interim limits that, effectively, allow ecological integrity to be *lower* than 2023 levels. This means interim limits can allow an environment to become worse even if it is already heavily degraded. 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[18] of the natural environment beyond the commencement of this Part".

112. While we assume the intent of this provision is to acknowledge the "lag effect", that further biophysical harm is unavoidable in some areas given the legacy of previous human activities

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

(the impact of which has not yet been felt, such as already discharged contaminants flowing through groundwater over time), it leaves considerable ambiguity and needs to be tightened. Otherwise, it risks providing another exemption pathway for harmful activities.

113. In particular, cl 41(3) could be interpreted as allowing existing *uses* of land (such as intensive agriculture or horticulture) or existing consent holders to continue to degrade the environment (without using powers in the Bill to curtail consents or existing uses) because those stresses were already present at the time of enactment. In other words, an existing "harm" or "stress" could be interpreted as an existing "use" that justifies setting a lower limit.

114. This may seem like a pedantic interpretation. However, if one digs deeper it becomes apparent that this is the only way that the concept actually makes sense. We explore this further below.

115. The Bill would therefore benefit from additional provisions on "when interim limits must not be set", clarifying that the concept only applies where regulatory interventions cannot prevent that harm from happening.

116. Moreover, although the Bill requires a timeframe to 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 can be determined by political or ecological/physical factors.

117. Moreover, while it may be implied by cl 43(4), 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.

118. 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 clauses 39 and 40) includes an "interim limit" (which is set under cl 41). For example, consent decisions cannot be contrary to an "environmental limit" (excluding interim limits), whereas exemptions to limits can be granted to an environmental limit *or* an interim limit.

The ability for the Minister to set an interim limit should be more tightly constrained to situations in which it is not possible to intervene to prevent further harm. In particular, it should not be used to justify the continuation of existing uses that breach environmental limits.

119. We noted above that the concept of an interim limit only makes sense if it is seeking to authorise human activities that are going to *make* the environment worse than 2023 (ie providing a weaker test than a corresponding environmental limit). This requires explanation.

120. In short, we need to ask: what does setting an interim limit actually do in the machinery of the Bill? If the changes mentioned above are made, the answer may be "not much". The more suitable response may therefore be to dispense with the current concept of interim limits altogether. Our logic is as follows:

    a. An environmental limit for ecological integrity is defined in the Bill as the state of the environment as at 2023. This acts as both (1) a measurement (describing what the

environment is like at the moment) and (2) a regulatory line in the sand (what you cannot do when it comes to setting prohibited activities and refusing/imposing conditions on resource consent). It therefore does two quite separate things.

b. An *interim* limit, by contrast, reflects the idea that the environment will get worse because of inputs already in the system. Like an environmental limit, this requires the measurement of the state of the environment. However, the Bill also appears to treat an interim limit as creating a new and quite different *regulatory* line in the sand. Instead of prohibiting things that make the 2023 state worse, it only prohibits things that make a subsequent, more degraded, environmental state worse. On the face of it, this sounds like a more lenient test.

c. However, the test is only more lenient if human activities are allowed to *cause* the environment to get worse than 2023 levels. If interim limits are truly set at a level that reflect inevitable "natural" degradation, and not the continuation or addition of new human stresses, then there is no difference in the legal test.

d. This is because any activity that will make the environment worse than 2023 will also, by definition, make it worse than an interim limit. There is no space "in between" where an activity can be contrary to an environmental limit but not contrary to an interim limit. All that space for additional harm has been taken up by the harm caused by existing stresses.

121. An interim limit therefore appears to serve no practical purpose from a *regulatory* perspective. Irrespective of whether an environment is at a 2023 level of ecological integrity or has since become worse, the direction not to allow activities contrary to an "environmental limit" has the same result: the activity cannot proceed. This may explain why provisions simply say that consents cannot be granted contrary to an "environmental limit" – because if that limit is breached then there is also no ability to breach a lower interim limit.

If interim limits can be set only in situations in which existing stresses will inevitably make the environment worse than the 2023 state, then we do not see the need to provide for them at all. The same regulatory result will be achieved by setting environmental limits and requiring that no activities be allowed contrary to them.

The limits and targets framework needs to be fundamentally reconceptualised

122. Setting aside such issues with interim limits, we return to more conceptual concerns about how environmental limits have been defined with reference to 2023 levels of ecological integrity. These are not functioning 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, even if there is some debate about what that means. The terminology in the Bill is therefore all wrong.

123. But the approach is not just *conceptually* wrong. It also causes immense confusion when looking at how the system of limits is expected to operate in practice. We understand that, in previous iterations of policy development for the Bill, the idea was that limits *would* be defined as a minimum acceptable level of environmental integrity/health, and was only

changed at a later stage to reflect 2023 level measurements.[19] This may explain some confusing features of the drafting, where the change in policy intent has not flowed through to the mechanics of the Bill. For example:

a. The Bill provides for limits (current state measurements) to be "set", rather than simply "recorded", "measured" or "identified".[20] In a number of places in the Bill, it is actually implied that there is a degree of discretion as to where limits are set, which is inconsistent with the premise that they are objective observations of baseline state.

b. It is also unclear why objective, scientific biophysical measurements of current baselines would be set by the Minister as a political actor and not by an independent, expert group (perhaps reflecting the earlier approach that a minimum *acceptable* state requires some judgement and political accountability).

c. The Bill defines "contaminated land" as any land in which a contaminant is present at concentrations that "exceed an environmental limit". Yet because an environmental limit for ecological integrity must now be set at 2023 levels, this would essentially prevent the addition of *any* new contaminant (which is broadly defined as something that changes physical or chemical composition, and which does not need to be hazardous to health or the environment) in *any* environment.

   This classification of land as contaminated would trigger the application of separate provisions for contaminated land,[21] which is quite clearly targeted at dealing with highly hazardous sites. So while the result would be extremely protective (to the extent it may prevent any changes to land use that would change the chemical composition of the soil), it appears this is actually unintentional and would be an extreme response.[22] All of this makes much more sense, however, if one defines a "limit" for soil as a minimum *acceptable* state (which may in turn be linked with the presence of hazardous substances, among other unacceptable things), not 2023 levels of ecological integrity.

124. The Bill's approach to limits also makes terminology confusing for users. For example, when it comes to consenting, only some forms of target (minimum level targets associated with limits) need to be complied with, because it is these that essentially reflect the minimum acceptable state. Other kinds of target exist too, which do *not* have to be complied with in the same way. It may be hard for users to unpick which is which if they are both called "targets".

125. Moreover, because the Bill seems to accept that broad exemptions will be available where a limit (ie the 2023 state) is not unacceptably degraded, this essentially creates two kinds of limit. One will be where exemptions are allowed, and the other where they are not. Again, this tends to hide the more meaningful legal question (whether something is unacceptably degraded or not) from public view. It would be much simpler to be able to state that all

[19] This shift can be observed in minutes of later meetings of the Ministerial Oversight Group.

[20] 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).

[21] In Part 8 of the Bill.

[22] For example, it might require broad exemptions from limits to be obtained for almost all farming activities.

"limits" must be complied with, rather than having to make subtle distinctions between different categories of limits (where exemptions are and are not possible) and different types of targets (which do and do not need to be complied with).

126. We understand that part of the reason that limits have been defined as current state is that it is difficult to identify what a minimum acceptable state looks like, and it is simpler to measure what we have now. However, while this may have some truth, the approach simply shifts the issue elsewhere. There is still a need to identify a minimum acceptable state, but instead of this being clearly defined as a limit up front it now needs to be set on a case-by-case basis in two quite separate processes: (1) when the Minister is determining whether (and where) to set a minimum level target to improve a degraded environment, and (2) when the Minister is deciding whether to grant an exemption from a limit in environments that are not unacceptably degraded.

127. While measuring current state as of 2023 is also important, to understand our starting point and prevent things from getting worse, it would be more appropriate to call this what it actually is – a "baseline" – rather than a "limit". It is about understanding where we are now, not setting ecological limits (points we should not go beyond in the future).

128. An environmental "limit" should be redefined as a more absolute measure of the *minimum acceptable state of the natural environment*. It may be that the 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.

129. While there may be some value judgements involved in this assessment (eg in determining how "much" ecological integrity is sufficient), that is not a valid reason to shy away from providing a legal test. We note three things here:

    a. As mentioned above, this determination is still expected to happen elsewhere (when the Minister is setting minimum level targets and when considering exemptions from limits), so the problem is not actually avoided, only hidden and made more *ad hoc*.

    b. The drafters have had no such qualms in taking a more absolute (yes/no) approach to the concept of human health. Limits for human health must be set simply "to protect human health", not just to prevent health from declining below 2023 levels. Yet "human health" is a concept that is equally value-based and open to interpretation and argument as ecological

integrity (how *much* harm to human health is acceptable?).[23] It is also an artificial and dated distinction, since ecological integrity (eg maintenance of food systems) is as essential to human health in the long-term, as pollution control (eg safe drinking water and clean air) is in the short-term. On one level, the key reason people care about the environment is because of its centrality in safeguarding human health.

c. In other parts of the Bill, the concept of "ecological integrity" *is* treated as if it is an absolute, and not just relative, concept. For example, in cl 50(2)(c)(ii), 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 whether there is a "reduction" in ecological integrity. In cl 3(1) of Schedule 6 (setting out the standard process for preparing the NPF), the Limits and Targets Review Panel is charged with advising the Minister on the extent to which limit or targets are "sufficient" to "protect … the ecological integrity of the natural environment", further indicating that it is something that can be objectively measured and either achieved or not.

130. We also note that defining a limit as the 2023 state, and basing strict protections around that line in the sand, risks undermining other limits that have already been set at quite different temporal baselines. Notable are those for freshwater, for which 2017 is the key baseline for limits under the NPS for Freshwater Management.[24]

The way in which environmental limits have been defined, as the current state of ecological integrity as of (essentially) 2023, is flawed. It creates a system that is unnecessarily complex, gives rise to legal ambiguities, and does not reflect what people think a limit actually is. Substantive redrafting is required. Because this is also intimately linked to how targets are conceived of, we provide our revised conceptualisation further below.

Targets

131. As foreshadowed above, the Bill does not *just* require baseline 2023 "limits" to be defended. It also provides a framework for targets to be set, to make sure that the environment is restored and improved. In other words, the idea of a minimum *acceptable* state for ecological integrity does exist, it is just provided in the Bill's provisions for setting targets, not in the setting of limits.

132. However, we have concerns with how these targets are provided for.

133. 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 baseline to be measured). This is good, as long as those aspects are made suitably specific (as recommended earlier).

134. However, the Minister must set a "minimum level target" only if he or she is "satisfied" that this 2023 state represents "unacceptable degradation". This is a relatively weak approach for

[23] 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.
[24] The Bill requires the policy intent to be carried through into the first NPF, but it is not clear how that is meant to work where there are conflicts with the legal framework under which it is expected to operate.

mandatory target setting where the context is, essentially, that ecological bottom lines have been infringed *already* and the natural environment is in a dire state.

135. There is considerable discretion for the Minister to decide *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).

136. 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, whether the state of the natural environment poses a "risk of irreversible or significant harm" to ecological integrity. That is a very high bar for action to be required.

137. Even if the Minister is satisfied there is unacceptable degradation, there is no clear normative guide for *where* minimum level targets are to be set (ie what "acceptable degradation" looks like) 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 even whether it can subsequently be made less ambitious.

138. This means that the only substantive direction for setting mandatory targets associated with limits (assuming the Minister has accepted that an environment *is* unacceptably 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.

139. If the current approach to limits and targets is to be retained, there should be a much clearer statement that what 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).[25]

140. There should also 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 based on ecological considerations and not a political decision. Alternatively, and preferably, there should be a requirement for the Minister to set a minimum level target if recommended by the Limits and Targets Review Panel, and a requirement that the Minister set it in the place

[25] We note that this is, confusingly, hinted at in cl 3 of Schedule 6 (concerning the NPF) – where the review panel must provide advice on the extent to which targets are "sufficient" to "protect… the ecological integrity of the natural environment."

recommended by the Panel unless there are compelling reasons not to do so. In other words, this Panel should determine whether there is unacceptable degradation, not the Minister.

141. We are also concerned that tucked away in clauses 31(1) and 32 of Schedule 6 is a provision that states that the requirement for establishing minimum level targets does not apply until 2028. To use the more commonly understood language, this is saying that meaningful ecological limits do not need to be set for five more years. This seems too long to us given it is already known that many elements of the natural environment are unacceptably degraded and, in some cases, still going downhill. It should be replaced by, at minimum, a requirement to use best efforts to establish minimum level targets (or even stepping-stones in the right direction) where information is practicably available.

There is too much discretion for the Minister to determine whether, and where, to set minimum level targets for degraded environments. There needs to be more clarity that the objective of minimum level target setting is to achieve ecological integrity/health, and a much stronger role for an independent, objective entity like the Limits and Targets Review Panel to determine whether and where they are set. There should also be stronger requirements to establish minimum level targets prior to 2028 where information is available.

142. 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 in primary legislation as being current state as of 2023). Any environmental state better than 2023 is destined to permanently retain the status of a "target" even once it is realised.

143. This makes little sense in everyday language, since a target is inherently something that is in the future. We could conceivably have a situation in 2040 where many minimum level targets have been achieved, but these are still classified as targets, not limits.

144. The distinction is important in law too, because it may stymie the practical ability of decision-makers to defend environmental improvements over time. That is especially so where degraded environments are being restored. This is because an environmental limit has a legal status that targets do not have. In particular:

    a. While consent authorities are not allowed to grant consent "contrary to" a limit *or* target, it is much less clear what "compliance" with a target involves, since a target is a concept that is inherently about working towards something in the future rather than enforcing something right now.[26]

    b. There are safeguards in clauses 44 to 46 stating 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*, implying that exemptions are only needed where the state of a degraded environment slips back below 2023 levels of

[26] For example, with what does a consent applicant have to comply if a target has been set but has not been 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?

integrity[27] and not where activities cause an activity to slip back below minimum levels of ecological integrity once they have been achieved.

c. An activity that would breach a "limit" is deemed to be a prohibited activity under cl 154(4)(a), but an activity that would breach a "target" is not. This potentially means that if an environment is significantly degraded, and is slowly improved over time to meet a minimum level target, an activity that would cause that to be undone is not prohibited unless it would make it worse than at 2023 (a steep slide). That may be particularly important when it comes to defending freshwater quality improvements made at places like Lake Horowhenua.

If the current definitions of limits and targets are to be retained, there needs to be a clear pathway by which minimum level targets *become* environmental limits when they are met in a legal sense.

A new framework for limits and targets

145. We recommend that the Bill's whole lexicon be reframed when it comes to limit and target setting, to address the more fundamental issues outlined above. This should have the following key features:

a. Current levels of ecological integrity as of 2023 still need to be measured. But instead of being "limits", these should be described as "baseline measurements". Some will be healthy, others will be degraded. But all are measures of what the environment is like now.

b. These measurements will need to continue over time (state of the environment monitoring). Where stresses are already present and cannot be undone, the state of the environment may get worse than 2023 without additional human pressures. As discussed above, this requires measurement, not a more lenient legal test for new activities. They should be called "current state" measurements, not "interim limits".

c. "Environmental limits" should be defined as a minimum acceptable environmental state, based on an objective measure of ecological integrity or health. Some environments will already be in breach of these limits, while others may be significantly above them. Either way, authorisations should not be able to be given for activities that are contrary to an environmental limit unless a narrow range of exemptions is granted. Defining a limit in this way provides much more clarity than relying on ministerial assessments of minimum level targets and the discretionary granting of exemptions to determine where a minimum acceptable state lies.

d. Every mechanism operating *below* an environmental limit should be clearly part of a strict limit setting framework, and the language should reflect that. The concept of interim limits should therefore be reimagined to replace the current concept of a minimum level target. Where current state measurements infringe an environmental limit, interim limits must be set to chart a pathway back to meet them. It would make much more sense to comply with

[27] 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.

this kind of interim limit than to comply with a target. This changes the concept of an interim limit from one that allows movement *away* from a limit, to one that requires movement *towards* a limit.

e. Mandatory targets should be required to be set for all things for which limits are set. Targets would be about improving things *above* limits.

Figure 1: the NBEB's current approach to limits and targets

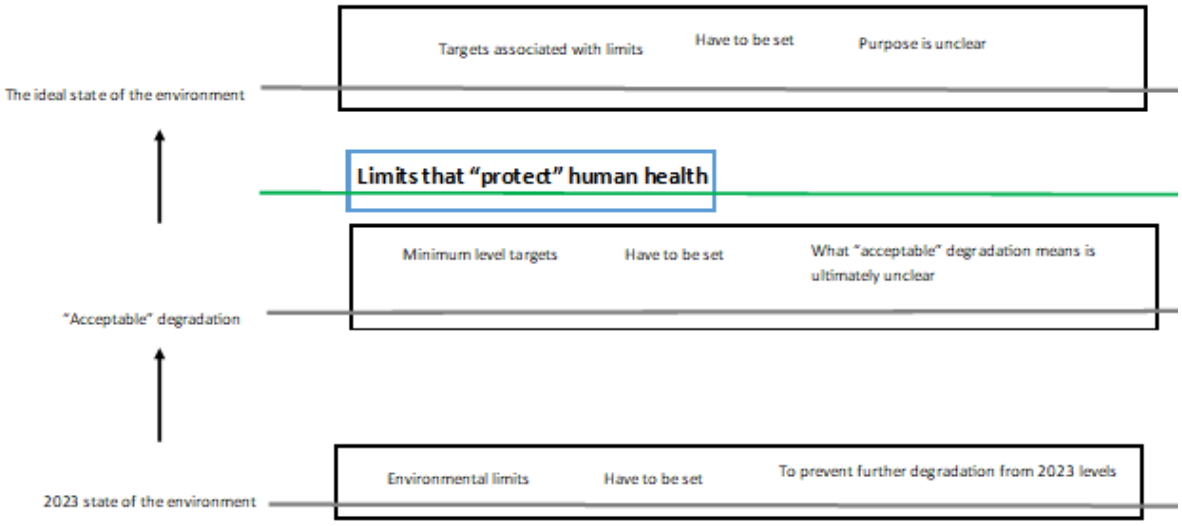
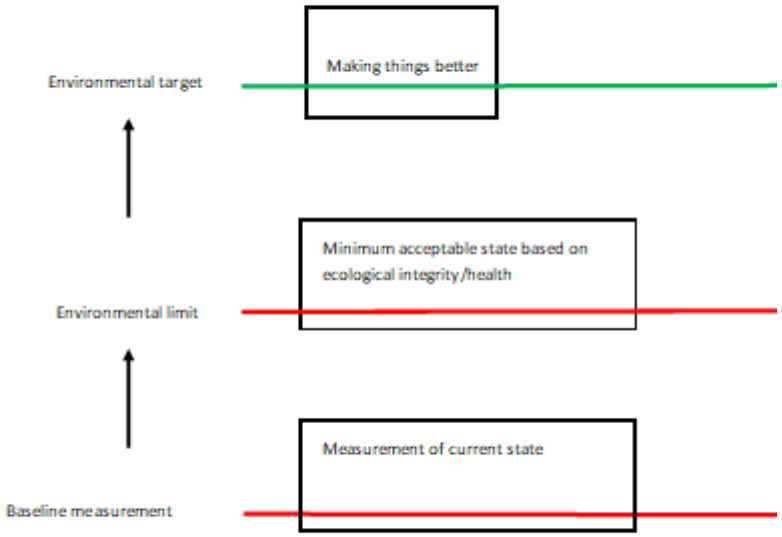


Figure 2: A more logical approach to limits and targets



The Bill's approach to limits and targets should be fundamentally reframed by defining key concepts in ways that make more practical and legal sense. An environmental limit should mean a minimum acceptable state of the natural environment, based on ecological integrity and human health. A baseline measurement should mean the state of the environment as of 2023. A current state measurement should mean the existing state of the environment as of the date it is measured. An environmental target should mean a desirable state of the environment to aim for in the future, which by definition must be above environmental limits.

Management units

146. Aside from how they are conceptualised, we are concerned that limits might be undermined in a variety of ways. One is through the establishment of management units.

147. Management units are important, because these set the location and spatial scale across which limits are measured and targets established. For example, management units for freshwater might be catchments, for air they might be airsheds, and for biodiversity they might be particular ecological zones.

148. Clause 55(2)(a) sets out several considerations for authorities when determining the size and location of management 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 the most effective way to defend ecological integrity, irrespective of whether it is efficient in cost terms.

149. Of even greater concern is cl 55(3). The size and location of a management unit are to be set to provide "flexibility" (for what?) and maximise 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 (eg allowing sedimentation of estuaries where there are significant primary industries upstream, while improving others that are not under such pressure).

150. Management units are also relevant when it comes to setting minimum level targets. As mentioned earlier, the Minister must set minimum level targets for environmental improvement where limits reflect an unacceptably degraded environment. But if management units are extremely broad (encompassing many areas that are *not* degraded, potentially even including areas of the conservation estate), then there will be an enhanced ability to "hide" heavily degraded pockets within a large unit and conclude that, overall, there is no unacceptable degradation (and therefore no requirement to set minimum level targets for improvement).

151. 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). This should be clarified in primary legislation.

We have concerns that management units, across which limits and targets are set, may be set in a way that averages out harm. This may lead to excessive offsetting and the ability to "hide" pockets of significant degradation without needing to set minimum level targets. Criteria for setting management units need to be tightly focused on the purpose for which limits and targets are set: ecological integrity and human health.

Exemptions to limits

152. We turn now to the issue of exemptions to limits, which are specifically provided for in clauses 44 to 46 of the Bill.

153. We do not consider that such an exemptions framework should be included in the Bill at all. This is for two reasons:

    a. First, 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). This provides significant flexibility when it comes to how specific projects comply with limits. If one cannot even offset harm to meet an overall limit, then an activity is arguably inappropriate in all but the most exceptional (eg emergency) situations.

    b. Secondly, if our quite different conceptualisation of limits and targets (described further above) is established, there should be no need for exemptions. This is because a "limit" would already be defined as a minimum acceptable state. It appears that the main reason the Bill provides an exemptions framework is because a limit is defined as current state (whether degraded or pristine), meaning that some environments may have capacity to absorb further harm (via exemptions) before infringing a minimum acceptable state.[28]

154. If the current framework is to be retained, however, we have concerns about the breadth of provisions allowing for exemptions. We explore specific drafting issues in the following section of our submission.

155. More generally, we stress that a broad exemptions framework needs to be looked at in the context of other weaknesses in the overall limit setting framework mentioned above: interim limits (which allow limits to be set lower than at current state even if that is degraded); management units (which are to be set in a way that maximises opportunities to offset harm in one place with improvements in another, potentially causing localised degradation); and minimum level targets where degradation already exists (which have significant discretion in terms of where they are set and by when they must be achieved).

156. Exemptions also need to be considered in the context of other aspects of the Bill that fail to provide adequate safeguards, such as fast track consenting processes, the lack of hierarchy when it comes to providing for outcomes (allowing environmental wellbeing to be traded off), and a confusing system for protecting significant biodiversity areas (discussed later in our submission). Exemptions are therefore just one among many areas that need to be tightened up.

The ability to direct exemptions from environmental limits should be removed from the Bill. If retained, the power needs to be considerably narrowed, particularly in the context of other

[28] This explains why no exemptions are possible when it comes to limits set for human health – because these are already set at a level that "protects" health, rather than 2023 levels.

weaknesses in the limit setting framework like interim limits, management units, and minimum level targets.

157. The relevant provisions for exemptions are reproduced below (our emphases in italics).

44 Exemptions from environmental limits may be directed

(1) Subsection (2) applies if the responsible Minister is requested to direct an exemption by a regional planning committee under this Act or the Spatial Planning Act 2022.

(2) The responsible Minister may direct in the national planning framework an exemption from an environmental limit or an interim limit relating to ecological integrity.

(3) Any request under this section must be made—

(a) by a planning committee; and
(b) in a form approved by the Minister; and
(c) during the process of preparing or revising the relevant plan or regional spatial strategy, as the case may be.

(4) A request for an exemption must demonstrate how the regional planning committee considered options for complying with the relevant environmental limit, *including by applying the effects management framework* (see section 61).

(5) If an exemption is directed, the responsible Minister must progress the direction as a change to the national planning framework and Schedule 6 applies.

45 Essential features of exemption

(1) An exemption from an environmental limit must be designed to result in the *least possible net loss of ecological integrity* that is compatible with the activity proposed.

(2) The activity must provide *public benefits that justify* the loss of ecological integrity.

(3) An exemption must be subject to a time limit that the responsible *Minister thinks appropriate in the circumstances*.

(4) If the responsible Minister imposes conditions when granting an exemption, the conditions and the time limits imposed must be published in the relevant plan or regional spatial strategy, as the case requires.

158. There are several preliminary things to note about this exemptions framework:

a. There is an ability to provide an exemption from an *interim* limit. As discussed earlier, this involves a situation where we *know* the environment will be getting worse, not better, even without the exemption being granted. Exemptions, by definition, will make that slide below limits even greater.

b. It is positive that exemptions have to be *applied for* by a regional planning committee to the Minister. This provides some assurance that exemptions to limits in plans will be scrutinised before they have effect (as opposed to under the RMA, where oversight of any "bottom lines" in plans by the Environment Court has been dependent on appellants taking action in the first place). Some aspects here require more clarity, however. For example, it is not obvious under cl 44 whether a regional planning committee is required to request an exemption to a limit, if the limit in question is one that is prescribed in the *plan* (ie a specific rule that gives effect to a direction in the NPF), not one directly provided for in the NPF. Arguably it must do so, given that the Bill in places 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). In other words, if a planning committee sets a "limit" in its plan that is more detailed than that in the NPF (which the Bill clearly contemplates happening), does it then have to request an exemption in order to change the limit in the plan? This is not clear.

c. It is also positive that, on the face of the provisions, the Minister cannot, on the Minister's own initiative, direct exemptions to environmental limits. The obligation is to *set* limits (ie *measure* current state or require planning committees to do so), and then consider requests for exemptions *from planning committees*. For clarity, it should be specifically stated that initiating exemptions is not a ministerial power.

   It should be clarified that there is no ministerial power to initiate an exemption from an environmental limit.

d. Clause 44(4) of the Bill provides that "a request for an exemption must demonstrate how the regional planning committee considered options for complying with the relevant environmental limit, including by applying the effects management framework". This is concerning, as it implies that applying the effects management framework (including offsetting and redress where stronger mechanisms are not "practicable") is a way in which limits *can* be complied with. We cannot see how providing redress (essentially compensation) for breaching a limit is in any sense of the word "complying" with that limit, given that the original harm remains.

   The clause is also confusing, since the Bill elsewhere states that the effects management framework applies only to impacts on significant biodiversity areas and specific cultural heritage, and only applies to other "resources" if the NPF states this specifically (we look at the effects management framework later in our submission). Yet cl 44(4) implies that the framework applies automatically when assessing compliance with all limits.[29]

   It should be clarified that applying the effects management framework is *not* a means of showing compliance with an environmental limit.

159. The tests for establishing an exemption under cl 45 are also much too broad, in a number of senses:

[29] The term "compliance" is confusing here, since it does not make sense in the context where planning committees are giving effect to limits (or a framework for them) established in the NPF. "Compliance" is used more often in the context of an actual activity that is having impacts on the environment that would breach a regulatory threshold. To avoid confusion, the term compliance here should really be substituted with another (eg planning committees "adhering" to or "translating" a limit in their plan).

a. Clause 45(2) allows the Minister to determine whether "public benefits" would justify the loss of ecological integrity, reintroducing by stealth the idea of an overall broad judgement approach to defending environmental limits. In contrast to other places in the Bill dealing with exemptions, 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 even one of national importance.

b. The breadth of exemptions contrasts with the more specific range of "important" activities[30] 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 across a management unit is arguably of *more* significance. (We look at these protected areas in the following section of our submission.)

c. 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. In some situations, harm may be incurred at the point of construction or operation, and yet result in ongoing impacts that cannot physically be stopped just because an exemption is revoked for undertaking the actual activity (eg clearance of land, ongoing emissions from landfills).

d. If an exemption *is* directed, cl 45 requires only the least possible net loss of ecological integrity, rather than requiring net gain. In the context of indigenous biodiversity at least, this is even weaker than the effects management framework, where one requirement for offsetting is no-net loss and "preferably" net gain. If an exemption is directed, there should be an expectation of net gain.

The ability to direct an exemption from environmental limits is too broad, including where public benefits justify the loss of ecological integrity, and the timeframe for when an exemption expires is too permissive. Exemptions also require only the minimisation of net loss, whereas the imperative is to require net gain.

160. There are two circumstances where exemptions must not be granted. These are contained in cl 46 (with our emphases in italics).

46 When exemptions not to be directed

The responsible Minister must not direct an exemption if the Minister *thinks*, after considering the matters set out in section 50(2),—

(a) that the current state of ecological integrity *in the area* where the exemption would apply is *unacceptably degraded*; or

(b) that an exemption would lead to an *irreversible loss* of ecological integrity.

[30] Which we think are still too broad – see discussion further below.

161. Clause 46 demonstrates that the whole exemptions framework in the Bill is a product of the unusual way in which environmental limits have been defined to begin with (ie as 2023 state).

162. Essentially, cl 46 is the place where an *actual* ecological limit is imposed (albeit on a case-by-case basis when exemptions are applied for), because it seeks to establish and defend a minimum *acceptable* state rather than just measuring current state.[31] It does so by preventing any additional harm in environments that are "unacceptably degraded" or where there would be "irreversible loss of ecological integrity". How it is drafted is therefore of crucial importance. We make a number of comments below.

Because limits have been defined as 2023 levels of ecological integrity (rather than minimum acceptable state), the *actual* limit setting mechanism in the Bill is in cl 46. This outlines when exemptions from maintaining current state cannot be granted: where the environment is "unacceptably degraded".

163. It is positive that sub-clauses (a) and (b) are expressed as alternatives (an exemption cannot be granted unless both of the tests are met). This recognises that even if an environment is not unacceptably degraded as at 2023 (it may even be in quite a healthy condition), any harm that would *permanently* reduce present levels of integrity should also be prevented.

164. However, it is concerning that a "revers*ible*" loss of ecological integrity does not necessarily mean that such loss *will* be reversed, as there is no clear requirement to do so. We note that the Minister has a broad *power* to impose conditions on exemptions, which could include requirements to reverse such losses, but there is no *obligation* to impose any conditions.

The term "irreversible" loss in cl 46(b) should be defined/amended to clarify that any exemptions granted on this basis are required to *actually* reverse the loss.

165. Clause 46(a) is also of concern, because it means that exemptions can still be granted where an environment is degraded, as long as it is not "unacceptably" so. This is a weak requirement. While there are some criteria in cl 50(2) that must be considered in determining *whether* degradation is unacceptable, these set a relatively low bar,[32] have ambiguities,[33] are to be "considered" rather than "applied", and the test ultimately relies on what the Minister "thinks" (an unusual and inappropriate drafting choice) rather than what the law *requires*. There is too much discretion involved.

There is too much Ministerial discretion involved in the assessment of whether an environment is "unacceptably" degraded. This instead needs to be linked to an objective assessment of whether the ecological integrity of an environment would be infringed.

[31] The other key, and complementary, provision is that for setting minimum level targets, which also kicks in when an environment is "unacceptably degraded" and needs to be *restored* to this minimum level.
[32] For example, whether the state of the environment places indigenous plants or animals at increased risk of *local displacement* or *extinction* or poses a risk of *irreversible* or *significant* harm to ecological integrity.
[33] For example, the "increased risk" of *local displacement* or *extinction* begs the question – increased relative to what? And the reference to "the risk that the state of the natural environment poses to human health" is curious, since limits for human health have a much clearer framework (they are set at levels that protect human health), and do not contemplate exemptions.

166. Moreover, the power to direct exemptions is constrained only where the Minister thinks the environment "in the area where the exemption would apply" is unacceptably degraded. This may be significant, because the reference to the "area" provides no indication of what spatial scale is being referred to: (1) the management unit across which the limit itself has been set; or (2) some smaller, localised area like the footprint of a specific activity. There are risks in being able to pick one interpretation or the other:

    a. If interpretation (2) is correct, exemptions might be granted only where the area in the immediate vicinity of the activity in question is not unacceptably degraded, even if the broader management unit is in a very poor state overall. This could, perversely, lead to harmful activities (eg mining or urban development) being allowed to operate in environments that are not yet degraded (eg remaining wetlands), bringing down the overall measure of ecological integrity across a management unit without a requirement to provide net gain.[34]

    b. If interpretation (1) is correct, exemptions could be granted only where a larger management unit is not unacceptably degraded, even if the specific location of the activity in question is heavily degraded. That could also have perverse outcomes: it might allow exemptions for activities that make one water body worse, on the grounds that other freshwater bodies upstream or in the "area" remain in good condition.[35]

The Bill should clarify that exemptions can only be granted where current state reflects (1) a management unit that is not unacceptably degraded as a whole, *and* (2) where the more localised environment around the activity is not already unacceptably degraded.

167. It is also not clear what the consequence of granting an exemption to a limit is (if any) when it comes to how targets associated with limits are to be met. There is no clear framework by which an exemption granted for one activity (which takes the environment further away from a target) needs to be counteracted by more stringent approaches to other activities (to take the environment back towards the target).

168. More generally, the Bill lacks a robust accountability mechanism or legal consequences for failing to meet targets associated with limits. Indeed, it is not even clear who, if anyone, is responsible for meeting targets once they are set (eg the Minister or planning committees). A concern is that while ambitious targets might be set, these may be undermined by the granting of multiple exemptions having significant cumulative impacts, without holding target setters to account for meeting them. This treats targets associated with limits as a "nice to achieve if exemptions let us" rather than something that the law treats as equally important as limits themselves.

[34] We note we are talking about what the *Bill* could see happen in the future, not what national direction made under it would necessarily allow at the moment. The Bill will provide the framework for national direction to be changed.

[35] It may be that an exemption is not even required at all in such a situation, since the ability to average out harm across a management unit when assessing compliance with limits means there may be no infringement of a limit in the first place.

The Bill needs to ensure that the granting of an exemption to a limit triggers a partial review of a plan to ensure its provisions are still adequate to meet associated targets. There needs to be a broader accountability mechanism for planning committees failing to meet targets.

169. The Bill also does not clearly require exemptions to be directed where a minimum level *target* (rather than a *limit*) is infringed. This means that degraded environments that have been improved since 2023, but remain unacceptably degraded, will not trigger the need for an exemption unless an activity will cause it to degrade back below 2023 levels.[36] The Bill needs to specify that exemptions are required if an activity would cause minimum level targets to be infringed (or, alternatively, that minimum level targets can, once achieved, *become* limits). Such exemptions could not then be directed if an environment remains unacceptably degraded. A more systemic fix, however, would be to reframe the Bill's system of limits and targets in a more fundamental way, as outlined earlier in our submission.[37]

If the system of limits and targets is not overhauled in a fundamental way, the Bill should clarify that the infringement of minimum level targets, once achieved, also require exemptions to be directed. These would not be able to be directed if an environment remained unacceptably degraded.

170. We offer some further miscellaneous comments about the exemptions framework below. These require targeted fixes to drafting:

    a. It seems odd that the *legal purpose* of setting environmental limits in cl 37(a) is unambiguous: to prevent levels of ecological integrity from declining relative to 2023 levels. This purpose appears to apply even if the 2023 state of the environment is pristine.

       However, the mechanics of the Bill directly undermine the achievement of that purpose, by contemplating exemptions that *will* allow this baseline state to decline (as long as an environment is not "unacceptably degraded"). This means that the purpose of setting limits and the implied purpose of the exemptions framework are fundamentally at odds, creating legal uncertainty as to whether the purpose in cl 37 applies to the exemption provisions or not. It further highlights the need to rework the whole framing of limits and targets as outlined above.

       The clear purpose of setting environmental limits (to prevent decline relative to 2023 levels of ecological integrity) is at odds with what the exemptions framework actually allows (pushing ecological integrity down to minimum acceptable levels of degradation). This creates a legal conflict.

    b. Exemptions to environmental limits cannot be applied for through a consenting pathway by an applicant. This is a very good thing, because a case-by-case approach to exemptions could

[36] Although exemptions can only be *granted* where an environment is not unacceptably degraded, the requirement to obtain an exemption in the first place only kicks in when a limit (ie 2023 levels of ecological integrity) is infringed. This means that environments above 2023 levels that are still unacceptably degraded will not require an exemption until they return below 2023 levels.

[37] Here, a minimum level target would be renamed as an interim limit. These would act as stepping stones in situations where an environment was unacceptably degraded already; as soon as one interim limit was achieved, no activities could be allowed contrary to it, providing a ratchet effect.

create a scenario of “death by a thousand cuts”, similar to what has happened under the RMA. However, it is still unclear whether exemptions can be initiated as part of an “independent” plan change (the new name for a private plan change), which can often be driven by private sector interests. The Bill should clarify that this is not possible, for example by defining “strategic content” (which independent plan changes cannot alter) as including environmental limits.

c. The Bill should also clarify in cl 44(5) that any exemptions to limits are to be progressed via the Schedule 6 *subpart 1* standard process for amending the NPF, and not via the alternative *streamlined* process in subpart 2. At present, the clause refers only to Schedule 6.

The Bill should clarify that exemptions to limits cannot be initiated through independent plan changes, and that the *standard* process for amending the NPF is required for exemptions.

d. It is not clear what form exemptions will take in the NPF or plan. Limits themselves must be described as a minimum biophysical state of the environment or a maximum amount of harm/stress to it. However, there is no express requirement for *exemptions* to those limits to be expressed in this fashion.

   Indeed, clauses 44 and 45 suggest that exemptions will be expressed not as a lower limit of environmental quality in a management unit (eg less stringent minimum measures of water quality or flows in a catchment) but rather as exemptions for a particular “activity” or even project (eg a particular industrial facility).

   We see risks in an approach that outlines broad biophysical limits and then simply lists particular activities or facilities that are exempt from them. To the extent that exemptions are allowed, they should be expressed as a maximum alteration to the state/pressure on the environment *by* an activity, rather than exempting a particular activity from limits *per se.*

Exemptions to environmental limits should be required to be expressed in the same form as environmental limits themselves (as minimum state or maximum harm/stress), not as a description of the activity that is exempt from the limit.

e. There is no clear role for the Limits and Targets Review Panel when it comes to exemptions. At a minimum, the Minister should be required to have particular regard to the views of the Panel before granting an exemption.

f. We recommend that appeal rights to the Environment Court should also be available where the Minister does not follow the Panel’s recommendation, providing a stricter process than that in Schedule 6 (for amending the NPF) where recourse to the Court on the merits is not provided for. If the Minister departs from the Panel’s recommendations, there should also be a requirement to give reasons.

A much stronger role for the independent Limits and Targets Review Panel should be provided for when it comes to consideration of exemptions to limits.

Other comments on the limits framework

171. Below, we offer some miscellaneous comments about the limits framework more broadly:

a. First, it is unclear what an environmental limit and associated target is meant to look like in the NPF or a plan. In other words, if one were asked to point to a "limit" or "target" in the actual document, where would one point? While a limit is specifically allowed to be expressed in a qualitative or quantitative way, it is unclear how such provisions will overlap with more familiar tools like rules (eg prohibited activity classification), standards, policies (eg "avoid" policies) and objectives. It is not obvious how a target has to be expressed.

   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 exemption is required).

   It should be clarified that environmental limits and minimum level targets can be expressed as policies (eg avoid policies) and rules (eg prohibited activities), and their status must be clearly identified in plans.

b. Secondly, there is a curious lack of reference to compliance with environmental limits when it comes to decision-making criteria for designations under cl 512. Resource consents cannot be granted contrary to environmental limits (a good thing), but that is not mirrored in the context of designations. This needs correction, given that land use (authorised by designation) is just as capable of infringing limits as other kinds of activity authorised by regional consent (eg discharges or taking water).

   The Bill should clarify that decisions on notices of requirement and changes to designations must not be contrary to environmental limits and associated targets.

c. Thirdly, there is an excessively broad ability for the Minister to allow large infrastructure projects to go through a fast-track consenting process. While this is not an exemption from the need to comply with limits and targets, it is relevant because the process 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). We are not convinced of the need for a fast-track process at all, since there is already provision for call in and direct referral.

   The fast-track consenting process modelled on Covid-19 legislation should be removed.

172. Finally, we note three matters of drafting that should be tightened with respect to limits:

a. First, the Bill provides in cl 40(3) that environmental limits may be formulated in two ways: a minimum environmental state or a maximum amount of harm or stress that may be "permitted" in a management unit. The use of the term "permitted" here is confusing, as it suggests either a permitted activity status (and therefore the misleading notion that limits set a permitted baseline and anything infringing them simply requires consent) or describes

a maximum amount of harm that might be "permitted" in the sense of "allowed by a permit". Neither of these reflect the policy intention, so "permitted" should be reframed as a less technical term such as "allowed" (which is used elsewhere in the Bill).

b. Secondly, while not specifically referring to limits, cl 57(1)(b) is problematic. This requires the NPF to provide direction to resolve conflicts "about environmental matters, including those between or among the system outcomes". The provision needs to be tightened to refer *only* to conflicts between system outcomes rather than "environmental matters" generally. Ministers should have no power to prioritise other outcomes over environmental limits and associated targets.

c. Thirdly, it is curious that cl 52 requires the Minister to consider various things (eg what is "most appropriate" for a directly affected customary marine title group) in deciding "whether" to set limits or targets. This implies that the Minister has discretion as to where an environmental limit is set, which is an uneasy fit with the idea that an environmental limit is simply measuring or recording the state of the environment as at the point of enactment (see cl 37(a) and cl 40(3)). It also implies that the Minister can choose *whether* to set a limit/target, which conflicts with the *requirement* to do so in cl 38.[38] It needs to be clarified that this does not alter the more general legal obligation to set limits and targets.

5.7 The effects management hierarchy and the protection of places of national importance

173. The Bill's framework for environmental limits does not deal with the adverse effects of all activities. As well as "complying" with limits and associated targets, the purpose of the Bill states that use and development must be done in a way that "manages" their adverse effects above limits.

174. One way the Bill does this is by outlining an effects management framework. In the following part of our submission we highlight issues with this framework. First, we look at its close relationship with provisions that protect particular places of national importance (notably those relating to biodiversity). Secondly, we look at how the effects management framework applies more broadly beyond the protection of those particular places.

The effects management framework

175. The NBEB outlines the effects management framework in subpart 5 of Part 3 (concerned with the NPF). This is described in cl 61 as "a means of managing adverse effects as follows:"

> (a) adverse effects must be avoided wherever practicable:
> (b) any adverse effects that cannot be avoided must be minimised wherever practicable:
> (c) any adverse effects that cannot be avoided or minimised must be remedied wherever practicable:
> (d) any remaining adverse effects that cannot be avoided, minimised, or remedied must be offset wherever practicable:

[38] *Some* limits are optional, but mandatory limits cover most domains.

(e) if adverse effects remain after applying the requirements, in that order, of paragraphs (a) to (d), the activity cannot proceed unless redress is provided by enhancing the relevant aspect of the environment.

176. As a preliminary comment, we note that these provisions are not found in the RMA, although case law under it has developed a similar approach from the basic RMA direction in section 5 to "avoid, remedy or mitigate" adverse effects.[39] In the NBEB, the direction is more fleshed out in a hierarchical form, with just the simple "manage" adverse effects remaining in its cl 3 purpose. This hierarchy broadly resembles that contained in the draft NPS for Indigenous Biodiversity.

177. Avoidance, minimisation, remediation and mitigation are not defined in the Bill. However, schedules 3 and 4 elaborate on when *offsetting* and *redress* will be appropriate and what, in broad terms, they mean (in that they provide a number of principles to be applied rather than defining the concepts per se). We return to the detail of these schedules in a moment. It is worth noting, however, that the schedules only apply to *biodiversity* and *cultural heritage* offsetting/redress.[40] The Bill does not provide equivalent guidance on how the effects management framework in cl 61 might apply where there are impacts on other resources like freshwater or air.

178. The reason for this appears to be that under cl 62, the Bill's effects management framework only applies, by default, to activities having impacts on two particular types of *place*: (1) significant biodiversity areas (SBAs) and (2) specified cultural heritage (SCHs). These are two examples of "places of national importance" (PONIs) protected elsewhere in the Bill, and we identify them in bold below.

555 Interpretation

place of national importance means any of the following:

(a) an area of the coastal environment, or a wetland, or lake, or river or its margins that has outstanding natural character:
(b) an outstanding natural feature or outstanding natural landscape:
(c) specified cultural heritage:
(d) a significant biodiversity area:
(e) an area that provides public access to the coastal environment, or to a wetland, lake, or river or its margins.

[39] And has pronounced on the distinction between mitigation (where the harm is mitigated) and offsetting (where the harm remains but is offset by improvements elsewhere).
[40] Partly reflecting the well-developed framework for this in the proposed NPS for Indigenous Biodiversity, and the fact that the effects framework applies by default to SBAs so it is worth providing more detailed framing for that. However, schedules 3 and 4 seem to apply to biodiversity offsetting generally (ie when an activity has potential impacts on biodiversity), not just where impacts are on an SBA. However, for the effects management framework (and therefore, presumably the schedule) to apply to anything other than SBAs (ie impacts on biodiversity that are not SBAs), the NPF has to specifically state that the framework applies.

62 When effects management framework applies

(1) The effects management framework applies to adverse effects on **significant biodiversity areas and specified cultural heritage.**

(2) The framework does not apply to adverse effects on other resources unless the national planning framework directs that the framework apply.

(3) The national planning framework or a plan may require—

(a) a more stringent management of any particular adverse effect; or
(b) less stringent management of any particular adverse effect other than one on significant biodiversity areas or specified cultural heritage.

179. Other PONIs (which we look at later in our submission) include outstanding natural landscapes (ONLs) and outstanding natural features (ONFs), but the effects management hierarchy does not automatically apply to impacts on them.

180. The framework *can* be applied to the management of "other resources" (presumably including other kinds of PONI as well as general resources like freshwater), but *only if directed in the NPF*. So while it is relevant more broadly to the management of activities, the main point of the effects management framework seems to be to manage adverse effects on SBAs and SCHs.

181. It is therefore useful, as a first step, to consider how the provisions relating to the effects management framework (in Part 3 of the Bill) work together with the provisions dealing with how SBAs and SCHs are protected (in Part 8 of the Bill). These two sets of provisions are meant to work together as a single system. Our main focus is on SBAs, and we leave the specific aspects of SCHs to be considered by others (although structural concerns may be similar).

The main purpose of the effects management hierarchy appears to be in the assessment of impacts on two categories of places of national importance – significant biodiversity areas and specified cultural heritage areas.

Places of national importance: the protection of significant biodiversity areas

182. Part 8, subpart 3 of the Bill deals with the protection of PONIs, including SBAs. Some clauses apply to all PONIs, while others apply only to SBAs.

183. Key provisions applying to SBAs are outlined below.

556 Identification of places of national importance

(1) Every plan must identify each place in the region that that is a place of national importance, other than—

(a) areas that provide public access to the coastal environment, or to a wetland, lake, or river or its margins; and
(b) significant biodiversity areas that—
(i) are in the coastal marine area or in a freshwater body; and
(ii) are exempt from the identification requirements by the national planning framework.

(2) A significant biodiversity area described in subsection (1)(b) may be identified in a plan.

557 Criteria to be prescribed for identifying significant biodiversity areas

(1) The Minister must set criteria for identifying significant biodiversity areas in the national planning framework.

(2) Before specifying criteria, the Minister must seek written advice from the limits and targets review panel (*see* clause 3 of Schedule 6), including advice on—

(a) whether, in the opinion of the panel, the criteria proposed by the Minister are scientifically robust; and
(b) any other matter the Minister considers relevant.

559 Protection of places of national importance

(1) An activity that would have a more than trivial adverse effect on the attributes that make an area a place of national importance must not be allowed by a rule, resource consent, or designation, unless—

(a) an exemption is made in accordance with the requirements set out in sections 64 to 67; or
(b) the activity is part of a protected customary right; or
(c) the activity is carried out under a customary marine title order or customary marine title agreement

(2) Subsection (1) applies to places of national importance, but only if that place is identified in—

(a) the national planning framework or a proposed part of the framework; or
(b) a plan or proposed plan; or
(c) in the case of a cultural heritage place, a closed register.

(3) Before an activity is able to commence, the consenting authority or requiring authority, as the case may be, must establish whether the area subject to a resource consent application or notice of requirement includes an area of significant biodiversity.

(4) Subsection (3) does not apply if—

(a) the activity is fishing authorised under the Fisheries Act 1996 (other than aquaculture); or
(b) the Minister has made an exception for the activity.

561 Protection of significant biodiversity areas

(1) Section 559(1) applies to a significant biodiversity area if—

(a) the place is identified in accordance with section 559(2); or
(b) significant new information has become available since the plan was made to establish that the place meets the criteria; or
(c) the place meets the criteria, even though the place was not assessed when the plan was made.

(2) Subsection (1)(a) applies unless significant new information has become available since the plan was made that establishes that the place does not meet the criteria.

184. We agree that a more targeted framework for protecting particular *areas* of high indigenous biodiversity value, like SBAs, is necessary. The Bill's heart is therefore in the right place when it comes to SBAs, because the more general machinery of the Bill (limits, targets and outcomes) would not adequately protect them. This is for two reasons.

    a. First, the environment limits and targets envisaged under the Bill are intended to operate across (potentially) broad management units. This means that a biodiversity limit (eg total indigenous vegetation cover across a management unit, or measures of species population) might still be "complied" with if harm to one high value place is met with improvements in another. Such an approach fails to protect the attributes of a place itself, especially (for example) if it is remnant indigenous forest and cannot readily be "replaced" by new planting elsewhere.

    b. Secondly, the list of outcomes in cl 5 of the Bill has no hierarchy, meaning that this cannot necessarily be relied upon to ensure strong protection in plans for specific *locations* of biodiversity value. Such considerations could be "traded off" with others, including housing and rural development.

185. SBAs are, we understand, intended to be similar to significant natural areas (SNAs), with criteria for identification yet to be established. The Minister through the NPF is empowered to make those criteria under cl 557(1), but these must be based on considerations outlined in cl 558 (which include representativeness, diversity and pattern, rarity and distinctiveness, and ecological context).[41] We note, however, that cl 558(2) specifically states that criteria for identifying marine SBAs must not include representativeness (the extent to which an indigenous ecosystem, consisting of the habitat of indigenous biota in an area, is characteristic of the indigenous biodiversity within the context and scale of the area concerned). This is problematic and should be removed, or at least replaced by a direction that criteria *may* include representativeness in the coastal marine area. We understand that cl 558(2) may prevent many of the carefully identified ecologically significant sites in the Marlborough Sounds (which protect against fishing impacts) from being identified in NBE plans, because a core consideration for these was representativeness within biogeographic zones. Being forced to remove such protections would undermine the Court of Appeal's decision in *Attorney-*

[41] These things are defined in cl 558.

General v The Trustees of the Motiti Rohe Moana Trust ([2019] NZCA 532), which the Bill otherwise seeks to preserve. Clause 558(2) should be deleted.

186. More generally, the basic idea in the Bill is that most SBAs will be systematically and clearly identified and mapped in plans, so that impacts on them can then be managed in a more transparent way. It is meant to be obvious to consent applicants or requiring authorities in advance, where these places are, and therefore what needs to be done to address impacts on them.

187. Instead of relying on discretionary national direction to require the identification and protection of biodiversity areas on private land (national direction on SNAs has proved extremely challenging under the RMA in this regard), such requirements are to be baked into primary legislation.[42] This requirement is in itself a big step forward and needs to be retained.

It is positive that the Bill requires the proactive identification and protection of SBAs based on criteria, rather than relying on general plan making processes and functions relating to biodiversity protection. Other features of the NBEB, such as limits and outcomes, will not provide adequate protection on their own.

188. However, we still have significant concerns with how SBAs are protected.

When does the effects management framework apply to impacts on SBAs?

189. At first glance the legal test for protecting SBAs seems obvious. The key provision here is cl 559(1)(a), which does not allow activities having "more than trivial" impacts on an SBA unless an exemption is made under clauses 64-67. In itself, therefore, clause 559 is a strongly protective direction, which should be retained.

190. There are other positive aspects too. For example, cl 559 prevents a *rule* (and not just a *consent*) from allowing more than trivial impacts on an SBA, meaning that these activities cannot be provided for as permitted activities in plans unless an exemption is granted through the NPF.

191. However, it is hard to reconcile (1) the direction to (essentially) *avoid* more than trivial effects on SBAs in cl 559 with (2) the statement in cl 62 that the effects management framework "applies" to activities having impacts on them. The effects management framework allows offsetting and redress where other measures are not "practicable", which is quite different to a requirement to not "allow" more than trivial effects.

192. This leaves the legal test for the protection of SBAs extremely murky. Does a proponent have to strictly avoid more than trivial effects unless an exemption is sought and granted? Or is a proponent entitled to have any impacts assessed through the effects management framework, potentially requiring nothing more than redress (including, potentially, financial *compensation*)?

[42] Although the criteria for identification are still to be specified in the NPF, they are based on a series of mandatory considerations in cl 558.

It is not clear if the effects management framework in cl 61 applies to activities having impacts on SBAs, despite what cl 62(1) says. This is because applying the framework is incompatible with the equally clear direction in cl 559 to not allow "more than trivial" adverse effects on the attributes that make an area an SBA.

193. Mental gymnastics are required to resolve this inconsistency. One interpretation is that being able to use the effects management hierarchy (and potentially providing only redress or offsetting) *is* the exemption pathway referred to in cl 559. In other words, an exemption can be granted from the stronger obligation in cl 559 (to avoid more than trivial effects) by replacing it with the weaker obligation in cl 62 (applying the effects management framework).

194. However, this is far from a satisfactory answer. For one, cl 62 clearly states that the effects management framework *applies* to impacts on SBAs, not that the framework is to be used as a form of exemption from stricter provisions.

195. Even more confusingly, clauses 64-67 (referred to in cl 559 as the exemption pathway) do not actually deal with exemptions to the cl 559 obligation (to avoid more than trivial effects). Instead, they appear to allow the Minister (through the NPF) to grant exemptions *from the effects management framework itself*.

> **64 Scope of possible exemptions**
>
> (1) The responsible Minister may specify, in the national planning framework, exemptions from the effects management framework for activities that have adverse effects on a significant biodiversity area or specified cultural heritage.

196. This is – to put it bluntly – very odd, as we cannot see why exemptions from the effects management framework would ever be needed, given that its minimum requirement is to provide redress/compensation where other measures are not "practicable". It does not therefore prevent essential projects from progressing.

It is confusing that exemptions from the cl 559 obligation not to allow more than trivial impacts on SBAs links to a part of the Bill outlining exemptions from something quite different – the effects management framework. We do not see why exemptions to this framework would ever be contemplated, since at its weakest it allows offsetting and redress where other responses are not "practicable".

197. It is unclear if the disconnect between cl 559 and cl 64 is an error, or intentional. All we can conclude is that those drafting cl 559 did not speak to those drafting cl 64, given that both provisions are quite clear in their opposing intentions.

198. It would make more sense for cl 64 to specify that the Minister can grant, in limited circumstances, an exemption *from the stronger cl 559 obligation to avoid more than trivial effects* on SBAs. If such an exemption *were* to be granted, the effects management framework *would* then apply. Essentially, this would mean that applying the effects management framework *is* the exemption from the cl 559 obligation, rather than the starting point for how impacts on SBAs are managed.

The Bill should clarify that applying the effects management framework to impacts on SBAs *is* the exemption to the strong requirement in cl 559. There should be no ability to grant an exemption from the effects management framework itself.

Exemptions to the protection of SBAs

199. Assuming that the above recommendation is actioned, we note that cl 64 would constrain the situations in which exemptions *can* be granted to the cl 559 obligation. However, these are currently far too wide in scope, meaning that exemptions to the NPF can be granted (and significant impacts on SBAs allowed) where there is (1) a functional or operational need for an activity's location, *or* (2) there is no reasonably practicable alternative location, *or* (3) if the activity meets "other requirements specified for an exemption under this Act".

200. We note that the draft NPS for Indigenous Biodiversity (at 3.11(2)) requires *both* (1) and (2) above to be satisfied for an exemption to be granted, and is therefore stronger than the NBEB. With respect to (3), we note that this creates considerable uncertainty – what are the "other requirements specified for an exemption under this Act" referring to, given that cl 64 *is* the place where the requirements are listed?

201. Clause 66 then lists the kinds of activities that can be subject to an exemption if cl 64 matters are satisfied. These include activities as broad as:

a. "Subdivision" (which can have significant impacts on indigenous flora and fauna).
b. Any activities mitigating or adapting to climate change (potentially hard coastal structures like seawalls, or large-scale wind or solar farms).
c. Activities "appropriately" managed under other legislation (which might conceivably include fishing under the utilisation-focused Fisheries Act, urban development under the Urban Development Act, or mining under the Crown Minerals Act).[43] This would essentially allow the Minister to choose a different (weaker) level of protection than under the NBEB.
d. Any "activities on Māori land".
e. Most concerningly, "activities that will provide nationally significant benefits that outweigh any adverse effects of the activity".

202. With respect to the last point, we note that cl 67 requires the Minister to consider various things in determining whether there are "nationally significant" benefits. These cross-reference matters in cl 329(3), which (confusingly) deals with criteria for calling in consent applications.

67 Considerations that apply to grant of exemptions

(1) The responsible Minister must,—

(a) in determining whether an activity will provide benefits that are nationally significant, have regard to section 329(3); and …

[43] These do not necessarily provide robust protections but may be considered "appropriate" by the Minister.

203. Purely in mechanical terms, this is an unusual cross-reference, as cl 329(3) matters go well beyond criteria for whether there are nationally significant "benefits", and also include other matters relevant to why an application might be called in (including potential *adverse* impacts). It is therefore left unclear whether the Minister, in considering whether or not an exemption is allowable under cl 66 on the grounds of there being a nationally significant benefit, can take into account both the benefits and potential harm of the activity.[44] The relevant "benefits" should instead be listed in cl 67(1)(a) itself.

The matters for which exemptions to the cl 559 obligation can be granted need to be significantly constrained. They should only apply to essential infrastructure, not things as broad as subdivision and where nationally significant benefits outweigh adverse effects. Other aspects of drafting also need to be tightened up.

204. Equally concerning are the various things the Minister is required to consider before granting an exemption, and allowing impacts on an SBA, under cl 67. The Minister must:

(b) before specifying an exemption, consider—

(i) the principles set out in section 6 (other than those set out in section 6(2)(b), (c), and (d); and
(ii) the relative cost of granting or declining to specify an exemption for an activity; and
(iii) any alternatives to specifying an exemption that would achieve the objective of the proposed exemption; and
(iv) any other matter the Minister considers relevant.

(2) An exemption provided for under section 564 must be designed to diminish the harm that will be caused to a place to the greatest extent compatible with enabling the activity to proceed.

205. It appears the cross-reference to "section 6(2)(b), (c), and (d)" is meant to refer to "section 6(1)(b), (c) and (d)".

206. Aside from this error, the content of cl 67 is of significant concern. As elsewhere in the Bill, it appears that the Minister is being invited to consider exemptions to fundamental environmental protections by engaging in an overall broad judgement approach. As well as the open-ended ability to consider "any other matter", there is the express invitation to consider the relative cost of granting or declining an exemption. The cost of declining an exemption will often be easy to quantify in monetary terms, but the benefits of doing so may be much more difficult without a robust framework for natural capital valuation (which we do not have).

207. We note that this is incompatible with the New Zealand Coastal Policy Statement, where strong "avoid" policies with respect to significant biodiversity areas in the coastal environment do not allow for exemptions at all, let alone ones where the Minister can balance

[44] Clause 66 applies where the Minister considers the nationally significant benefits *outweigh* the adverse effects of the activity, but the reference to cl 329(3) is only when the Minister is determining whether there are nationally significant benefits or not, and not whether the benefits outweigh the adverse impacts.

development against protection in determining whether to grant one. If this change of policy is intentional, it is alarming, especially since the Bill gives a strong direction elsewhere for the first iteration of the NPF to maintain the policy intent of existing national direction.

208. Presumably cl 67 relates not only to *whether* to grant an exemption, but also to the extent of harm allowed *by* the exemption. This gives rise to a fairly open-ended discretion to destroy SBAs if they are not compatible with enabling an activity to proceed.[45]

Under cl 67, the Minister is able to consider a wide range of matters in determining whether to grant an exemption to what is already a wide range of activities having impacts on SBAs. These need to be much more tightly focused on the extent to which an activity is necessary to achieve the public interest.[46]

209. It is also unclear how the exemptions *process* is intended to work. In particular, it appears that exemptions cannot be applied for or granted through the consenting (or notice of requirement) process. The only pathway for an exemption seems to be through a proactive change to the NPF (and there is no ability for a person to *apply* for a change to the NPF).[47] Thus the overall effect of cl 559 is, *prima facie*, that unless an exemption is already granted in the NPF, all activities having more than trivial impacts on an SBA are prohibited activities.

210. However, we note that this may not be the case in practice. Rather than the NPF creating focused exemptions in advance for specific SBAs or specific activities (eg for one particular project like a wind farm), it seems possible that the NPF will instead create an enabling framework whereby consent authorities are invited to consider consent applications for general categories of activity. In other words, being allowed to use the consenting process in the normal manner would *be* the exemption provided in the NPF, and exemptions allowed to do that could potentially be broad brush. For example, the NPF might simply state that there is an exemption from cl 559 for "nationally significant infrastructure", which could then go through a consenting process in the usual manner. It could even conceivably provide an exemption for general kinds of farming activity by providing for these as permitted or controlled activities. After all, an exemption can override the requirement that a *rule* (not just an individual consent) prevent adverse effects on an SBA.

211. These provisions require significant tightening. At a minimum, it should be clarified that new activities having more than trivial impacts on an SBA cannot be provided for as permitted activities even via the NPF exemption process. A consenting process is at least needed, or we will simply not know what the cumulative impacts on SBAs are.

212. Moreover, to the extent that exemptions are contemplated, these should only be focused on specific projects in the context of their location and effects, and not be provided for in the NPF

[45] The existence of these provisions suggests to us that the effects management framework is not itself intended to be an exemption from the cl 559 obligation. Clause 67 only makes sense as an exemption *from* the effects management framework.

[46] We note that the NPS for Freshwater Management (at 3.22(1)(b)) requires that exemptions to the obligation to avoid impacts on wetland extent demonstrate a significant regional or national benefit.

[47] Curiously, exemptions to the separate requirement to avoid more than trivial impacts on an HVBA need to be done through "rules" in the NPF. It is unsure whether this is intended to be different to exemptions for SBAs (eg whether exemptions can be issued via "policies" in the NPF).

as exemptions for generic "types" of activity (eg urban development or significant infrastructure). It would therefore be better to clearly link the need for an exemption to the consenting context (ie a consent applicant must obtain an exemption from the Minister, based on an assessment of the effects of a project on that particular SBA in question) rather than the NPF authorising a broad swathe of activities that can then be consented in the normal manner.

213. Overall, we conclude that the exemptions framework for SBAs is of considerable concern irrespective of whether the exemption is to the strong cl 559 obligation (which makes some sense) or to the weaker obligation to apply the effects management framework (which makes no sense at all). Constraints on exemptions in cl 66 should be significantly tightened, so that they are allowed only for those activities having significant public importance like essential infrastructure (not things as broad as "subdivision" or where benefits outweigh harm), and where there is a functional need for the activity to occur in that location. Exemptions should be considered only in context at the consenting stage. Clause 67 should be significantly tightened, or removed entirely.

214. To the extent that exemptions to the cl 559 obligation are needed (eg for routine maintenance of electricity lines involving trimming within an SBA), it should be made plain through targeted standards (attached to consent conditions) how the effects management framework is intended to work.

The Bill should clarify that activities having more than trivial impacts on SBAs cannot be classified as permitted activities. There needs to be a clearer trigger point in the consenting provisions of the Bill that requires an exemption to be obtained for activities having such impacts.

215. We also recommend that cl 66(1)(r), allowing an automatic exemption for activities carried out by the customary marine title holder in the relevant customary marine title area, should be limited only to those activities actually *authorised under the Marine and Coastal Area (Takutai Moana) Act*, not any activity conducted by "the title holder".

Clause 66(1)(r) needs to be tightened so it only authorises exemptions where activities of customary marine title holders are authorised under the Marine and Coastal Area (Takutai Moana) Act.

216. Similarly, cl 66(1)(g), which allows exemptions where SBAs are established solely because of the presence of a plant species listed as threatened or declining in the New Zealand Threat Classification System,[48] should be removed. We do not understand why exemptions should be contemplated where there are more than trivial threats to flora specifically listed as threatened, even if these are abundant in the ecological area in question.

Exemptions should not be allowed where SBAs contain plant species listed as threatened or declining in the New Zealand Threat Classification System. Clause 66(1)(g) should be deleted.

217. At the bigger picture level, we are struggling to understand why clauses 62-67 (concerning the effects management framework) are so disconnected in space from the provisions with which

[48] We note exemptions cannot be granted where the plant species is rare within the region or ecological area.

they are clearly so entwined – clauses 559-667 (dealing with places of national importance). By contrast, it is telling that provisions dealing with exemptions for activities having more than trivial impacts on "highly vulnerable biodiversity areas" (a different category of protected place, which we touch on further below)[49] are located immediately after the provisions that deal with their protection. That makes the link between protections and exemptions much clearer than in the case of SBAs,[50] where one has to jump around the statute and where, as a consequence, the mechanics simply don't work.[51]

Aside from being tightened, provisions concerning exemptions from the cl 559 obligation to avoid impacts on SBAs should be located immediately after provisions concerning the obligation itself. They would then be more targeted at the relevant context, as they are in the case of highly vulnerable biodiversity areas.

Weaknesses in the effects management hierarchy

218. Another issue is the nature of the effects management hierarchy itself. In other words, if one *does* apply the effects management hierarchy in cl 61 to activities having an impact on SBAs, what shortcomings does that framework then have? We have many concerns on this front. Some of these are about substance and others about confusing and unclear drafting.

219. The most obvious point is that cl 61 allows a cascade of responses to impacts on SBAs (eg offsetting and redress) which, where stronger measures are not practicable, goes lower than what is contemplated specifically by the RMA (mitigation). That said, case law under the RMA built upon the basic avoid, remedy and mitigate hierarchy to provide for biodiversity offsetting, and put safeguards around its use. The appearance of offsetting in the NBEB is therefore not unfamiliar, even if it is a new concept for primary legislation.

220. The "avoidance" of adverse impacts on SBAs, at the top of the hierarchy, is a reasonably clear direction. However, it is much less clear how offsetting and redress are being provided for, and this is where we have the most concerns.[52]

221. The basic hierarchy in cl 61 is fleshed out in schedules 3 (biodiversity offsetting) and 4 (biodiversity redress). For both, we note that it is unclear whether these provisions are intended to apply to all biodiversity or only *indigenous* biodiversity. Reference to *indigenous* biodiversity appears to be made sporadically, and almost randomly, throughout the schedules.

[49] Although, confusingly, not a "place of national importance" despite being in the subpart dealing with places of national importance.
[50] For HVBAs, it is clear that the exemption is "from the prohibition in section 563", and cl 565 is directly targeted at that context (not the effects management framework).
[51] One reason the provisions are separated in the case of SBAs may be because the effects management framework *can* apply to things other than SBAs and SCH, if the NPF provides for that. However, it would make much more sense for clauses 62-67 to be located immediately following cl 561 (after the provisions on SBAs and SCH) and for the ministerial power to apply the framework to other "resources" to then make cross-reference to that.
[52] We note again here that that biodiversity offsetting and redress are not specifically targeted at SBAs (ie specific *areas* that are protected), but apply to any activities having impacts on biodiversity (whether in an SBA or not). That leaves open the possibility that schedules 3 and 4 would apply to all impacts on biodiversity if the NPF directed this to happen.

The Bill needs to clarify whether schedules concerned with biodiversity offsetting and redress apply to all biodiversity, or just indigenous biodiversity.

222. We turn to Schedule 3 first. This sets out a series of principles for the use of biodiversity offsets. It provides for two types of principle: some requiring *compliance* and others being, essentially, *desirable*:

> Principles 1–12 **must be complied with** for an action to qualify as a biodiversity offset.
> Principles 13–14 **should be met** for an action to qualify as a biodiversity offset.

223. Perhaps most fundamentally, it is unclear how one "complies" with a principle. For example, schedule 3(6) requires offsets to be "preferably close to the location of development or within the same ecological district". The term "preferably" appears several times in the schedule. How does one comply with a preference, let alone a principle? Drafting provides little certainty. We consider that the schedules need to be redrafted more tightly so that principles are phrased as obligations that need to be adhered to/complied with.

224. Principle 1 also states that:

> a biodiversity offset is a commitment to redress more than minor residual adverse impacts. It should only be contemplated after steps to avoid, remedy, and mitigate adverse effects have been demonstrated to have been sequentially exhausted and thus applies only to residual indigenous biodiversity impacts.

225. This is confusing on several levels. For one, it has inconsistencies with the effects management framework in cl 61. The principle does not mention "minimising" harm, leaving it unclear whether there is a requirement to "sequentially exhaust" this option before offsetting (or, indeed, whether avoiding, remedying and mitigating harm is collectively the same thing as minimising harm, or if minimisation is something quite different).

226. Moreover, "sequentially exhausting" avoidance, remediation and mitigation is quite a different test to that in cl 61, where the requirement is to do each of these where "practicable" before contemplating the next. Even if these are intended to be the same test (ie that you "exhaust" mitigation *by* doing everything practicable to mitigate), that is not clear in the Bill and leaves the meaning open to argument.

227. Similarly, schedule 3 states that offsetting "should" only be contemplated if avoidance, remediation and mitigation have been exhausted. This is quite different to a requirement that adverse effects "must" be offset if they cannot practicably be avoided, remedied or mitigated.

228. Reinforcing the earlier discussion, it is also confusing that the effects management hierarchy is said to apply by default to impacts on SBAs, on which "more than trivial" effects are not allowed under cl 559. This "more than trivial" test is quite different to the purpose of offsetting within the framework itself, which is to address "*more than minor* residual adverse effects". In other words: if there is an impact on an SBA to which the effects management framework needs to apply, do offsets need to address "more than trivial" impacts, or do they instead need to address "more than minor" impacts? These are different legal tests.

The drafting in schedule 3 of the Bill creates significant legal uncertainty through its use of different, and sometimes incompatible and inconsistent, terms.

229. Even more confusing is the extensive overlap of concepts in the mitigation framework. We are not certain whether these are errors in drafting, or an attempt to create a complex set of concepts.

230. Cl 61 itself gives a reasonably clear hierarchy: avoid, minimise, remedy, mitigate, offset, and redress. However, in schedules 3 and 4 it becomes much murkier as to what these things mean. In particular:

a. A biodiversity offset is defined in schedule 3 as a commitment to "redress" more than minor residual adverse impacts. The reference to redress begs the question as to whether this and offsetting are actually the *same* concept, despite being explicitly sequential steps in cl 61.

b. Biodiversity redress then defined as:

> a commitment to provide redress for more than minor residual adverse impacts. It must only be contemplated after steps to avoid, remedy, mitigate and offset adverse effects have been demonstrated to have been sequentially exhausted and thus applies only to residual biodiversity impacts.

c. In many ways this is the same definition as offsetting, unless there is some subtle distinction between "a commitment to redress" and "a commitment to *provide* redress" and the subtle difference between "must only" be contemplated (for redress) and "should only" be contemplated (for offsetting). The principles for biodiversity redress are for the most part the same as those for offsetting, leaving the distinction between the two unclear. In particular, both seem to contemplate that measures to counteract harm in one place can be done in other places (an offset site and a redress site). The key distinction appears to be that the biodiversity values for offsetting must be the same as the values harmed (like for like).

d. Clause 2 of schedule 3 then refers to "biodiversity compensation", a term that is not mentioned elsewhere in the Bill (including the effects management framework in cl 61) and appears to be used largely interchangeably with "redress". Redress (and compensation) also appear to contemplate "environmental contributions" – simply paying for harm – when "there is no effective option available for delivering indigenous biodiversity gains on the ground".

231. The upshot is that three terms – biodiversity offsetting, redress and compensation – all appear to be referring to similar things, but it is never entirely clear what that thing is. The confusion is continued when one looks elsewhere in the Bill. For example, cl 112 contemplates that:

> 2) A rule requiring an environmental contribution must specify—
>
> (a) the purpose for which a contribution is required, which may include—
> …
> (ii) making a mechanism to offset adverse effects available:…

232. This arguably suggests that paying for harm (a contribution) is a means by which offsetting can occur, which goes against the whole notion of what an offset is meant to be in schedule 3 (although it could equally be interpreted as only being available where a physical opportunity for offsetting on the ground exists and requires funding).

233. The distinction between the requirements for offsetting and redress are unusual in other places, too. For example, offsetting is meant to be a "stronger" response, but cl 2 of schedule 3 (offsetting) appears weaker than the equivalent cl 2 of schedule 4 (redress). In particular, it is said that "an offset would be inappropriate" if residual adverse effects cannot be offset on the grounds that:

    a. the irreplaceability or vulnerability of the indigenous biodiversity affected;

    b. there are no technically feasible or socially acceptable options by which to secure gains within acceptable time frames;

    c. effects on indigenous biodiversity are uncertain, unknown or little understood, but potential effects are significantly adverse.

234. For redress, the drafting is different, and arguably stronger: "a decision-maker must consider the principle that many indigenous biodiversity values are *not able to be redressed*" because of the same list of reasons.

235. This further muddies the water as to what the legal test actually is, because these are *both* different to the requirement that a response higher up must be "exhausted" before one lower down can be contemplated. This probably reflects sloppy drafting, in that the provisions use quite different structures and language to say much the same things, but it raises a significant amount of legal uncertainty.

236. Moreover, we do not understand why a requirement for no net loss and preferably net gain applies to offsetting but not redress. Redress is a weaker response, but just because offsetting is not "practicable" it seems odd that redress then does not have to have a net positive impact. If anything, a requirement for overall net gain should be emphasised *more* strongly when redress is required.[53]

237. More generally, it is problematic that the requirement for offsetting in cl 3 of schedule 3 is "no net loss and preferably net gain". Aside from being an unclear legal test, we consider that there should be a requirement only for net gain and not no net loss. The intent of the Bill is to improve the state of the environment, but this requires clear hooks to the mechanisms capable of achieving it. Requiring net gain for biodiversity impacts, where offsetting is appropriate, is one of the few ways of doing this. It needs to be a clear requirement. Reference to "overall" net gain should be deleted, as every element of harm should be offset in this manner.

238. We are concerned that the "limits to offsetting" (when it is inappropriate to use) in cl 2 of schedule 3 involve significant discretion. One test is whether there are "socially acceptable" options to secure biodiversity gains at an offset site "within acceptable time frames". What

[53] Even if this is just through an environmental contribution that is earmarked for biodiversity improvements.

these mean is unclear. Similarly, cl 8 of the schedule specifies that offset gains must be achieved "within the consent period". Aside from being quite different tests (for example, what happens if there is a socially acceptable gain within an acceptable timeframe (eg 20 years), but that is longer than the duration of consent (eg 10 years)?), some consents can actually be indefinite in duration and the obligation will therefore never bite.

239. We consider that biodiversity offsets, where appropriate, must be realised in a timeframe dictated by ecological factors (eg how long it takes for vegetation to regenerate on a site) irrespective of consent duration, and that the duration of particular conditions[54] securing such obligations should then be set *based on* ecological factors. This is important, because consent duration may be set for other (potentially arbitrary) reasons.

240. Problems with drafting are also highlighted by schedule 4, which sets out "principles for *biodiversity* redress" and yet is prefaced "The following sets out a framework of principles for the use of *cultural heritage* offsetting". This is clearly an error, but the copy-paste mentality that has gone into preparing these provisions (some appear to have been directly copied from the proposed NPS for Indigenous Biodiversity rather than being tailored to the new context of the Bill)[55] is concerning.

Concepts in schedules 3 and 4 have been defined in overlapping ways. Unclear drafting makes it very uncertain as to what the legal requirements for applying the effects management framework to SBAs actually involves.

There is no simple fix to this, and we consider that the schedules should be redrafted from the ground up to more clearly define relevant terms and clarify the relationship of the schedule with relevant provisions in the body of the Bill (notably cl 61). While this should build on the proposed NPS for Indigenous Biodiversity, this cannot simply be copied over given differences between the RMA and NBEB.

241. We also note some structural issues with how the effects management framework has been provided for in the Bill.

    a. Part 3 (dealing with the NPF) is an odd location for provisions dealing with the effects management framework,[56] given that this has much broader relevance than the NPF. Arguably the framework is much more relevant to consenting. The framework would, however, be more appropriately contained in a schedule that can be cross-referenced in multiple parts of the Bill.

    b. We also note that the effects management framework is targeted at *activities*. However, we find it very unclear how it is meant to operate or "bite" in practice. Notably, there is no clear link between the consenting provisions of the Bill (when particular activities are actually being proposed and assessed) and a requirement for the effects management framework to be applied to those determinations. In other words, there is no express requirement to

[54] But not necessarily the *activity* authorised by the consent. We note that conditions will need to be able to ensure beyond the expiry of consent.
[55] Potentially explaining the absence of reference to "minimisation", as well as the anomalous use of "compensation" and "redress" in an interchangeable way in schedule 4.
[56] In a similar way to environmental limits, which are also provided for under Part 3 concerning the NPF.

apply the framework when determining consent applications that have effects on resources to which the framework applies (eg significant biodiversity areas, but potentially others).[57]

Provisions relating to the effects management framework should be located in a schedule to the Bill that could be cross-referenced in multiple places in the Bill, rather than being contained within a part dealing with the NPF. A clearer link should be made between the consenting process and the obligation to apply the effects management framework.

242. Overall, and aside from problems with the complicated drafting and mechanics of schedules 3 and 4, we consider that the ability to allow "redress" for harm to SBAs where other responses are not "practicable" is too weak.[58] We consider such "redress" to effectively be a form of "exemption" from the requirements of the Bill. It should only be used as a last resort and where the activity having impacts is essential. In contrast to the framework for exemptions to limits (which itself has significant weaknesses as outlined earlier in our submission), there is no clear "justification" required, based on the nature and societal importance of the activity, for when an activity is allowed to provide redress rather than avoidance or mitigation.

243. Most concerning is the lack of clarity around when an "environmental contribution" can be provided for within the (presumably) broader concept of "redress". Under cl 9 of schedule 4, an environmental contribution simply requires the payment of money or land as compensation for adverse effects. The clause states that such contributions can be made "when there is no effective option for delivering indigenous biodiversity gains on the ground". This leaves it unclear what an "effective" option means and what "gains" are being referred to. The overall effect seems to be that if any kind of "redress" is considered appropriate under cl 2 of schedule 4, then it will be very easy to jump straight to the provision of an environmental contribution, rendering all the other principles in schedule 4 (eg additionality, scale, time-lags) redundant. In short: one can simply pay for harm.

244. Indeed, it seems to us that an environmental contribution is a completely different concept to that of redress (ie sits lower down on the hierarchy), since it quite clearly does not comply with most of the other principles in the schedule and therefore stands alone. For example, environmental contributions must simply "relate to" an impact and "be directly linked" to an intended biodiversity gain or benefit. This language is not only vague, but diverges from even the weak principles outlining what the broader concept of "redress" must achieve (eg that gains from redress must be "proportionate" to impacts, and "preferably … within the same ecological district"). It also looks very different from the concept of compensation in the NPS for Freshwater Management, where "a financial contribution is only considered if it directly funds an intended aquatic gain or benefit that complies with the rest of these principles".

245. We consider that cl 9 is inappropriate and should be deleted. However, if it is retained, it needs a much clearer test for when it is used.

[57] Under the quite disconnected cl 559(3), "before an activity is able to commence, the consenting authority or requiring authority, as the case may be, must establish whether the area subject to a resource consent application or notice of requirement includes an area of significant biodiversity." Schedules also refer to obligations to provide offsets within the "consent period", suggesting that the effects management framework is intended to operate at the consenting level, leaving the place of designations unclear.

[58] We note that there is uncertainty as to what test applies when considering if redress can be used, since schedule 4 provides some more detailed guidance as to when redress is inappropriate, but cl 61 instead states it can be used when offsetting is not "practicable".

246. A deeper point is that, on current drafting, it is extremely hard to understand the intended relationship between offsetting, redress and environmental contributions in order to provide proper comment. The concept of redress overlaps considerably with offsetting (many of the same, or extremely similar, principles apply to both, with both involving on the ground biodiversity gains at a separate site). Even more unhelpful is the fact that redress is defined in a tautological way ("biodiversity redress is a commitment to provide redress"). And while it would seem reasonable that environmental contributions are a *form* of redress (a logical assumption since they are contained in the schedule dealing with redress), the former conflicts with many of the principles that essentially define what "redress" is.

The effects management framework should not allow environmental compensation/environmental contributions to be provided as a response to more than trivial impacts on SBAs. Clause 9 of schedule 4 should be deleted or heavily constrained in terms of when it applies (ie not to SBAs).

Moreover, the legislation needs to be much clearer in defining terms like offsetting and redress, and we cannot provide proper comment until that occurs and the intent is made clear.

247. To summarise the points above, we see three core issues with the drafting when it comes to protection of SBAs.

a. The Bill does not make it clear *whether* the legal obligation is to avoid more than trivial impacts under cl 559, or simply to apply the effects management framework under cl 62. The former is appropriate, while the latter should be treated as an exemption to the cl 559 obligation.
b. If the effects management framework is applied to activities impacting on SBAs, this sets a very low bar because it potentially allows impacts to occur as long as redress is provided and any stronger measures are not "practicable" (which may include consideration of how expensive measures are).[59] Redress is particularly problematic because it allows for harm to occur and be paid for. This is not appropriate and should be removed.
c. The Bill seems to provide for exemptions to be granted to allow "more than trivial" impacts on SBAs as well as to enable activities to sidestep the entire effects management framework (if relatively weak conditions are met). Exemptions to the latter should not be allowed, and exemptions to the former should be significantly constrained.

Where the effects management framework applies to SBAs (as an exemption pathway from the cl 559 obligation), we consider that offsetting and redress should be available only to the extent that higher options are not "possible". This should be reflected in both cl 61 and fundamentally rewritten schedules 3 and 4, and be phrased as a legal obligation rather than a principle.

It is also essential that an additional step in the effects management hierarchy is included in cl 61. This should make clear, as in recent drafts of the NPS for Indigenous Biodiversity, that if redress is not appropriate, then the activity must not proceed. At present, drafting in cl 61 allows activities to slide off "the end of the snake" by providing redress and nothing else.

The effects management framework beyond the context of SBAs

[59] *Tauranga Environmental Protect Society Inc v Tauranga City Council* [2021] NZHC 1201 at [133]-[150].

248. As mentioned above, cl 62 states that the effects management framework applies to SBAs and SCHs by default, but leaves the door open for the Minister to apply it to activities having impacts on other "resources". Many of the concerns we have identified above are therefore also relevant beyond the context of just impacts on SBAs.

249. For example, concerns with schedules 3 and 4 would be equally relevant to impacts of activities on biodiversity in areas not classified as SBAs. In particular, the ability to provide offsetting and redress where stronger measures like avoidance and remediation are not "practicable" is concerning across all environmental domains (eg freshwater) and protected places (eg ONLs) to which the Minister might choose to apply the effects management framework.

250. This concern is exacerbated by the express power in cl 62(3)(b) for the Minister to impose "less stringent management of any particular adverse effect" than that provided by the effects management framework. The effects management framework *already* provides an inappropriately low bar (redress where other measures are not practicable), and this power invites the bar to be set even lower by allowing management approaches to jump straight to offsetting and redress, or to dispense with the need for redress at all.

It is inappropriate for the Minister to be able to provide a less stringent management of adverse effects than under the effects management framework, and cl 62(3)(b) should be removed.

251. As mentioned earlier, there also seems to be potential for the Minister to apply the effects management framework when assessing whether environmental limits are being complied with. Here, redress (particularly compensation) is entirely inappropriate, because the harm remains. Clause 44(4) directly contemplates that "applying the effects management framework" (potentially including a requirement to provide redress) is one way in which a regional planning committee can demonstrate "compliance" with environmental limits. At a minimum it needs to be clarified that providing redress for harm is not a means by which limits can be complied with.

The Bill needs to clarify in cl 44(4) that providing redress for harm is not a means by which environmental limits can be complied with.

252. We also have concerns that applying the effects management framework to SBAs could undermine broader environmental limits for indigenous biodiversity. SBAs should be regarded as a form of place-based biodiversity limit and therefore deserving of strong protection and limited exemptions. Indeed, when a planning committee is considering overall environmental limits for indigenous biodiversity (ie across a whole management unit), heavy reliance may be placed on the protection of existing SBAs in practice, meaning that these areas may actually *be* environmental limits reflected in NBE plans, not just highly valued locations.

253. This understanding is supported by the fact that cl 557 of the Bill requires the Minister to obtain advice from the Limits and Targets Review Panel when specifying criteria for the identification of SBAs. Allowing redress/compensation for impacts on SBAs may therefore erode overall limits, not just the attributes of particular protected areas.

To the extent that broader limits for biodiversity in a management unit are dependent on the protection of SBAs, it should be clarified that impacts on SBAs require exemptions from both limits and the cl 559 obligation.

Other places of national importance

254. We now consider other places of national importance (PONIs) to which the effects management framework does *not* apply by default. In particular, we look at how the Bill protects ONLs and highly vulnerable biodiversity areas (HVBAs). We also look at some other problematic provisions that apply to SBAs, mainly with respect to their identification.

255. There are five categories of PONI, defined in cl 555:

(a) an area of the coastal environment, or a wetland, or lake, or river or its margins that has outstanding natural character:
(b) an outstanding natural feature or outstanding natural landscape:
(c) specified cultural heritage:
(d) a significant biodiversity area:
(e) an area that provides public access to the coastal environment, or to a wetland, lake, or river or its margins.

Identification of PONIs

256. It is good that the Bill requires the identification of PONIs on largely scientific and objective grounds,[60] including SBAs (cl 561) and HVBAs (cl 563). While the criteria for identifying SBAs are to be determined by the Minister in the NPF, the Bill provides reasonably robust statutory considerations for doing so, removing this matter from political discretion.

257. However, it remains to be seen whether the identification of ONLs is robust, given that criteria are left to the NPF to determine.

Broad criteria for the identification of ONLs should be included in the Bill to give confidence that more detailed provisions in the NPF will be robust.

258. We are also concerned that the requirement for plans to identify all PONIs excludes some important SBAs, including those that are in the coastal marine area or in a freshwater body. This is somewhat softened by requiring the avoidance of more than trivial effects *even if an area is not identified in the plan*, but it would be much more appropriate for them to be identified as part of the planning process up front.

259. While we appreciate that these may be difficult to identify (notably those in offshore environments), there should be a requirement to do so where practicable (especially in inshore coastal environments, such as estuaries, that are under significant pressure and where the need for protection is urgent). That is especially obvious if planning processes are actively engaging in the marine space for other reasons, such as the identification of aquaculture

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

zones. In many places, adequate information is already available to identify inshore areas as SBAs.

260. Leaving the identification of SBAs to when consent applications are made for activities *in the area subject to the application* (see cl 559(3)) will also not be good enough, given that much harm comes from activities not actually happening *in* the coastal marine area. This should be aligned with the cl 559 obligation to avoid effects *on* the attributes that make a place protected, by requiring any SBAs on which the activity may have adverse *effects* to be identified (irrespective of whether it is within the project's footprint).

There should be an additional obligation in cl 561 to identify SBAs in the coastal marine area and freshwater bodies where practicable. It should also be clarified that other SBAs in these environments need to be identified if any activity would have an impact on the attributes that make it an SBA, not just where an activity is located in an SBA.

261. With respect to cl 559(3), if a consent is required it is also inappropriate for the identification of an SBA to occur "before an activity is able to commence". The right time to require this is *prior to an application being determined*, and it should be linked to the powers of a consent authority to require the provision of additional information from an applicant. It would be a perverse outcome for a consent to be granted, and only then (prior to the activity actually commencing) for SBAs to be identified by a consent authority/requiring authority. It would beg the question – what happens to the consent if an SBA is identified? We conclude this is just untidy drafting and needs correction.

262. It should also be clarified, however, that any SBAs must be identified before a permitted activity is able to "commence" (at present, identification requirements only apply to consents and designations).[61] This would reinforce the requirement in cl 559 that rules (ie for permitted activities) cannot "allow" activities having more than trivial effects, but also recognise that SBAs may not in fact be identified in the plan that provides for those permitted activities in the first place.[62]

The Bill should clarify that the obligation to identify any SBAs bites before a consent application is determined, and before a permitted activity is able to commence.

263. We also have concerns about the ability of the Minister in cl 559(4)(b) to make an exception to the requirement for a consent authority to identify any SBAs before an activity is able to commence. There appear to be no safeguards around when the Minister can or cannot grant such an exception, and we see no justification for why that should be allowed. If there is no obligation to identify an SBA, then it is unclear whether there is any obligation to avoid impacts on it (or if a formal exemption is needed).

The power of the Minister to make an exception to the obligation to identify SBAs in cl 559(4)(b) should be removed.

[61] By implication, since the persons required to identify them are consent authorities and requiring authorities.
[62] There is an obligation to map most SBAs (except in the coastal marine area and freshwater), but the Bill contemplates that this may not happen in practice, given the obligation to avoid more than trivial effects applies if something meets the definition of an SBA even if it hasn't been identified in a plan.

264. Similarly, under cl 559(4)(a), the requirement that a consent authority identify any SBA before commencement of an activity does not apply to "fishing authorised under the Fisheries Act 1996 (excluding aquaculture)". This recognises that fishing is an "activity" but not one that is generally controlled under the NBEB. However, that will not always be the case. The *Motiti* decision has confirmed that the RMA has jurisdiction to control the impacts of fishing activity on biodiversity, and we see nothing in the NBEB that suggests this situation will be changed.

265. We therefore have concerns that cl 559(4)(a) would remove the requirement to identify marine SBAs even where an NBE plan sought to control fishing activity due to its potential impacts on biodiversity. This would be easily addressed by rewording cl 559(3), as mentioned earlier, to read "before an application/notice of requirement is determined…." rather than "before an activity is able to commence…". That ensures that the identification of an SBA is triggered only by activities requiring authorisation under the NBEB (including fishing activities where within its jurisdiction), but not those restricted *only* by the Fisheries Act. Clause 559(4)(a) could then be deleted.

Clause 559(3) should be amended to require identification of SBAs before a consent application/notice of requirement is determined, not before an activity can commence. Clause 559(4)(a), creating a carveout for fishing, should be deleted. This would ensure that where the NBEB sought to control fishing for its biodiversity impacts, the requirement to identify marine SBAs would apply.

Problematic provisions with respect to other places of national importance: ONLs, ONFs and natural character

266. We turn now to the issue of ONLs and ONFs. We note that the definition of "places of national importance" include ONLs and ONFs as well as areas of outstanding natural character in the coastal environment or lake, wetland or river. It is positive that this, alongside SBAs, comes with an express obligation for these to be identified in plans (since cl 556 applies to all PONIs).

267. It is also positive that there appears to be no power for the Minister to exempt planning committees from the obligation to identify ONLs, ONFs and areas of outstanding natural character (as there is with some SBAs, like those in the marine and freshwater environments).

268. However, it is unclear what happens if there *is* a failure to identify these areas (the resources and time required to do so may be significant, so it may not happen in a timely way). There are serious risks here. Unlike SBAs, the obligation under cl 559(2) to avoid more than trivial impacts on the attributes of an ONL or ONF applies only if it *is identified* in the plan, not if it meets the criteria for an ONL/ONF (even if those criteria are included in the plan). 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 include criteria for landscape assessment), and in the meantime projects (including large projects anticipated in a regional spatial strategy) may require consent or notice of requirement. The risk is that the obligation to avoid more than trivial effects on ONLs and ONFs would not bite, and instead there would be the ability for a consent authority/requiring authority to weigh up the various outcomes in cl 5. This provides less

protection than the RMA, since there is no hierarchy in cl 5 as there is between section 6 matters of national importance and section 7 other matters in the RMA.

269. Moreover, there is some ambiguity in the Bill as to whether an ONL or ONF, in legal terms, encompasses ONLs and ONFs that are not identified in plans. These terms are not clearly defined in the Bill. If ONLs and ONFs encompass only those that are identified, then not only do they lose protections as PONIs, but also the outcomes in cl 5 provide no obvious protection at all. It needs to be made clear that landscapes and features can be ONLs and ONFs for the purposes of cl 5 even if (because they are not identified) they do not receive protection under cl 559 as currently drafted.

Protections for ONLs and ONFs do not "bite" unless these are specifically identified in a plan. They may have little or no protection until, or unless, this occurs. The Bill should specify, at a minimum, that more than trivial impacts on ONLs and ONFs must be avoided (even if they are not identified in a plan) until NBE planning processes have been through a proper identification process. It should also be made clear that landscapes and features can be ONLs and ONFs for the purposes of cl 5 outcomes even if they are not identified (and therefore not protected under cl 559).

270. Moreover, focusing on preventing more than trivial impacts on ONLs may provide robust protection for the highest value landscapes (a good thing), but risks losing some of the RMA's nuance when it comes to protecting landscapes not having ONL status. In particular, the concept of "amenity" appears to have been deliberately excluded from the list of system outcomes in cl 5, meaning that there is no longer a clear "home" for the protection of these landscape values outside the coastal environment and freshwater bodies. One area of concern may be geothermal systems, where a strong direction in cl 5(b) ("achieving") with respect to reduction of greenhouse gases (and therefore support for developing renewable energy sources) could conflict with the importance of protecting rare geothermal systems for their natural and cultural values, especially where they are not identified as part of ONLs, ONFs or SCHs.

271. Section 6 of the RMA also requires planners to "recognise and provide for" the preservation of the "natural character of the coastal environment" (as well as wetlands, lakes and rivers) from "inappropriate" development, effectively ensuring a hierarchy relative to section 7 matters (which include some development-focused ones) and relative to matters not specifically provided for in Part 2 (eg housing and infrastructure). In contrast, cl 559 of the Bill strictly prevents impacts only on areas of "outstanding" natural character. The upshot is that areas of natural character that are *not* outstanding may receive less protection (relying on weighing up many conflicting cl 5 outcomes) than the RMA (recognised and provided for under section 6). This creates a tension with the New Zealand Coastal Policy Statement, which has protections based on the legal direction to recognise and provide for natural character (not just outstanding).

The NBEB risks taking a less protective approach to landscapes/features/areas of natural character that are not outstanding. This reinforces our earlier recommendation that some outcomes – including landscape protection – should have strengthened weighting under the list of outcomes in cl 5.

272. We note, more generally, that the way in which clauses 557-565 are structured is highly confusing and this makes it difficult for readers to follow. Some provisions (such as clauses 556 and 559) apply to all PONIs, while others create carveouts or additions (and sometimes duplications) for specific types pf PONI, with no apparent logical order. One has to jump back and forwards between provisions to understand which clauses apply to which kinds of place, and which ones change the meaning of others. For example:

    a. Clause 559 (requiring more than trivial effects to be avoided) applies to all places of national importance (including SBAs), but only if the place is identified in the NPF, a plan, or a closed register (for cultural heritage).[63] This is followed by cl 561(1) on the next page (after provisions concerning cultural heritage), which essentially overrides the general statement in cl 559 by specifying that significant biodiversity areas do not actually have to be identified in these ways for the cl 559 requirement to apply.[64] It would be simpler if cl 559(2) simply specified that it applied to all PONIs except SBAs.

    b. Clause 559(1)(a) allows exemptions to be made for any place of national importance by referring to the requirements of clauses 64-67. However, clauses 64-67 refer only to exemptions for *significant biodiversity areas*, not other places of national importance (eg ONLs and ONFs, or areas of natural character). This leaves it unclear as to whether or not exemptions can be granted for more than trivial impacts in the latter kinds of areas, or whether they are intended to be protected more absolutely than SBAs.

Clauses 557-565 require a more logical structure, and should be rewritten to ensure that the provisions applying to each type of PONI are abundantly clear. In particular, it should be clarified whether exemptions are contemplated for impacts on all types of PONI (eg ONLs), or just SBAs.

273. With respect to specified cultural heritage areas, we note that the requirement to avoid more than trivial adverse effects only applies where these areas are identified in the NPF, a plan or a closed register (curiously, not a regional spatial strategy). This raises the same kind of issue with ONLs and ONFs mentioned earlier, in that any failure to identify these areas in a timely way (and, indeed, the process for identifying them may be fraught and contested) will mean they are not afforded protection under cl 559(2).

274. There is also no requirement for a consent authority to establish, before an activity is able to commence, whether specified cultural heritage exists in the area affected by the application.

275. Clause 555 defines a PONI as including "an area that provides public access to the coastal environment, or to a wetland, lake, or river or its margins." Clause 559 then provides default protection from activities having more than trivial effects on all PONIs. However, as mentioned above, this protection only applies where a PONI is identified in the NPF, a plan or (for cultural heritage) a closed register. This is highly confusing, since cl 556 then implies that areas for public access cannot be identified in plans; while cl 556(2) states that significant biodiversity areas that are not *required* to be identified in plans (those in marine and freshwater environments) *can still* be identified, there is no equivalent provision authorising

[63] This makes cl 559(3) very confusing, because it requires a consent authority to determine whether the activity is occurring in an SBA: shouldn't that be obvious if it is identified in the NPF or a plan? And why single out an SBA in this manner but not an ONL or ONF?

[64] The requirement for consent authorities to determine whether an SBA exists becomes more understandable only after reading this provision, as it may not be identified on a map.

public access areas to be identified. This quite different treatment implies that the latter cannot be identified, and therefore cannot be protected.

276. This seems to be an oversight in drafting, as there is no point in classifying an area as a PONI if it cannot be protected under PONI provisions. Clause 556(2) should therefore state also that areas described in cl 556(1)(a) "may be identified in a plan".

277. We note, however, that public access to wetlands, lakes, rivers and the coastal environment is secured not just via plans (which prevent/control activities having adverse effects on it). Many more proactive mechanisms lie outside the resource management system, such as covenants, easements and public ownership of land. Another key mechanism, within the scope of the NBEB, is the provision of esplanade strips triggered by the subdivision of land. This is about improving access, not just protecting existing access. The Bill needs to ensure that these strips are sufficient to allow access by ensuring planning committees and consent authorities are directed to maximise their width. We consider that cl 123 (rules relating to esplanade reserves) and cl 606 (new reserves and strips required when land is subdivided) is not directive enough, and should require a minimum width of 20 metres unless exceptional circumstances exist. That is important not just for access, but also to improve resilience to hazards like flooding.

The protection of highly vulnerable biodiversity areas

278. While clause 559 deals with the protection of SBAs, the Bill provides another category of protected area for indigenous biodiversity. These are "highly vulnerable biodiversity areas" or HVBAs. The idea is that more targeted provisions will protect species/ecosystems that are rare, threatened or endangered in a stricter way than SBAs. They are dealt with in clauses 562-567.

562 Criteria for identifying HVBAs

(1) An area is an HVBA if it meets 1 or more of the following criteria:

(a) the area is the area of 1 or more nationally critical species:
(b) the area is part of a critically endangered ecosystem:
(c) the area includes residual indigenous ecosystems in a critically threatened area of land (including both terrestrial and wetland areas):
(d) the area includes an ecosystem that is 1 of the few and best remaining examples nationally of that type of ecosystem:
(e) the area includes any naturally rare or threatened indigenous marine ecosystems, communities, or habitats.

(2) Any person making a determination as to whether an area in an HVBA must have regard to mātauranga Māori.

563 Limits to activities within HVBAs

An activity that would have a more than trivial adverse effect on the attributes that make an area a HVBA must not be allowed by a rule, a resource consent, or a designation, unless—

(a) an exemption applies under section 564; or
(b) the activity is part of a protected customary right.

564 Exemptions from protection of HVBA

The national planning framework may specify exemptions from the prohibition in section 563

565 Limits to exemptions

Exemptions under section 564 may be made only—
(a) by rules in the national planning framework; and

(b) for the following kinds of activity:

(i) activities on Māori land:
(ii) activities in a plantation forest, but only if the forest is managed to maintain, for the long term, a population of a species in the HVBA that is—
(A) a threatened species:
(B) an at-risk species:
(iii) activities for the purpose of maintaining or restoring indigenous biodiversity, including by pest control, but only if—
(A) the activity does not involve the permanent destruction of significant habitat of indigenous biodiversity; or
(B) it will result in a demonstrable gain for indigenous biodiversity over the long term:
(iv) activities undertaken by or on behalf of the Crown on conservation land or waters that—
(A) are not inconsistent with any relevant conservation planning document; and
(B) do not have a significant adverse effect beyond the boundaries of the conservation land or water:
(v) activities undertaken for the purpose of managing Te Urewera under the Te Urewera Act 2014:
(vi) research activities that have no more than minor adverse effects, but only if the scientific value of the research outweighs those effects:
(vii) fishing (other than aquaculture) in areas that have not been identified as HVBAs.

566 Considerations that apply to the grant of exemptions

(1) The Minister, before including an exemption in the national planning framework, must consider—

(a) the relative cost of granting or declining to grant an exemption for the activity; and
(b) any alternatives to granting an exemption that would achieve the objective of the proposed exemption; and
(c) any condition that should be imposed; and
(d) any other matter that the Minister considers relevant.

(2) An exemption must be designed to diminish the harm that will be caused to the HVBA to the greatest extent compatible with enabling the activity to proceed.

279. Surprisingly, despite being included in the same subpart entitled "places of national importance, including places of significant biodiversity and areas of highly vulnerable biodiversity", the definition of a PONI in cl 555 does not actually include HVBAs. This has curious legal implications. For example:

a. It implies that there is no general obligation under cl 556 (which applies only to PONIs) to *identify* such areas. We consider this to be a significant shortcoming generally (it is vital to know where such areas are), but more specifically in the context of fishing, where exemptions to the obligation can be granted for fishing in areas *that have not been identified as HVBAs.* One can imagine a situation in which politicians may be reluctant to identify HVBAs because it would require fishing to be constrained. The requirement to identify HVBAs in plans and before consents/notices of requirement are determined should be specifically replicated under cl 562.

There needs to be a specific obligation in the Bill to identify HVBAs, as there is with SBAs.

b. It also leaves it unclear if more than trivial effects on HVBAs under cl 562 must be avoided *only* if HVBAs are identified in the NPF or plan (which is the case for ONLs and ONFs) or whether the obligation to avoid impacts applies as long as they meet the criteria for being an HVBA (which is the case with SBAs). The Bill should clarify that the latter is the case.

It should be clarified that the obligation to avoid more than trivial impacts on an HVBA applies irrespective of whether the HVBA has been identified in a plan.

c. It is also unclear whether the effects management framework in cl 61 can be "applied" to HVBAs. The framework explicitly applies by default to SBAs only (and not all places of national importance), but the Minister can choose to apply it to other "resources" via the NPF. It is not clear whether that includes HVBAs.

Because of the wording of schedule 3 and the definition of an HVBA (essentially, an area containing threatened species), it appears likely that offsetting (and therefore redress) will not actually be possible under the effects management framework (the schedule states that "residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected"). However, even if offsetting and redress are unavailable *when* applying the effects management framework, this is different to whether the effects management framework can apply in the first place. In particular, it is not clear whether more than trivial effects need to be avoided, or whether they could still lawfully be *minimised*, *remedied*, or *mitigated*.

The Bill needs to clarify that the effects management hierarchy cannot be applied to activities having impacts on HVBAs, and that the legal direction is instead to avoid more than trivial adverse effects.

280. We have some of the same concerns for HVBAs as we do for SBAs, because the mechanics of the provisions are similar. In particular, the process for obtaining an exemption is equally unclear (whether an application can be made as part of a consenting process, and whether the NPF through a "rule" can provide a framework by which impacts on HVBAs are considered through the consenting process).

281. Moreover, although exemptions are more tightly constrained than for SBAs, some (such as "activities on Māori land") are too broad and need to be more focused on the *types* of activity and their degree of impact. There needs to be a clear statement that even where an exemption is granted, it cannot authorise *significant* adverse effects on an HVBA.

To the extent exemptions are possible for activities having impacts on HVBAs, there should be a clear trigger in consenting provisions requiring an exemption to be obtained where impacts are more than trivial. Exemptions should be tightly constrained and not be able to authorise significant impacts.

282. More generally, it is anomalous that slightly different terms seem to be used throughout the Bill to refer to the same thing. For example, the heading of subpart 3 refers to "places of significant biodiversity" which presumably is the same thing as the "significant biodiversity areas" defined in cl 555. Presumably the "areas of highly vulnerable biodiversity" referred to in the heading are also the same as the "highly vulnerable biodiversity areas" defined in cl 555.

5.8 Other provisions with respect to the National Planning Framework

283. We have addressed some key elements of the NPF above (limits, targets, and the effects management framework). These are tightly linked to other things, like the protection of PONIs, so we have addressed those above as well.

284. Aside from those elements, we generally support provisions in the Bill relating to the NPF. The idea of a single, integrated NPF rather than a collection of separate pieces of national direction is a sensible one, as is a requirement for mandatory content.

We support the idea of a single, integrated NPF with mandatory content. Fragmented and discretionary national direction has become a significant issue under the RMA.

285. However, we wish to note some elements we think are in need of improvement.

286. Clause 36, outlining resource allocation principles, is an anomalous inclusion in provisions dealing with the NPF. Such general principles should be found in Part 1 of the Bill.

287. It is also unusual that one of these principles is "sustainability", which keeps alive a version of a concept from the RMA that has otherwise been expunged from the Bill. It may be more appropriate for this principle to be focused on allocating resources in a way that best achieves the environmental purpose(s) of the NBEB (eg activities that would have synergies with its targets and outcomes) rather than creating another new term that is bound to be litigated. Moreover, allowing environmental considerations to influence allocation decisions could be an effective way to create a competitive "race to the top" and incentivise activities not only to reduce their impacts but also to improve the environment.

288. It is also unclear in cl 87(2) as to what effect the principles of te Tiriti o Waitangi have on allocation of resources. A cross-reference is made to general allocative principles, but not to cl 4. At a minimum, there should be a direction for the NPF to provide guidance on this question.

Resource allocation principles should be contained in Part 1 of the Bill, not Part 3. The reference to "sustainability" in these principles should be replaced by a reference to the protective parts of the Bill's purpose, to encourage resources to be directed to uses that would have environmental benefits. Greater clarity should also be provided as to the effect of cl 4 on allocative decisions.

289. Clauses 57 and 58 need attention as well. Clause 57 requires the NPF to provide direction for each system outcome listed in cl 5. Clause 58 then directs the NPF to provide direction on other "certain matters". We produce these clauses below.

57 National planning framework must provide direction on system outcomes

(1) The national planning framework must include content that provides direction—

(a) for each system outcome; and
(b) for the resolution of conflicts about environmental matters, including those between or among the system outcomes.

(2) Direction provided under subsection (1) need only be in such detail as is appropriate to the particular system outcome or outcomes.

58 National planning framework must provide direction on certain matters

The national planning framework must include content that provides direction on:

(a) non-commercial housing on Māori land:
(b) papakāinga on Māori land:
(c) enabling development capacity well ahead of expected demand:
(d) enabling infrastructure and development corridors:
(e) enabling renewable electricity generation and its transmission.

290. We do not see why cl 58 matters have not been integrated into the broader list of outcomes in cl 5 (indeed, there is considerable overlap between some of them, such as in the "timely provision of infrastructure services"). It is unclear if the matters for which direction is provided under cl 58 (only some of which have clear "outcomes" associated with them)[65] have the same, more or less weight or status as the outcomes in cl 5.

291. Our concern is that some cl 58 matters, such as "enabling development capacity well ahead of expected demand" and "enabling infrastructure and development corridors" will be treated as more directive and specific than the broader protective cl 5 outcomes required to be reflected in the NPF, and therefore have more weight when it comes to resolving conflicts between

[65] For example, direction on "non-commercial housing on Maori land" has no real normative component (what should be achieved by such direction?), whereas "enabling development capacity ahead of expected demand" has a clearer aim.

them. They should be integrated into cl 5, with the much simpler direction in cl 57 (provide direction for each system outcome) remaining.

292. Consistent with the need for synergies between outcomes discussed earlier in the context of cl 5, cl 57(1)(b) should also be amended to require direction on how conflicts can be resolved in a synergistic manner, to benefit both human wellbeing and the natural environment. Otherwise decision-makers may feel pressure to trade off outcomes where there is no need.

Clause 58 matters should be integrated into cl 5 outcomes, with any duplication removed. Clause 57 should be amended to ensure that conflicts between outcomes resolved in the NPF are done in a synergistic manner where possible.

293. Clause 71 also needs amendment. Relevant parts of clause 71 provide that:

> **71 Regional planning committee must amend plan if plan rule duplicates or conflicts with framework rule**
>
> (1) If a plan rule duplicates a framework rule or conflicts with a framework rule, the regional planning committee must amend the plan to remove the duplication or conflict.
> (2) A plan rule conflicts with a framework rule if—
>
> (a) both of the following apply:
>
> (i) the plan rule is more stringent than the framework rule; and
> (ii) the framework rule does not expressly say that a plan rule may be more stringent than the national planning framework rule; …

294. At a minimum, cl 71(2)(a)(ii) should be amended so that it includes where the framework rule *is silent* as to whether the plan rule can be more stringent than the framework rule. This means that the benefit of the doubt falls in favour of environmental protection where the NPF does not clearly contemplate whether or not plans can be more stringent. That amendment should also be made to the equivalent wording in cl 89 (when framework rules prevail over plan rules).

295. However, we recommend removing cl 71(2)(a)(i) and (ii) entirely. National direction should impose a minimum level of environmental protection, but should leave planning committees free to impose more stringent controls where needed in their own communities. The NBEB is about supporting positive outcomes for the natural environment not putting up roadblocks for communities seeking environmental improvements.

Clauses 71(2)(a)(i) and (ii) should be deleted, as they impose an inappropriate constraint on planning committees going beyond minimum levels of environmental wellbeing imposed in the NPF.

296. We also note that cl 73 is extremely broad, and requires a regional planning committee or local authority to take "any action that the national planning framework directs them to take". This leaves open the question of whether the NPF can require councils to take tangible action (including non-regulatory measures) without associated central government funding. Indeed,

cl 56 authorises the NPF to contain content that is very broad (well beyond what might be contained in NBE plans) such as how priority issues are to be "dealt with". Clause 84 states "the national planning framework may include provisions about any other matter that accords with the purpose of the national planning framework", and the reference to councils (rather than just planning committees) in cl 73 suggests that central government could offload a significant unfunded mandate onto local government (risking failure).

Some constraints may be needed with respect to the ability of the NPF to direct planning committees to take "any action". In particular, this should be accompanied by a clear direction as to how such actions are to be funded or resourced.

297. Clause 75 specifically authorises the NPF to direct consent authorities to review conditions of resource consents. This is a positive step. However, we consider there needs to be a legal obligation, not just power, for the Minister to do so in cases where environmental limits have been infringed across a management unit. The risk otherwise is that inappropriate consents continue to operate, cumulatively causing environmental limits to be breached.

There should be a legal obligation for the Minister to direct the review of consents in places where environmental limits and minimum level targets have been infringed.

298. Clause 80(2)(c) is of concern in that it confers a power for the NPF to include "exemptions from standards". It should be made clear that this does not authorise another substantive exemption pathway (by allowing breaches of permitted activity standards) where there is a risk that an activity will result in significant adverse effects on the natural environment or where there is a risk of environmental limits being breached.

Clause 82(2)(c) powers to direct exemptions from standards need to specifically exclude situations where environmental limits and minimum level targets are threatened or infringed.

299. Clause 82 provides for the NPF to include "transitional provisions for any matter". This is extremely broad, and undermines legal certainty. Transitional provisions should be clear on the face of primary legislation. We flag here that transitional provisions are an issue more broadly with the Bill, including when it comes to compliance and enforcement (where new provisions and tools do not appear to come into effect until NBE plans are notified).

300. The more general "strategy" for when the RMA ceases to apply and when the NBEB starts to apply is a fundamental question that is not answered in the Bill itself. This is concerning. It is not appropriate for the geographical and temporal operation of such important primary legislation (which regions it will apply to and when) to be determined by the Minister through regulation making power, on which transition seems to rely. We understand that there are resourcing constraints necessitating a careful transition, but (1) such choices should be signalled in the NBEB itself, and (2) resourcing constraints on producing NBE plans and RSSs should not necessarily prevent other vital features of the NBEB (eg enforcement provisions and ability to extinguish existing use rights) from "switching on" earlier. It would be preferable for existing plans to be deemed to be NBE plans early on, so that the broader (and better) architecture of the NBEB can apply, even if subsequent plan reviews require substantial changes.

Substantive transitional provisions appear to be reliant on regulation making power. These should be made clear in the Bill itself so there is clarity as to where, when and how the NBEB will apply.

301. Finally with respect to national direction, we offer some comments about the process contained in schedule 6 for creating and modifying the NPF.

a. Clause 2 requires pre-notification engagement in the form of collaboration on the proposed NPF with the National Māori Entity, and engaging with iwi and hapū as well as local government representatives. It states that the Minister *may* engage with others. The Minister should also be required to collaborate with those civil society organisations representing the public interest in a healthy environment (eg those listed in Covid-19 fast track consenting legislation).

b. Clause 3 outlines the role of the Limits and Targets Review Panel. We consider that this Panel should be appointed through a process a step removed from direct political decision-making, given that it is intended as a check and balance on the Minister. The Panel should therefore be appointed by the Minister on the recommendation of the Parliamentary Commissioner for the Environment, or some members recommended by key environmental groups (similar to how some members of the Conservation Authority are appointed).

c. Under cl 3, the Minister should be required to provide reasons if he or she does not adopt the recommendations of the Limits and Targets Review Panel.

d. The purpose of cl 3, and the role of the Review Panel, should also be made clearer. While not ideal (and earlier we recommended quite a different approach), the current purpose of environmental limits is to prevent ecological integrity from becoming worse than 2023. Limits are to be set – or *measured* – according to existing state. Here, the role of the Panel is really to assess whether the state of the environment as at 2023 represents a sufficient degree of "ecological integrity" and therefore what minimum level targets *should* be. There are two distinct roles here that need to be made clearer: (1) advice on whether the Minister's assessment of limits is accurate in a scientific sense; and (2) advice on whether and where minimum level targets need to be set (ie whether the environment is "unacceptably degraded" under cl 50(1), and what should happen as a response).

e. Clause 7 allows "challenges" to framework rules to be made, although the mechanism for doing so is unclear. This ability to challenge should be extended from just "rules" to include policies and other provisions in the NPF, which may often be the more significant provisions.

f. It is positive that boards of inquiry convened to hear the NPF are set up by a convenor, not directly by the Minister. However, a standing independent board would be preferable.

g. Clause 12 is concerning, as it allows the Minister to set the terms of reference for the Board of Inquiry. This should not be able to be unduly narrowed where environmental limits and minimum level targets are potentially impacted, as a constrained scope has caused issues when it comes to reviews of national direction such as the NES for Plantation Forestry.

h. It is positive that there is no longer the ability for the Minister to create a bespoke process for creating and changing national direction (as the Minister can do now under the RMA).

i. It is also positive that the Minister must consider whether it is necessary to review the NPF when an emissions reduction plan or adaptation plan is issued or amended. A similar provision should be included so that the NPF review process is linked to the monitoring of limits and targets in environmental reporting. An exceedance of limits should require review and corrective measures, or at least a mandatory plan of action.

j. We generally support cl 31(1)(e), which states that the policy intent behind RMA national direction is to be maintained into the first iteration of the NPF. It is essential that freshwater, coastal and biodiversity aspects are not undermined. However, we are concerned that the policy intent behind other national direction, notably for plantation forestry, will be set in stone for much longer than desirable given the clear protective intent of the legislation. The Bill should not prevent changes to the first NPF to the extent that existing national direction is already ultra vires the RMA.

A number of amendments are required with respect to the process for creating and changing the NPF. Notably, the Limits and Targets Review Panel should have a stronger role, and mandatory reviews should be triggered when monitoring reveals the infringement of limits or minimum level targets.

5.9 Natural and built environment plans

302. The NBEB takes a structurally similar approach to planning as the RMA, in that a layer of national direction needs to be given effect to in a more detailed and place-based layer of plans. However, there are important differences to the RMA. Notably:

a. While regional and territorial authorities remain, there will be a single plan incorporating regional and district-level provisions.
b. Councils are no longer directly responsible for plan making. Instead, representatives from councils (alongside mana whenua) constitute regional planning committees, and these are the entities charged with making plans. This is necessary in practical terms, given the intention to have a single plan for a region (necessitating a single plan-maker). However, it also changes the dynamic, in that councils are no longer front and centre of the plan making process.
c. The plan making process is different to that in the RMA and is designed to make plan making faster and less litigious. The standard process, outlined in Schedule 7, broadly resembles that used for the Auckland Unitary Plan.

303. Some elements are positive. However, we have some concerns. Some of these link to earlier points about broader framework issues with which plans will need to interact (eg limits and targets), while others are specific to NBE plans. We will not go through every provision, but instead highlight key issues to be fixed.

Tree protection in plans

304. We have concerns about provisions relating to the protection of trees (notably in cl 125), and the constraints on protecting them in a systemic way.

125 Limitations applying to making rules relating to tree protection

(1) Subject to direction by the national planning framework, a plan may identify and protect any individual tree or group of trees in a specified location set out in a schedule to the plan if the location or value of the tree justifies its protection, so long as,—

(a) in the case of an individual tree, the tree is described and the allotment identified by address or legal description or both; or
(b) in the case of a group of trees, the group is described and the allotment identified by street address or legal description or both.

(2) Unless directed to do so by the national planning framework, a plan must not impose tree protection provisions where trees are identified only by species, height, or girth but in undefined areas, regardless of their location or value.

(3) In this section, *group of trees* means 2 or more trees in a cluster, grove, or line on a single allotment or adjoining allotments.

305. This is largely carried over from ill-advised amendments to the RMA and should be removed (as well as the complementary provision in cl 646(e), which outlines matters for which territorial authorities are responsible).

306. It is imperative to maintain and improve urban tree cover to assist our cities in adapting to climate change, and to ensure the continuation of ecosystem services they provide. The provisions are not conducive to ensuring that urban tree cover as a whole is fit for purpose in more systemic ways - for example safeguarding remaining urban biodiversity and connectivity across a city, providing access to nature, or providing resilience to urban dwellers against a changing climate (eg shading/cooling). A big picture approach to tree cover is needed, rather than protecting individual or "specimen" trees because of their amenity value.

307. The ability of planning committees to protect trees should not be artificially constrained by legislation, and to do so goes in the opposite direction to the outcomes sought by the proposed NPS for Indigenous Biodiversity. Indeed, it is unclear to us how lofty goals to *increase* urban tree cover and achieve minimum level targets for biodiversity within urbanised management units can be achieved without the power to protect trees in a blanket way (eg coastal Pohutukawa or mature oak). It seems unlikely that this could be achieved through the scheduling of every specific tree in a city, both due to a lack of resources for individual assessment and a lack of political motivation to do so. Moreover, the provision seems inconsistent with other aspects of the Bill, including relatively strict protections for areas of natural character in the coastal environment (one form of PONI). This is because much of the natural character of the coastal environment can be provided by mature tree cover, such as Pōhutukawa).

308. Clause 125 imposes a default position only, and the NPF can allow planning committees to take a more stringent approach. However, there is no clear policy foundation cl 5 outcomes for urban tree cover to be valued (eg through good urban design principles). This potentially means that there is no real legal push for central government through the NPF to *allow* councils to protect urban trees in a more system way than cl 125. While a Minister *could* do that, and we understand that the intention to do so is there at the moment, there is no guarantee it will happen based on what the Bill provides in its list of outcomes that must be actively promoted. And it leaves it as a political choice for the Minister rather than a legal question.

309. The timing issue is also important, because it is unclear when the NPF will allow a more stringent approach to be taken. In the meantime, tree cover could continue to reduce. That is important, because (1) it will take a long time for a mature tree cover to return, and (2) because protections will only apply to trees that are already there. It seems particularly nonsensical to us that there might be councils keen on tree protection, and a government keen to recognise it too, but neither able to actually do it until a number of years have passed and enabling provisions finally appear in the NPF.

310. There should also be strong recognition of good principles of urban design in cl 5, to provide a legal basis for the NPF and planning committees to take a strong approach to tree protection and to colour how development matters in cl 5 are weighed (eg providing for new housing in a way that retains mature tree cover).

311. We also note that cl 125 lacks some of the crucial safeguards that the RMA had with respect to tree protection. We are unsure whether this is intentional, or a misguided attempt to simplify the drafting. For example, the equivalent cl 76(4A) of the RMA applied only to *urban* allotments, whereas cl 125 applies to *all* allotments, potentially removing the ability of plans to protect indigenous forest on any private land (and conflicting with the requirement to identify and protect SBAs). The RMA also specifically exempted reserves and conservation land from the constraint, whereas the NBEB does not. In short, cl 125 is not an issue of *urban* tree protection – it is an issue of tree protection full stop.

312. Finally, the ability to protect individual and groups of trees "if the location or value of the tree justifies its protection" seems to introduce another legal test and puts an inappropriate onus on those seeking protection.

Provisions preventing planning committees from protecting trees (particularly urban trees) in a systemic way, like cl 125, are inappropriate and need to be removed. These provisions are much too broad and prevent protection of trees in rural areas and on public land, not just urban allotments. This is particularly inappropriate.

Constraining existing use rights through plans

313. We have concerns about the effectiveness of the Bill in being able to change or extinguish land uses when it comes to climate change adaptation. This requires us to look at cl 26 and cl 139-140, which deal with when plans can and cannot override existing use rights.

26 Certain existing uses protected in relation to land

(1) A person may use land in a way that contravenes a plan rule within the jurisdiction of a territorial authority if—

(a) the use was lawfully established before the rule became operative or the proposed plan was notified; and
(b) the effects of the use—

(i) are the same or similar in character, intensity, and scale to those that existed before the rule became operative or the proposed plan was notified; or
(ii) any change in effects is limited to reducing the adverse effects on the environment or otherwise enhances the environment.

(2) Despite subsection (1), an existing use of land must comply with the plan rules that give effect to the national planning framework as it relates to each of the following, as far as they are relevant, but only if the national planning framework or a plan expressly provides that this subsection applies:

(a) the natural environment; and
(b) the reduction or mitigation of, or adaptation to, the risks associated with—

(i) natural hazards:
(ii) climate change:
(iii) contaminated land.

(3) Subsection (2)(a) applies only if the national planning framework expressly states that it applies.

(4) Subsection (2)(b) applies—

(a) whether or not the rules give effect to provisions of the national planning framework; but
(b) only if the national planning framework or a plan expressly state that it applies.

…

314. It is positive that existing use rights for land[66] can be constrained where they "relate" to the natural environment (although this should also specify it includes where environmental limits/targets risk being infringed, and should apply irrespective of whether the NPF says it does or not). Under the RMA, there was limited ability to address such things, so this is a step forward. Similarly, there are stronger powers to review consent conditions where the health of the natural environment is at risk.

315. It also appears that existing use rights can be constrained where a plan rule relates to climate change adaptation (eg to provide for managed retreat from the coast or floodplains). However, in practice this may be hampered by a requirement in clauses 139-141 that plans do not render land incapable of reasonable use. The relationship between cl 26 and cl 139 is not clear.

[66] Noting that these exclude *regional council* controls on land use.

139 Land subject to controls

…

(2) If a person with an interest in land considers that a provision in a plan or proposed plan applying to that person's interest makes, or would make, the interest in the land incapable of reasonable use, that person may challenge the provision or proposed provision.

…

(5) In this section and section 140, *reasonable use*, in relation to land, includes the use or potential use of the land for any activity if the actual or potential effects of the activity would not be significant on the natural and built environment or on any person other than the applicant.

140 Jurisdiction of Environment Court over land subject to controls

…

(2) The grounds that must be satisfied by the applicant or appellant are that the provision or proposed provision of a plan—

(a) makes the relevant land incapable of reasonable use; and

(b) places an unfair and unreasonable burden on any person with an interest in that land.

(3) In determining whether the grounds set out in subsection (2) are met, the court may assess and take into account the risks or future risks (if any) identified as relevant to the land in question.

(4) Section 141 applies if the court is satisfied that the grounds in subsection (2), as assessed under subsection (3) (if relevant), are met.

141 Court's determination

(1) In determining an application provided for in section 140(1), the Environment Court may direct the relevant regional planning committee to do whichever of the following the committee considers appropriate:

(a) modify, delete, or replace the provision in the plan or proposed plan in the manner that the court directs; or

(b) notify the relevant local authority that it is required to offer to acquire all or part of the estate or interest in the land under the Public Works Act 1981, as long as—

(i) the person with the estate or interest agrees to that course of action; and

(ii) the requirements of subsection (3) are met.

…

(4) If an offer to acquire the relevant estate or interest in the land or part of it is made under subsection (1)(b)—

(a) is accepted, the local authority is responsible for implementing the acquisition under the Public Works Act 1981, including meeting the costs of the acquisition:

(b) is not accepted, the provisions in the plan remains in force unaffected or, if not already in force, comes into force without modification.

316. Several things are not clear here. For one, "reasonable use" of land specifically includes where the actual or potential effects of the activity "would not be significant on the natural and built environment or on any person other than the applicant". But it is not clear whether residential use of land in the face of (for example) more frequent storm surges and rising sea levels would actually create an effect on the "environment" or people other than an occupier of the land.

Arguably if it affects only the occupier (as applicant), then continued occupation is a reasonable use. But is it "reasonable" to expect to use land for residential purposes if it will be eroded away in 10 years? Or if the local council and others are required to continue to provide services? What about where ongoing occupation creates impacts later on for subsequent purchasers or occupiers of the property? Or where there are others living in a household who are not the "applicant", yet who have consented to impacts on themselves?

317. Similarly, it is not clear in cl 140(3) whether taking into account "the risks or future risks", in determining whether there is reasonable use or an unfair burden under cl 140(2), is meant to encompass only effects on the environment and other people. It arguably suggests that climate risks to the land itself, and the occupier, are legitimate to consider, meaning that continued residential use might be "unreasonable" in legal terms. It is also unclear what timeframes may be involved in this assessment of risk, and whether it needs to be imminent or just foreseeable.

318. If that is the case, then no offer of compensation will be required under the Bill for, effectively, a plan that prevents some people in high-risk areas from continuing to live in their homes.[67] That is a significant consequence, and one that law makers should specifically contemplate if it is intended. The Bill also does not make clear what *degree* of climate risk would be sufficient to make residential occupation an unreasonable use (only that "risks" must be "taken into account"), creating a messy case by case assessment in court for those who have the resources to actually challenge planning decisions and produce their own site-specific risk assessments.

319. Finally, cl 141(4)(b) is unclear. This is not found in the RMA. Essentially, if a plan provision *does* render land incapable of reasonable use, then a planning committee must either offer to acquire the land or change the plan provision. However, if an offer to purchase is made and then *rejected*, the Bill states that "the provisions in the plan remain in force unaffected or, if not already in force, come into force without modification." It is not entirely clear what provisions are being referred to here (ones that extinguish reasonable use rights or ones that do not).

320. If the former, which seems the more likely interpretation, it essentially means that if a council offers to buy out a landowner but is rejected, then plan provisions (if authorised by the NPF) can extinguish existing use rights for climate adaptation reasons whether they are reasonable or not. The consequence may be that while plans *can* ultimately extinguish land use rights in order to undertake managed retreat, there will in practice need to be significant funds available for councils to acquire land if landowners choose to follow that path.[68] If funds do not exist, councils will not realistically be able to progress plan changes that provide for managed retreat. This is a complex area, and the Bill glosses over much deeper questions about who pays for adaptation, including compensation for landowners. Councils will not likely be able to do so, using existing mechanisms, on the scale required. Such issues may be more properly addressed in the forthcoming Climate Adaptation Act (CAA) but the interface

[67] Or potentially require them to obtain consent for residential occupation and comply with conditions.
[68] Which many will, one would think, if the alternative is that their land is rendered unavailable for residential occupation.

between the NBEB the CAA on such matters needs to be carefully considered and provided for in the current Bill.

321. As an aside, it is important to recognise that in many cases it may not be a *plan* rendering land incapable of reasonable use, but the physical realities of climate change (ie where land is unstable, eroding away or subject to increased risk of flooding). A plan may simply be *recognising* this reality, not *causing* it. It is unclear how that distinction may play out in legal terms (for example, whether the Environment Court would have jurisdiction under cl 140 to order a council to make an offer to acquire the property if it is not the *plan* rendering the land incapable of reasonable use), and requires clarification.

322. The broader point is that, as presently drafted, there is no real compulsion for NBE plans to ensure that the country meaningfully adapts to climate change risks. That is most noticeable when it comes to the extinguishment/phasing out of existing use rights outlined above (where planning interventions seem unlikely to be used in a systemic way in the absence of complementary funding for compensation/assistance). But it is also important when it comes to preventing *new* activities (eg residential development) that will be vulnerable to climate induced hazards (eg to flooding).

323. As discussed earlier, part of this is because cl 5 outcomes (including adaptation and urban development) can be traded off, with conflicts resolved through political discretion. But it is also because the plan-making provisions of the Bill fail to provide adequate direction. In particular, cl 102 outlines what plans must include, but there is no reference to rules/policies relating to adaptation. Instead, cl 102 simply refers to "providing for system outcomes", "managing resources" and "identifying land" for which protection or development is a priority. Strangely, cl 102(2)(j) *does* re-emphasise the need to supply sufficient development capacity, doubling down on the direction already contained in cl 5(c)(ii), but makes no equivalent direction about adaptation. And it is somewhat ironic that cl 105(1)(d) allows plans to include provisions relating to recovery from emergency events, but cl 102 does not require measures to be taken to ensure climate change induced emergencies are avoided in the first place.

324. We consider that cl 102 should state that a plan must include provisions that (1) ensure vulnerable activities cannot be authorised in high hazard areas (taking into account the risks posed by climate change),[69] and (2) outline situations in which existing use rights/consents are to be reviewed in order to achieve the outcomes in cl 5(b)(iii). This should be complemented by changes to cl 107(1), highlighting that particular regard must be had to a climate adaptation plan and risk assessment produced under the Climate Change Response Act.

325. An additional clause should be inserted (immediately following cl 118 would be a suitable location) for rules relating to climate change adaptation. This should state that a plan must provide for residential development, including subdivision, in high hazard areas to be a prohibited activity. Deemed prohibited activities are familiar from the RMA (for example, see s

[69] Where information is available, this should result in clear prohibited activity status. Where it is not available, it should enable an assessment to take place through the consenting process as to the nature of the hazard, potentially resulting in consent being declined.

87B(4) of the RMA).[70] Such rules should also be deemed "strategic content" to ensure that independent plan changes cannot seek to overturn their prohibited status.

326. Moreover, a broad equivalent to cl 79 (relating to the NPF) should be included in NBE planning provisions. This should state that any activity that has, or may have, significant adverse effects on the environment (including a landowner or occupier), when considered in light of climate change, must not be provided for as a permitted activity in plans.[71] Of course, this provision would have ramifications well beyond climate change adaptation, as it would apply to all activities having significant adverse impacts on the environment (whether exacerbated by climate change or not). But it would ensure that activities with significant impacts on communities when considered in light of a changing climate (like forestry harvesting) would require a resource consent (and strict conditions, given a strengthened list of outcomes in cl 5 that should flow through to plans) in order to proceed. It would also prevent the subdivision of land (and the permitted development rights that generally flow from that) from occurring as of right where the potential future climate impacts on landowners/occupiers were significant.[72]

Much more clarity is required as to how clauses 26 and 139-141 are intended to operate in the context of climate change adaptation. It is hard to see how they will operate properly without other key pieces of the puzzle (eg funding mechanisms for compensation and a common approach to where and when managed retreat occurs) being put in place under separate adaptation legislation.

More broadly, the NBEB needs to take a much more proactive and directive approach to ensure that communities adapt to climate change/natural hazards. That requires a stronger direction as to when plans must require alteration of existing rights (eg extinguishing existing use rights and cancelling or reviewing the duration/conditions of resource consent), and a much clearer direction that new activities vulnerable to climate change /natural hazards must not be allowed (ie must be prohibited activities) in high hazard zones.

327. We note that EDS is currently conducting a policy project looking at climate change adaptation. While this issue goes well beyond the NBEB, this Bill is a crucial piece of the puzzle because it regulates land use. The first working paper of the project can be found on the EDS website.

Relationship between NBE plans and regional spatial strategies

328. Clause 109 of the Bill states that NBE plans must be consistent with regional spatial strategies made under the Spatial Planning Bill. The idea is that the latter are high level instruments that outline what goes where (and constraints on that), whereas NBE plans are regulatory tools

[70] This deems the mining of mercury to be a prohibited activity. This provision used to be located in the plan-making provisions of the RMA, until for largely mechanical reasons a 2009 amendment shifted it to the consenting provisions. We consider it is more transparent to provide for an equivalent in plan-making provisions, as this provides a proactive obligation on planning committees to outline where those prohibited activities are located.

[71] That nuance should also be reflected in cl 79 itself.

[72] In addition to the plan having to provide for urban development as a prohibited activity (where no consent can even be applied for) in areas identified as high hazard zones.

that do not revisit strategic questions. We understand that preparation of spatial strategies is to happen first, with NBE plans following.

109 Plans must be consistent with regional spatial strategies

Every plan must be consistent with the relevant regional spatial strategy, unless and to that extent that—

(a) new information becomes available that supersedes the information used to determine the content of the regional spatial strategy; and

(b) there is a significant change in circumstances or in the physical environment since the regional spatial strategy was developed (for example, a major environmental or economic event).

329. We consider that the order in which planning instruments are created under the NBEB and the SPB is wrong, and that it would make more sense for them to prepared contemporaneously. This is eminently possible, because the planning committee charged with making both is essentially the same (with the addition of a single central government representative for a spatial strategy).
330. Much of the information needed to inform regional spatial strategies (for example, identification of protected areas like SBAs and ONLs) will only be generated through the more detailed NBE plan process, yet the latter are expected to be consistent with the regional spatial strategies and follow them in time.

331. We see a significant risk that spatial strategies will be focused on identifying development corridors, without the environmental information necessary to know if the right projects are being planned for the right places. Once identified and planned under the SPB, it will be hard for large infrastructure projects to be changed, even if there is an ability to "override" the spatial plan where new information becomes available.

A spatial strategy and an NBE plan should be created and reviewed along the same timeframes.

332. We are also concerned that cl 109(b) would allow a major "economic event" to justify departures from the *protective* elements of a regional spatial strategy. For example, a spatial strategy might identify connected biodiversity corridors across a region (or multiple regions), which could be undermined by large infrastructure projects that sought to stimulate the economy.

As a minimum, clause 109 should state that an NBE plan cannot depart from a spatial strategy to the extent that the latter imposes environmental limits required by the NPF.

333. Again, the structure of provisions can cause confusion. If one looks at clause 97 (itself confusingly headed "Scope of plans" despite not really being concerned with scope at all), a plan is required to be consistent with a spatial strategy. In cl 109 this general statement is reproduced (being unnecessary repetition) but with the important caveat that in some cases (where new information is available) they do *not* have to be consistent. It is unclear why cl 97(b) is necessary at all, and it could readily be deleted.

334. Moreover, there is an additional clause 104 that replicates, word for word, clause 109. This seems to be an error and should be deleted.

Process for making and changing plans

335. The process for creating and changing NBE plans is contained in an extensive schedule 7. There are several processes provided for: standard (for full plan reviews and changes to "strategic content"), proportional and urgent. We make a number of comments on this below. Because many of these points are relatively short and sharp, we highlight most of our key recommendations in the text in **bold type** rather than providing additional blue summary boxes.

a. Clause 5 states that plan changes can be initiated by any person (independent plan change requests) but that these cannot change the strategic content of the plan. This is replicated in cl 44(4). "Strategic content" is a concerningly ambiguous phrase, and nowhere in the Bill is it defined or is it specified that plans will clearly state what is and is not "strategic content". Under the RMA, private plan changes could not amend regional policy statements, providing a much more transparent ringfencing of what developers could and could not apply to change.

   The Bill should require NBA plans to clearly identify what parts comprise "strategic content". This should specifically include environmental limits, associated targets, and other targets, as well as provisions concerning the protection of PONIs and provisions necessary to give effect to national direction.

b. While we consider the adequacy of the provisions around engagement agreements under clauses 9-13 a matter for Māori and the Crown to consider, we note that **introducing the overlapping concepts of engagement agreements and Mana Whakahono a Rohe could cause confusion and complexity. It may be preferable for the former to be subsumed into the latter to the extent that is possible**.

c. There is overlap between the matters in Part 4 of the Bill (eg cl 102) and the matters in subpart 2 of schedule 7 (eg cl 14). Different language is used to refer to the same or similar things (eg major regional policy issues vs major policy issues of a region and its district). **A cleaner approach would be to choose one place in which the required content of the plan is located rather than duplicating material across multiple provisions.**

d. It is positive that planning committees under cl 15 must establish an engagement register, identifying people interested in being consulted in plan development. **Key environmental NGOs operating at the national level should be included in cl 15(3) as having a right (but not obligation) to be consulted**. It is also positive that engagement on a document outlining major regional issues occurs prior to notification of the actual proposed plan.

e. **Clause 17(1)(b) should refer to "effective" ways of reaching constituents rather than "innovative" ways.** Whether something is innovative is immaterial if it is not effective.

f. **The concept of an "enduring submission" is a positive one and should be retained**.

g. **Under cl 22, planning committees should in the standard plan process (for whole of plan reviews) be required to consult with core NGOs representing the public interest in a healthy environment**.

h. **It is positive that misguided provisions under section 32 of the RMA (concerning evaluation reports) have been removed in the equivalent cl 25 of the Bill, which should be retained**. Those provisions included a focus on economic impacts and employment, and were an inappropriate yardstick with which to measure the appropriateness of the proposed plan (essentially introducing an overall broad judgement approach to the decision on whether to proceed with a proposal). The focus of cl 25 is quite rightly on the most appropriate way to achieve the purpose of the Bill.

i. It is also positive that planning committees must periodically report to the Ministry (or Director General) outlining how a plan will give effect to the NPF and set and apply environmental limits. However, **cl 29(5) specifies that the Ministry (or Director General) may take any action under the Act in respect of the report that they think appropriate. This is a very vague provision, and would benefit from some examples of action that might be taken**.

j. Under cl 31, it is anomalous that a copy of a proposed NBE plan must be provided to some, but not all, of the entities with which the planning committee was required to consult during preparation of the plan. In particular, **it should be made clear that this list includes those to whom notification must be made under an engagement agreement or Mana Whakahono a Rohe.**

k. It is curious that a planning committee can make a primary submission on a plan (to itself) under cl 34, but not a secondary submission under cl 36. **The ability to lodge a secondary submission would be appropriate, to enable the committee to respond to the primary submissions of others**, and for that to inform the deliberations of an independent hearings panel (in the standard process) or commissioners (in other processes).

l. **Core environmental NGOs representing the public interest should be given an opportunity to make a secondary submission under cl 36**.

m. It is anomalous that a planning committee must consult with iwi authorities *and* groups representing hapū in the region when following a proportionate process under cl 44(5)(a) and an urgent process under cl 48(5), but only iwi authorities when following the standard planning process. This should be rectified.

n. We are concerned that public interest submitters will be wrongly excluded from involvement in significant plan changes. This is because **the principles guiding when the "proportionate process" can be used, which largely excludes participation by public interest groups, are too vague.** Under cl 7(2), this process can be used if "the planning committee identifies all those directly affected by the proposed change". **There needs to be an additional safeguard, namely that the process cannot be used where the potential impacts on the environment are significant or where there is a significant public interest**.

o. Moreover, **the test for using the proportionate process in cl 7(2) directly contradicts cl 45(2), which clearly contemplates that the proportionate process *can* still be used even if the committee cannot identify all those directly affected**. In that case, all the other features of the proportionate process remain, but the new concept of "targeted" notification is put into action. This appears to mean that anyone *can* make a submission, but that real effort will only be put into notifying those who have an "interest in the subject area". Not only does this make it unclear what the legal test for using the process is (whether the committee has to be able to identify all affected person or not) but it also creates an alarmingly vague legal test for who actually needs to be notified if it is used (who has an interest in the subject area?).

p. The overall effect here seems to be that a planning committee can choose to use a proportionate process for a plan change if it *thinks* it can identify all affected persons, but if that turns out not to be the case, it can still proceed with the process anyway. Although appeal rights are still available for plan changes going through a proportionate process, this is still of concern because appeals can only be lodged by those who made a submission (and therefore were aware of the plan change in the first place). This is made less likely if notification was only "targeted" (and potentially "hidden").

q. There are other drafting anomalies here too. Cl 46(1) states that if the proportionate process is used, the planning committee *must* serve limited notice on those directly affected, and this notice must state "that only those given limited notification may make a submission". This directly contradicts the statement in cl 46(2) and cl 45(4), which says that "any person" can make a submission if targeted notification is used. The upshot of all this is that those served with limited notification (those directly affected) will be told that they are the only ones with a voice, only to find that actually any person who found out about it is entitled to submit as well. **It needs to be made clear that the proportionate process can be used only if all affected persons – including those representing the public interest in a healthy environment – are identified. The concept of targeted notification should be dispensed with.**

r. It is positive that an urgent plan change process can be initiated under cl 47(2) where required to avoid significant harm to the environment or to human health. **There should, however, be an automatic trigger requiring an urgent plan change where a limit or associated target is infringed.**

s. However, we are concerned that an urgent process can be initiated where the planning committee "agrees" there are exceptional circumstances that warrant it. This could include almost anything, as not guidance is given. Moreover, it is not clear who can request an urgent plan change. **It should be clarified that independent plan changes cannot use the urgent plan change track (which cl 74(2) currently implies is possible).**

t. **It should be made clearer what the distinctions are between the proportionate and urgent plan change processes**, and the rationales for this distinction. It is not particularly clear from reading the Bill.

u. We also note that **the Bill is inconsistent in its use of "proportionate" and "proportional" when referring to this planning track and this needs to be made consistent.**

v. **With respect to independent plan change requests, grounds for refusing requests under cl 73 should be expanded to include where a plan would be contrary to a target or infringe an environmental limit.** Moreover, **these matters and those currently in cl 73(1)(c) and (d) (such as non-compliance with the Act) should *require* the request to be declined**. At present, a local authority *may* reject a request on these grounds, which seems nonsensical.

w. It is positive that the Bill provides for three yearly reports and nine yearly reviews of plans. However, **reports and reviews should specifically include consideration of whether the plan has caused limits to be infringed or failed to meet targets associated with limits**. That is vital for accountability.

x. More generally, we note that the structure of Schedule 7 is extremely confusing, making it unclear which provisions apply to which planning process. For example:

    i. Clause 6(1) states that the "standard process" applies to the "development" of plans and is described in "Part 1".[73]
    ii. Clause 7, however, then states that the "standard process" must[74] be used for the "first plans prepared under this Act" as well as "any subsequent reviews of the full plan" and "where it is proposed to amend the strategic content of a plan". This is a much wider range of situations than those mentioned in cl 6.
    iii. Subpart 2 of Part 1 is then entitled "preparation of plans: standard plan changes", creating uncertainty as to what this subpart is actually concerned with (only plan changes, or full plan reviews and first generation plans envisaged by cl 6?).
    iv. Creating even more opacity is cl 29, which is in the part concerned with the standard process but which introduces some provisions dealing with the other two planning processes (proportionate and urgent) even though they are dealt with separately later on. The same thing happens under cl 31(4)(a) and cl 39(1), which deals with aspects the proportionate and urgent processes.
    v. Moreover, cl 6 refers to the proportionate process in "clause 8" (clause 8 has nothing to do with this process), and the urgent process in "clauses 12 to 14" (again, these clauses have nothing to do with the urgent process).
    vi. There is also no mention in clauses 6 and 7, which summarise the different processes, to the *independent* plan change process.

336. This structural confusion is exacerbated further by the fact that Part 2 of schedule 7 outlines the proportionate and urgent planning processes not in their entirety, but via a complicated explanation of which provisions concerning the standard process do and do not apply (and how they apply differently).

337. Furthermore, it is confusing that the "standard" process in Part 1 of the schedule seems to skip abruptly from cl 39, where the planning committee must provide information to the independent hearings panel, to provisions outlining when the plan becomes operative. In

[73] Confusingly, clause 6 is itself found in Part 1, despite the fact that it describes multiple other plan processes, not just the standard one.
[74] Despite there being a heading saying "principles *guiding* which process is to apply", implying some discretion.

between is an enormous procedural gap concerning what the independent hearings panel does. Strangely, highly detailed provisions about this are provided for separately in Part 3 of the schedule (separated by Part 2 concerning most aspects of the proportionate, urgent and independent plan change processes), despite the role of the panel being linked solely to the standard planning process.

338. Thus aside from relatively minor issues of substance, we consider that **these schedules need to be restructured and rewritten in a much more coherent and user-friendly manner**.

i. **Part 1 should list the four planning tracks, and state clearly the situations in which each is to be used. To provide a more complete picture, they should also refer to other possible tracks: where plan changes are (1) called in or (2) directly referred.**
ii. **Part 2 should outline the standard planning track (including independent hearings panel provisions), and not include any provisions relating to other planning tracks.**
iii. **Part 3 should outline the proportionate planning process in its entirety, unless it is very clear that provisions concerning the standard process apply in a straightforward manner.**
iv. **Part 4 should outline the urgent planning process in the same fashion.**
v. **Part 5 should contain provisions relating to independent plan changes, and clearly explain how they link to other processes (eg if adopted by a planning committee).**
vi. **Part 6 should provide for miscellaneous matters.**

Other concerns with NBE plans

339. Below, we briefly canvas some other concerns we have with provisions in Part 4 concerning NBE plans. Again, key points/recommendations are highlighted in **bold** to avoid repetition of relatively short points in summary boxes.

340. **The membership of planning committees is not made clear, and is left largely to negotiation between councils and mana whenua**. There is potential for some councils (eg rural based ones) to dominate others (eg urban ones) despite having different population sizes. A negotiated process for membership could have significant implications for what ends up in the plan and how protective it is, especially if there is wriggle room for exemptions from environmental limits, the ability to set large management units, and interim limits (as discussed earlier). We simply note that **this is an issue that requires close consideration**.

341. **It is unclear how the composition of planning committees will be affected by the te Tiriti clause** (a requirement to give effect to the principles of te Tiriti), and whether this will provide for co-governance or not. **This requires greater clarity, at a minimum via a direction that the NPF must provide some broad guidance.**

342. It is also **unclear who will bear the cost of running regional planning committees** and the plan making process. Presumably this will also be negotiated, but could cause significant tensions between councils and risk processes becoming dysfunctional.

343. Clause 102, outlining what plans must include, is vaguely worded. For example:

a. requiring a plan to have "strategic content that reflects the major policy issues" and to "manage the resources of the natural and built environment" seem to add nothing more than already provided by the purpose of the plans.
b. The requirement to "achieve" environmental limits is inappropriate, as it implies that a limit is something to be worked towards, rather than defended.
c. The requirement to resolve conflicts relating to any aspect of the environment is inappropriately broad, because it should not apply where limits and associated targets conflict with development outcomes. It is also unrealistically onerous, in that plans will not be able to resolve every single conflict. This is why a consenting process is still required.

344. Overall, **the clause is poorly drafted compared to the reasonably clear and directive requirements in cl 30 of the RMA.**

345. **It is positive in cl 102(h) that plans must specifically include provisions that give effect to water conservation orders** (including land use). This addresses a significant weakness of the RMA and **needs to be retained**. However, cl 396 needs to be strengthened. At present, it prevents water, coastal and discharge permits being granted that would (essentially) be contrary to a water conservation order. This should be expanded to include all resource consents (including land use consents).

346. Clause 103(2) is problematic, as it states plans do not *have* to include content on matters contained in cl 644(a), (d), (e), (f) and (g). These contain key things within the jurisdiction of regional councils that should be *required* to be dealt with in plans, such as:

(a) the use of land for the purpose of—
(i) soil conservation:
(ii) maintaining and enhancing the quality of freshwater in water bodies and coastal water:
(iii) maintaining the quantity of freshwater in water bodies and coastal water:
(iv) maintaining and enhancing ecosystems in water bodies and coastal water:
(v) mitigating or reducing the risks arising from natural hazards:

(d) the discharge of contaminants into or onto land, air, or water and discharges of water into water:

(e) in relation to the bed of a water body,—
(i) the introduction or planting of any plant in, on, or under that land for the purpose of—
(A) soil conservation:
(B) maintaining and enhancing the quality of water in the water body:
(C) mitigating or reducing the risks arising from natural hazards:
(ii) managing historic heritage on the beds of lakes and rivers:

(f) the maintenance and enhancement of indigenous biodiversity:

347. We do not understand why this cl 103(2), dealing with things that *may* be included in a plan, seems to have been quite consciously separated from cl 103(1), dealing with things that *must* be included. This is particularly confusing because the more general cl 102 (what plans must include) covers things as broad as "managing the effects of using and developing the environment", which clearly encompasses the things in cl 103(2) that "may" be included. **The**

provisions should be dramatically simplified to state that plans must include all matters within the functions of regional councils and territorial authorities.

348. More generally, **clauses 102-105 are overlapping and confusing. A clearer approach would be to follow the approach of clauses 67 and 75 of the RMA (content of regional and district plans).**

349. Similarly, it is odd that cl 105(1)(a) states a plan "may" include plan outcomes and policies, rules and other methods. This directly contrasts with the RMA's approach, where regional plans *must* state objectives, policies and rules (if any) to implement policies. In particular, it is hard to imagine how a plan will "achieve" environmental limits if it does not contain rules. This also contradicts other parts of the Bill, where outcomes are seen to be core, mandatory elements of NBE plans. **It should be made plain that a plan must include outcomes, policies, and rules to implement policies.**

350. It is unclear whether cl 105(2), which contemplates "rules" that relate to minimum freshwater flows and minimum standards of water and air quality, are environmental limits or not. This reflects many places in the Bill where the actual "form" of environmental limits is not obvious. As mentioned earlier, **there needs to be a requirement that provisions reflecting limits/minimum targets (whether rules, policies or something else) are expressly required to be identified as limits/minimum targets.**

351. Clause 105(1)(f) should be amended so that plans *must* manage the effects of fishing in coastal marine area if measures taken under the Fisheries Act do not already meet the purpose of the NBEB. This would ensure that there are no gaps at the interface of the two pieces of legislation, with such gaps occurring under the RMA.

352. **With respect to te Oranga o te Taiao statements in cl 106, it is unclear whether this is intended to be an aid to the interpretation of the *purpose* of the Bill (and therefore highly influential), or a more general document to be considered in planning decisions. It should be clarified that the latter is the case**.

353. We consider that **clause 104 or clause 97 should require plans to give effect to an emissions reduction plan made under the Climate Change Response Act**. While climate change mitigation is referred to as an outcome in cl 5 (among many others and not in hierarchy), the relationship between emissions reduction plans and NBEB instruments (the NPF, plans and consents) is weak. For instance, plans must not be "inconsistent with" an emissions reduction plan under cl 21(3)(b) of schedule 6 (which should be "give effect to"), and it is not mentioned specifically in consenting provisions (**where there should be a requirement to refuse applications that are contrary to an emissions reduction plan**).

354. It is important for regional planning committees, when preparing NBE plans, to have regard to conservation management strategies and plans made under conservation legislation. As currently drafted, this requirement is not present, which contrasts with s 66 of the RMA (which requires these to be considered when preparing regional plans).

355. **With respect to cl 107, we consider that any views offered by the Parliamentary Commissioner for the Environment should also be a matter to which planning committees**

must have "particular regard". Statements of community outcomes (SCOs) and statements of regional environmental outcomes (REOs) are intended to reflect the views of district and regional communities via their elected councillors (to make up for the more diluted local democratic influence in regional level plans), and there needs to be an equivalent to represent the interests of the environment itself.

356. It is important that cl 108(d) is tightened. At present, this requires planning committees to disregard "any" adverse effect arising from the use of land by people on low incomes and those with special needs or disabilities. The intent is good, to prevent NIMBY opposition to change due to the social or economic characteristics of residents, but **cl 108(d) should be tightened to ensure such effects are only disregarded to the extent they actually relate to those characteristics**. It is not license for people in those categories to create any kind of adverse effect. This should be replicated in other, similar provisions throughout the Bill.

357. With respect to environmental contributions in cl 112, **the Bill should clarify that such rules requiring contributions can also be set in the NPF, not just in NBE plans**.

358. Clause 116 refers to "private plan changes". **This should be altered to refer to "independent plan changes", which we understand is the NBEB's language for the same concept.**

359. With respect to cl 117, we consider that one purpose of plan rules should be to establish limits and minimum level targets. This is important, since it seems likely that the NPF will establish a framework for limit setting that will only "bite" in a regulatory sense through NBE plans (ie rules and standards).

360. Clause 118 outlines when planning committees cannot provide for discharges of contaminants entering water to be permitted activities. A similar provision is provided in cl 124 with respect to dumping and incineration in the coastal marine area. **There should be equivalent provisions relating to the NPF, reflecting that *no* instruments should provide for such things as permitted activities**.

361. Clauses 124(5) and 124(6) appear to be duplicative of cl 105(2), with some inconsequential (and therefore confusing) differences in specific wording. The duplication should be removed.

362. It is generally positive that, in places, the Bill takes a more transparent approach than the RMA to the relationship between plans and the Fisheries Act. While the RMA dealt with this in section 30 concerning the functions of regional councils (which did not allow controlling "the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act), the NBEB now directly states in plan-making provisions that "a plan must not include rules that place controls on taking, allocating, or enhancing fisheries resources in the coastal marine area for the purposes of managing fishing or fisheries resources controlled under the Fisheries Act 1996."

363. This wording leaves the possibility that *policies* are not excluded from dealing with fisheries management.[75] Environmental limits *must* also be set for the coastal marine area and indigenous biodiversity, begging the question as to what those need to cover.

364. The provisions also retain the valuable jurisprudence established in *Motiti* (which confirmed the RMA could be used to protect marine biodiversity from the impacts of fishing), due the similarities with the RMA's wording.

365. However, **it should be clarified in the Bill itself that the NBEB *can* (and indeed is *expected* to) manage the environmental impacts of fishing activity on the coastal environment, and that what the NBEB cannot do is manage the allocation of fisheries or set total allowable catch (or total allowable commercial catch).** This would remove some of the jurisdictional uncertainty that still remains in the wake of the *Motiti* decision.

366. With respect to allocation frameworks in NBE plans, cl 126 takes a more proactive approach than the RMA. It states that plans *must* include rules requiring an allocation method to be used for freshwater (both takes and its assimilative capacity), and other resources specified in the NPF. For other resources, a planning committee *may* include rules requiring allocation methods. Market based allocation methods (eg auctioning or tendering) may not be used for allocating rights to apply for water takes, but can be used for other things (including assimilative capacity of water).

367. Interestingly, under cl 126(4)(b), the default allocation method for resources other than freshwater (takes and assimilative capacity) is referred to as the "standard" consenting process. It is not clear if this "standard" process is intended to exclude fast track consenting, direct referral, or call in processes. In particular, it is unclear whether it would be possible for a plan to anticipate that these other consenting tracks would be used to allocate resources. A "standard" process does not seem to be defined. **It should be clarified that allocation decisions cannot be made using the fast-track consenting process (if that process is to be retained). A preferable approach, as mentioned earlier, would be to remove the fast track process entirely.**

368. We note with respect to cl 127 more broadly that what an "affected application consenting process" is, and what it is intended to achieve, is not at all clear. It is defined as the process outlined in clause 304 and following. But even when one looks at clauses 304-314 very little clarity is provided. It would be extremely confusing to a lay reader.

369. Our understanding is that this process is intended to allow multiple consents to be considered together, and for their merits to be compared directly against each other, when there is a scarce resource to be allocated. In other words, the "best" application when assessed against statutory criteria is to be granted rights to use the resource, if the plan allows for this process to occur.

370. If this is correct, that intention needs to be made much clearer in cl 127 and clauses 304 and following. That could be achieved by inserting a "purpose" for the affected application

[75] Meaning that if consent is required for other reasons, then those policies can be relevant to determining if consent is granted.

pathway. It would ideally have a more intuitive name, like a "comparative" or "competitive" consenting process.

371. It is confusing to use the word "permit" in clauses 127 and 128. The more general term "allow" would be preferable.

372. It is curious that cl 128 allows a plan to "permit" as well as "require" a market-based allocation method for resources other than freshwater takes. This suggests that a plan can allow a consent authority to determine, on a case by case basis, whether a market-based mechanism should be used. That would provide little transparency or predictability. **If such a mechanism is to be used for allocation, it should be required to be signalled/described in the plan itself.**

373. **With respect to cl 128(3), sub clause (b) seems unnecessary**. This is because allocation of rights to take, divert or use freshwater is already an activity that is excluded from cl 88(1), and therefore already captured by cl 128(3)(a).

374. Clause 130(4) provides that a rule in a proposed plan has immediate legal effect if it protects "areas of significant indigenous vegetation" or "significant habitats of indigenous animals". This has been largely carried over from the RMA, with some minor language changes. But it is unclear how this provision relates to the protection of SBAs elsewhere in the Bill (do the concepts mean the same thing?), which must be identified and protected in NBE plans. **The relationship needs to be made clearer, to ensure that any rules relating to SBAs in a proposed plan have immediate legal effect.**

375. Clause 142 provides a power for local authorities to acquire land by agreement if necessary to "terminate or prevent a prohibited activity in relation to the land". The power to acquire land to terminate/prevent a prohibited activity was found under the RMA. However, we find this an unusual provision given that prohibited activities cannot lawfully occur unless subject to existing use provisions, begging the question as to why an acquisition would be necessary where the suitable response would simply be enforcement of a prohibited activity rule. **If that is targeted at existing uses, which are prohibited in a plan but can lawfully continue, then it should be made plain.**

376. Moreover, the RMA stated that acquisition can occur where "expedient", not just where "necessary", and also where an activity is non-complying (ie undesirable), not just prohibited. **Clause 142(1)(b) should therefore include the purpose of terminating/preventing activities that would be contrary to targets or outcomes, given that the "non-complying" signal is no longer provided for under the NBEB.**

377. We also flag an error in cl 142(1)(b), where it reads "the acquisition is necessary or necessary for 1 or both….". **This may be intended to say "expedient or necessary for 1 or both…", mirroring the RMA.**

378. It is positive that cl 146 strengthens the duty on local authorities from "observing" their own plans (in the RMA) to "complying" with plans.

379. Part 8 of the Bill provides for domain-specific provisions relating to NBE plans. Aside from issues with these being quite disconnected from the NBE plan provisions themselves (in Part 4), we have some comments of substance.

380. Provisions concerning contaminated land in Part 8 of the Bill are an improvement on the RMA. Notably, it is positive that there is a clear directive that landowners are responsible for managing their 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 in cl 423 that the Environmental Protection Authority is the lead agency where contamination is nationally significant. However, there is no clear duty in the provisions to actually do or achieve remediation. This needs to be specified more clearly. We also note that cl 421(b) imposes a duty on territorial authorities to both "prevent" and "mitigate" adverse effects. This leaves it unclear what the legal nature of the duty is.

381. With respect to aquaculture, the ability for the Minister of Aquaculture to intervene and change an NBE plan (without going through the normal plan change process) has been retained in clauses 851-852. Such provisions should be removed, as they represent ministerial overreach and undermine the functions of the regional planning committee.

382. Moreover, the "undue adverse effects" test has been carried over to the Bill, whereby aquaculture operations are constrained by their impacts on the fishing industry (clauses 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 like fishing that arguably have more significant overall impacts.

383. We are concerned that the obligation to provide all evidence at the time of making a submission may be inefficient (in that targeted evidence can be more effective later on once issues are narrowed) and also impinge on natural justice (by excluding advocacy through the process). The 40-day time period for making submissions seems too short, given that whole of plan reviews will be extensive (especially for first generation plans) and require preparation of significant amounts of evidence. We note that the intention of the Bill is to "front end" decision-making by relying on plans rather than consents, so it is important to ensure that the former are robust.

384. Finally, we note that the link between NBE plan content and other provisions concerning freshwater allocation are extremely vague. Clause 693 provides that, following the Minister's response to the recommendations of a newly formed Freshwater Working Group on how to allocate freshwater, an "allocation statement" may be prepared between the Minister and iwi/hapū. This statement must be sent to the relevant regional planning committee, with a direction that the committee must "determine how the plan is to be updated" and update it in "a manner that is consistent with the Act".

385. This makes it very unclear as to the committee's (and, potentially, judiciary's) legal obligation. Is it to give effect to the allocation statement, in the manner of national direction? Is it to decide whether or not to give effect to it? Or is it simply to initiate a plan change to allow the Bill's normal process to be gone through? We do not comment on the right solution, but **the legislation requires clarity**. We also note that the process of creating allocation statements is being treated as a purely political negotiation. There is no reference to the Bill's purpose, te

Tiriti clause, or allocation principles in doing so. That will make it even more difficult for the courts to determine the lawfulness of planning committee decisions when "updating" their plans in response to an allocation statement.

5.10 Consenting

386. Part 5 of the Bill deals with processing and decision-making on resource consents. We will not comment on every one of the extensive consenting provisions in the Bill. Many of them are similar to those in the RMA. However, there are elements that are of concern, and elements that represent improvements that should be retained.

387. It is positive that consents cannot be granted contrary to an environmental limit or target under cl 223(11)(a)(i). However, as foreshadowed earlier in our submission, it should also be made clear here that consents cannot be granted for activities having more than trivial impacts on a PONI unless an exemption has been granted.

388. It should also be made much clearer that a consent cannot be granted contrary to measures necessary to adapt to climate change hazards. Notably, this should prevent consent being granted for residential activities in high hazard flood or erosion zones (reinforcing, as per our earlier recommendations, that plans must treat such activities as prohibited activities). Such an approach is familiar from s 71 of the Building Act, which prevents the granting of building consent where building work is subject to natural hazards. The risk of simply "having regard" to such things in cl 223(2) is that climate change adaptation is one outcome among others to be considered, and any conflict invites trade offs to be made. Similarly, cl 228(1) should *require* (not just allow) subdivision consent to be refused where necessary to reduce risks from natural hazards (even if not in a high hazard zone and therefore prohibited).

389. A clear link should be made between cl 223(13), concerning inadequacy of information, and the general precautionary principle in cl 6. This should make plain that the adequacy of information is to be assessed in light of the obligation to favour caution in the event of uncertainty.

390. The relationship between consenting and the effects management framework needs to be made clearer, as highlighted earlier. At present, it is unclear whether the effects management framework (or just the general duty to "manage" adverse effects in the purpose of the Bill) applies to consenting decisions other than in situations in which activities are proposed to occur in SBAs and SCHs.

391. It is positive that appeal rights have been introduced with respect to the merits of notification decisions on resource consents made by consent authorities. This is preferable to the current recourse to judicial review.

392. It is also generally positive that under clauses 200(1) and 205(2), notification status is to be made clearer in plans themselves. Under the RMA, too much energy has been expended on determining whether to notify a consent on a case-by-case basis. A case-by-case assessment is still possible, but only if the plan specifically provides for this.

393. The test for requiring public notification in plans is quite different to that under s 95A(8) of the RMA, however, which was based on there being more than minor effects.

205 When to require public notification

(1) In this section and sections 206 and 207, *decision maker* means—

(a) a regional planning committee in a plan; or
(b) the Minister in the national planning framework.

(2) A decision maker must require public notification of an application for a resource consent if satisfied that 1 or more of the following apply:

(a) there is sufficient uncertainty as to whether an activity could meet or contribute to outcomes, or the activity would breach a limit:
(b) there are clear risks or impacts that cannot be mitigated by the proposal:
(c) there are relevant concerns from the community:
(d) the scale or significance (or both) of the proposed activity warrants it.

394. This test should be tightened to *include* where a proposal would have more than minor adverse effects, as well as the other matters in (a)-(d). Clause (2)(a) should also refer to "minimum level targets" alongside "limits", and delete the term "sufficient".

395. More generally, we note that this test creates significant uncertainty. In particular, it is not clear when the "scale or significance" of an activity *would* "warrant" notification, or what "relevant" concerns encompass. It would be simpler to retain the RMA's test for notification, which is now well understood, while requiring plans to specify whether particular types of activity are to require public notification based on that test.

396. We also note that the purpose of notification in cl 198 (reflected also in cl 200(3)(b)) is too narrow; it is focused only on whether *information obtained* from notification is likely to make a material difference to a consent decision. It misses a key point of notification, which is to allow environmental groups to make submissions and thereby appeal decisions in the courts. It provides a check and balance on consent authorities, not just a source of information the decision-maker would otherwise be unaware of. This purpose is significant, because it flows through to decisions about whether a plan will require, allow or prohibit notification (and therefore constrain appeal rights).

397. If public notification is not required in a plan, it is positive that cl 206 of the Bill still requires plans to provide limited notification where it is appropriate to notify "any person who may represent the public interest".

398. While there are extensive provisions outlining when *plans* must or may provide for notification statuses, there does not actually appear to be a legal test for when a *consent authority* should notify (or limited notify) an application. This is a significant omission, because the Bill specifically states that plans *can* allow notification status to be determined by a consent authority, but does not provide a legal test for them to make that decision (consent authorities are not "decision-makers" to which the provisions apply). It should be made plain

that consent authorities must, if the NPF or plan provides so under cl 199(1)(b), notify an application if there are more than minor effects on the environment.

399. Finally with respect to notification, we note that it is unusual that the EPA's decision whether to publicly notify an application called in by the Minister is based on the old RMA test of "more than minor" effects rather than those applying to consent authorities under cl 205.

400. With respect to consent duration, 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.

401. We are not convinced that a separate fast track consenting process (the "specified housing and infrastructure fast-track consenting process" in subpart 8 of Part 5) is necessary, given other improvements to process under the Bill (including the ability to call in projects of national significance and avoid a two-stage process). The fast-track process limits who can comment on consent applications, and constrains appeal rights to questions of law in the High Court.

402. Particularly concerning is the broad discretion given to the Minister to determine whether the process is "appropriate" under cl 318, and to recommend to the Governor General the promulgation of regulations under cl 856 specifying who shall (and, consequently, cannot) be invited to comment on proposals under cl 319(1)(b). There is no reference to the specific civil society environmental groups that were listed in the Covid-19 consenting legislation on which this is modelled.

403. We also have concerns around how an independent consenting panel is appointed to determine applications that go down this track. Clause 856 suggests that regulations do not *have* to require appointments to be made by the Chief Environment Court judge, whereas this should be required.

404. And we note that an inappropriately broad range of activities are able to progress down this fast track, including housing development. We are not convinced that rapid housing development still has the urgency that led to such provisions being included under Covid-19 response legislation on which this is modelled.

405. It is also unclear in a number of places whether provisions relate to the application to *use* the fast track process (which the Minister must determine), or the application *for consent* itself (which is then determined by a consenting panel). For example, cl 320 is entitled "submissions on application to use specified housing and infrastructure fast-track consenting process" and yet its position in the Bill suggests it actually refers to the process by which a consenting panel *determines* the consent application (by *using* the fast track process). Confusingly, the definition of "application" in cl 315(2) is "an application to use the housing and infrastructure fast-track consenting process to determine - (a) an application for a resource consent…", shedding no light on the confusion.

406. If the fast-track process is to remain, there need to be constraints on the Minister's broad power to determine who can and cannot comment on proposals. There also needs to be an expanded list of *ineligible* activities under cl 317 (currently focused only on activities in customary marine title areas) to include activities having significant adverse effects on the environment (including those contrary to limits and targets). There needs to be statutory criteria for when the Minister can send an application down this pathway based on environmental impacts, not just whether the Minister thinks it "appropriate" or whether a project is significant.

407. 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. We also note that while the power for the Minister to appoint a board of inquiry upon call in (cl 350) applies to consenting, there is only a more constrained power for the Minister to appoint the *convenor* of the board of inquiry responsible for reviewing national direction (ie the NPF), who then appoints other members. This convenor must be a current or former judge, which is not the case in the consenting context.

408. Clause 329, outlining the grounds for the Minister to call in a proposal of national significance, should also specifically include where the proposal risks infringing an environmental limit or minimum level target.

409. The concept of a permitted activity notice is a positive one. This will allow the cumulative impacts of permitted activities to be monitored more effectively. It is also positive that some permitted activities must be registered in this way, such as aquaculture activities under cl 113.

410. As noted earlier in our submission, the ability to extinguish or constrain existing use rights and cancel resource consents is an improvement on the RMA, notably when it comes to activities having an adverse impact on the natural environment (and where there is persistent non-compliance with consent conditions under cl 719). However, there needs to be a proactive *duty* on decision-makers to do so where environmental limits and minimum level targets are threatened by the continued exercise of a consent. If it is not necessary to cancel a consent or extinguish existing use rights immediately in order to defend a limit/target, there should be a duty under cl 277(7) to review conditions of a consent relating to its duration (to ensure it is phased out before a limit/target is breached). That should be the case irrespective of whether the NPF or plan specifically allows a review of duration, to ensure that the process for defending limits is sufficiently agile.

411. Similarly, there needs to be a clear duty to review the conditions of consent under cl 277(3) and cl 277(4) where environmental limits/minimum level targets are at risk of being breached. At present, the clause allows councils to decide whether or not to do so even if a limit has been clearly breached, undermining the idea of limits being a line in the sand to be proactively defended. This is another way in which political discretion could undermine limits. It would be particularly problematic in the case of consents granted for significant amounts of time, such as consents allowing discharges to air for up to 35 years.

412. It is also unclear what the "exceptional circumstances" required for the review of land use consent under cl 277(3) would include. This seems to be an inappropriately high (as well as

legally uncertain) threshold for enabling a review where there are significant impacts on the natural environment. For example, it is not clear whether a review would be allowed where an environmental limit was being infringed across a management unit (eg the clearance of indigenous vegetation allowed by a consent). Would this be an "exceptional circumstance"? Clause 277(3) should clarify that consent conditions must be reviewed to the extent that they are contributing to the exceedance of an environmental limit or minimum level target.

413. There also needs to be a duty to review consent conditions and existing use rights when these are inconsistent with water conservation orders. This is in line with the new requirement for plans to give effect to water conservation orders, since they will be unable to do so if consented activities creating adverse impacts on them remain unchanged.

414. We have concerns about the use of "plan directed" alternative dispute resolution (ADR), and the potential for this to constrain access to justice in the courts for environmental advocates where they have not voluntarily entered into an ADR process. The use of plan-directed ADR should be constrained to where there are no public interest questions to determine, and where questions do not concern limits or targets.

5.11 Relationship between the NBEB and place-based legislation

415. It is important that the NBEB and SPB interact effectively with more specific pieces of environmental legislation. Key statutes include the Waitākere Ranges Heritage Area Act and the Hauraki Gulf Marine Park Act. The Bill provides for consequential amendments to those statutes, since that is where the links are made to the RMA.

416. The intention with respect to the Hauraki Gulf Marine Park Act (HGMPA) appears to be to retain much the same link as it currently has with the RMA. In short, this means that the protective matters in sections 7 and 8 of the HGMPA are to be deemed to be part of the NPF, that NBE plans must not conflict with sections 7 and 8, and that consent authorities must have regard to sections 7 and 8 alongside other matters in the RMA.

417. The retention of this link is broadly positive. However, we consider it should be strengthened.

a. Under the Bill, consent authorities are directed not just to "have regard" to various matters (as under section 104 of the RMA), but also to refuse consent if it is (for example) contrary to a limit or a target. Requiring the protective objectives of section 8 to be had regard to risks further diluting them. **Some of could more properly be regarded as setting "targets" to be complied with, and not just another matter to have regard to. Alternatively, the section 8 objectives could be required to be "secured" (or similar) alongside other higher priority aspects of the cl 5 outcomes (see earlier discussion on outcomes).**

b. The relationship between the Hauraki Gulf and PONIs is unclear. Under section 7 of the HGMPA, the Gulf's ability to support the environment's life-supporting capacity is recognised as being of "national significance". Given this legislative recognition, **there is a case for clarifying that the Gulf itself is a place of national importance.**

c. It is essential that transitional arrangements dealing with how the NBEB rolls out across the country recognises the connected nature of the Gulf. In other words, if the idea is to apply the Bill to some regions before others, **there should be a requirement that all regions with areas within the Marine Park proceed at the same time.** As mentioned earlier with respect to the NPF, there needs to be a much more transparent provision in the legislation itself outlining when and where the NBEB will replace the RMA.

418. The relationship with the Waitākere Ranges Heritage Area Act (WRHAA) is also important. The point made above with respect to the national significance of the Hauraki Gulf, and its suitability as a PONI in its own right, applies equally to the Waitākere Ranges Heritage Area. This is because section 7 of the WRHAA already deems the Area to be a place of national significance by virtue of many attributes that also qualify areas as PONIs. If the Area is deemed to be (or contain) PONIs, the Bill should clarify that exemptions from the obligation with respect to PONIs (ie to avoid more than trivial impacts) can only be granted if consistent with the purpose and objectives of the WRHAA.

419. Moreover, regional spatial strategies, which are about achieving positive outcomes and not just addressing adverse effects, should be obliged to give effect to the purpose and objectives of the WRHAA (rather than being "not inconsistent" with them). Similarly, there should be a requirement in the NBEB that resource consents cannot be granted if "contrary to" the purpose and objectives of the WRHAA.

420. We note that concerns with respect to tree protection in cl 125 (mentioned earlier in our submission) are particularly concerning in the context of the Waitākere Ranges Heritage Area. This is because they relate to all land, not just urban allotments and not just private land. The result is that NBE plans will be constrained in their ability to protect tree cover in the Area, because the Bill expressly provides that it prevails in the event of conflict with the WRHAA. We reiterate our view that cl 125 should be deleted.

6. Comments on the Spatial Planning Bill

421. We see the main benefit of the SPB as being to provide better integration between various aspects of the system. While it is not *essential* for this to be a separate Act (some integrated management could be achieved through NBEB instruments, for example by embedding regional spatial strategies within NBE plans similar to the RMA's regional policy statements), we are comfortable with separate legislation.

422. 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.

423. 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,[76] with the NPF simply providing direction for *how* they are to be set.

424. 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).

425. 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, alongside the representative of central government already provided for), as an advocate for nature. The Limits and Targets Review Panel should have a stronger role in the creation of RSSs.

426. 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.

427. 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).

428. As mentioned earlier in our submission, the order in which instruments are created and amended is important. In particular, although RSSs are intended to be higher level and inform NBE plans (and as the Auckland Unitary Plan process made clear, it is a good thing to establish a strategic layer before a regulatory layer), the reality is that a lot of the ecological information required to inform the strategic layer in RSSs (eg the location of SBAs and the setting of minimum level targets) will only appear through NBE planning processes (and potentially a second or even third generation NPF, given transitional provisions exempting the first NPF from some mandatory content). In contrast, it seems plausible that the location and nature of large-scale infrastructure and other projects will be identified in RSSs because the information to do so will be readily available, and it may be difficult to constrain or alter those things in any fundamental way later on. This is also of concern because the RSS process does not have provision for appeals to the Environment Court, creating a significant amount of legal influence over subsequent NBE plans without corresponding legal safeguards. The two

[76] Indeed, for ONLs and SBAs, these are specifically required to be identified in *plans*, not the NPF. Only the criteria for doing so are to be included in the NPF itself.

instruments therefore need to be prepared in parallel so that environmental information informs strategic planning from the outset.

429. The purpose of the SPB also needs to be made more environmentally focused. In particular, it should expressly mention the imperative to protect and enhance the natural environment (not just refer to the purpose of the NBEB), and should refer to the integration of functions under the Climate Change Response Act 2002 alongside other statutes like the Land Transport Management Act 2003 and Local Government Act 2002. Climate change considerations will be important in making big picture strategic decisions at the RSS level, such as whether to plan for significant new emitting infrastructure such as airports. Once identified in RSSs, the extensive exemptions available through NBEB processes for infrastructure suggest to us that those big picture decisions about development will be difficult to reverse or change in fundamental ways.

7. Errors in drafting

430. We have noted a number of typographical and grammatical errors in the NBEB. Some of these may affect sense and meaning, so are important to address.

431. The Roman numerals in clause 5(c) are not correct.

432. Clause 27 appears to be a copy-paste of the equivalent RMA provision, so refers to “objectives and policies”. Elsewhere, it appears that the language of “objectives” has been replaced by “plan outcomes”.

433. Clause 28(1)(b) appears to be an incomplete sentence.

434. Clause 30 “sections” should read ”section”.

435. The definition of “environmental limit” has a typographical error, in that “of” should be changed to “or”.

436. There is a grammatical error in the definition of “incident”, where “have” should read “has”.

437. There is an error in the definition of “Minister for oceans and fisheries” where the word “of” should be “for”.

438. There is an error in the definition of “regional spatial strategy”, which refers to the *Strategic* Planning Act rather than the *Spatial* Planning Act.

439. In cl 419(1)(b) “is” should be “its”.

440. In cl 26(2) “planing" should be “planning”.
441. The heading prior to cl 68 should have “the” National Planning Framework.

442. Clause 66(1)(n) “Defences” should be “Defence”.

443. The cross reference in cl 79(2) should be to section 81(c), not 81(b).

444. Clause 24(5) is incomplete. The equivalent cl 15B(4) in the RMA adds that "and regulations or rules may be made prohibiting a discharge which would otherwise be permitted in accordance with subsection (1)(b) or (c) or subsection (2)(b)". This is necessary, as there is otherwise no clear legal basis for a framework rule, plan rule or consent condition *to* apply to a discharge.

445. Clause 24(2)(c) – the full stop after "noxious" should be a comma.

446. It is confusing that the terms "natural environmental limit and limit" are defined with reference to cl 39, but the term "environmental limit" is defined separately with reference to cl 39 and 40. The meaning of a "natural environmental limit" remains unclear.

447. Reference to "262(2) cases" in cl 261 refers to a non-existent clause.

448. In cl 270(4) the text should read "person A's "application"".

449. In cl 318(2) the wording should be Minister "of" conservation not "for".

450. In cl 38(2)(g) of schedule 7, "does" should be "do".

451. There is an error ("Nāori") in cl 11(4).

452. There is inconsistent use of "Natural and Built *Environment* Act" and "Natural and Built *Environments* Act" throughout the Bill.

453. Reference to "subpart 1 of Part 7A" in cl 851(2) is confusing, as there is no Part 7A in the Bill.

454. It is inappropriate to define "risk" in the interpretation clause as the meaning in the Civil Defence Emergency Management Act (the likelihood and consequence of a hazard), as this does not necessarily reflect the notion of risk in the precautionary principle (which is about harm to the environment, rather than a hazard, which is defined in the Civil Defence Emergency Management Act as "something that may cause, or contribute substantially to the cause of, an emergency"). Environmental harm is often not an "emergency" under that Act.

455. There are instances of "consenting authority" in the Bill (for example, in cl 559(3)) that should be amended to "consent authority".

8. Concluding comments

456. While reform is necessary, and we think the Bills represent an improvement on many aspects of the RMA, a number of fixes are required, 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.

457. We note that while the Bill has been considered to be cost-saving overall compared to the RMA, there have been acknowledgements that it will increase the cost burden on the planning

system while reducing costs on private persons/applicants. While we support the idea that more should be obvious in plans (reducing the need for consenting and the cumulative impacts that brings), this represents an inequitable shift of the cost burden to the public (taxpayer and ratepayer) purse. While it need not be enshrined in legislation, it would be important for a funding mechanism to be developed that ensures those who benefit from the use of non-private resources and the natural environment are also proportionately responsible for funding the system enabling those benefits.

458. Other supporting measures will also be needed to ensure the new legislation works in practice. Notably, it will need to be accompanied by a more integrated and standardised system for environmental monitoring (allowing timely aggregation and presentation of data at a national level), including consistent baseline (2023) measurements and ongoing current state measurements of attributes that reflect limits and minimum level targets. This will need to be funded/supported by central government, and linked clearly to obligations under the Environmental Reporting Act (indeed, it may be more appropriate to make consequential amendments to that Act, requiring time series reporting on current state, limits and targets). Information on the state of the environment, consent applications/decisions, and compliance with regulatory requirements should also be available to the public in real time as far as practicable, and the Bill should provide a general duty to ensure easy public access to data in an understandable form.

459. Significant investment will need to be made by central government to support the development of limits and minimum level targets for different domains. This will involve research funding, and needs to connect with other processes looking at how such investments are made in a strategic fashion. Planning committees will need to be closely supported in setting regulatory limits, as otherwise there is a risk that the NPF sets only high-level provisions and that committees struggle to translate these into meaningful restrictions on the ground.

460. A key supporting measure provided by the NBEB (under cl 689) is the establishment of a statutory Freshwater Working Group by the Minister for the Environment. Its key purpose in cl 690 is, essentially, to make progress on fraught questions about water allocation, including with respect to Māori rights and interests. However, this process appears to be focused solely on allocation of water for use. This is understandable, since the basic framework of te Mana o te Wai is intended to continue, and the current gap in that framework is how human interests are to be allocated between different people/groups rather than to the natural environment. However, we consider that the Freshwater Working Group should also consider how allocation to "nature" should be progressed via new water conservation orders. At present, these remain an ad hoc and application-based tool rather than a strategic and proactive tool.

461. Finally, we note that EDS is in the process of finalising a report addressing environmental advocacy settings in the future system. The summary of that report, which will be available on the EDS website,[77] contains a table of additional specific recommendations for how the NBEB and SPB (alongside other supporting measures) needs to provide for better advocacy outcomes.

[77] www.eds.org.nz

462. EDS is also doing work on the future of local government and the Environmental Protection Authority. While this work is not complete, we note that deeper institutional change beyond the scope of the current reforms (eg funding and capacity constraints for local government) will be important in ensuring that the Bills work well.

463. We thank the Select Committee for the opportunity to submit on these extremely important Bills.

464. We wish to be heard in support of our submission.