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

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Introduction

1. The Environmental Defence Society (EDS) thanks the Environment Select Committee for the opportunity to make a submission on the Planning Bill and the Natural Environment Bill (NEB) (collectively, the Bills).

2. EDS is an apolitical, not-for-profit organisation dedicated to achieving improved environmental outcomes for all New Zealanders. It is active as a litigator, policy think tank, events convenor and environmental advocate. It has dedicated considerable resource over the past seven years into looking at the future of the resource management system in Aotearoa New Zealand.[1] It has become a leading voice in this space.

3. EDS opposes the Bills in their present form. Significant changes are needed to make them acceptable and workable.

4. However, we do not consider this to be fatal to the passage of the Bills. The Resource Management Act 1991 (RMA), which the Bills are designed to replace, is not fit for purpose and requires either replacement or fundamental amendment. The Bills could achieve that outcome if amended as recommended in this submission.

Preliminary comments

5. Although the Bills are being described as the largest 'economic' reforms in a generation, they should not be, at their heart, about the economy. They should be about protecting, managing and restoring the environment. This needs to be the lens through which the reforms are assessed.

6. Looking through this lens does not prevent consideration of how to make the system more efficient, certain and user-friendly. That is necessary, given deficiencies in the RMA. Nor does it prevent efforts to grow the economy within proper environmental constraints.

[1] For a list of EDS's resource management publications see: https://eds.org.nz/our-work/policy/projects/resource-management-reform/

However, we do not have an economy – or healthy society – without the natural world on which our survival and wellbeing depend. It should be the cornerstone of any good environmental law.

7. Our natural environment is currently in bad shape. It requires not just protection but also improvement. For example:

    a. We have the highest proportion of threatened or at-risk indigenous species in the world (over 4,000).[2]
    b. More than half of our rare ecosystems are at risk of collapse.[3]
    c. Ninety percent of wetlands have been lost since pre-human settlement.[4]
    d. Forty-six percent of groundwater monitoring sites failed to meet drinking water standards for *E. coli* at least once between 2019 and 2024.[5]
    e. Between 2016 and 2020, 55 percent of groundwater monitoring sites suffered from moderate or severe organic pollution.[6]

8. In this submission we outline the key aspects of the Bills that need to change. We provide specific changes where appropriate. Because the two Bills are so interlinked (there are many cross-references, sharing of legislative machinery, and other relationships), our submission is structured according to topics that frequently cut across them, rather than dealing with each Bill in turn.

9. Most important are the provisions concerning:

    a. Regulatory relief;
    b. Environmental limits (and related provisions, such as goals and planning process); and
    c. Standing and public participation.

10. While these three topics are of most concern and we address them first, there are other elements of the Bills (including their scope and goals) that require change.

11. There are also many positive aspects of the Bills that should be retained and built upon or strengthened.

12. In addition, there are more general themes that run through multiple topics that are of concern:

    a. There is considerable discretion left to the Minister (through national instruments) and councils (through plans) to determine the meaning of key terms and to balance environmental concerns against development. The Bills need to have clearer legal tests amenable to determination by the courts, not just be a framework for future decision-making.

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[2] Our Environment 2025 Tō tātou taiao (New Zealand Government, April 2025).
[3] https://www.stats.govt.nz/indicators/rare-ecosystems/
[4] https://environment.govt.nz/publications/environment-aotearoa-2022/waiti-freshwater/
[5] Our Environment 2025 Tō tātou taiao (New Zealand Government, April 2025).
[6] Our Environment 2025 Tō tātou taiao (New Zealand Government, April 2025); https://www.sciencedirect.com/science/article/pii/S0048969725021898

b. There is a lack of detail about how aspects of the Bills will work. If the reason behind this is a lack of time for policy development or drafting, the legislative process should be paused, and policy work (and engagement with stakeholders) should continue.

c. There are significant inconsistencies and uncertainties that will make it extremely difficult to apply the laws and will undermine their overall intent. In particular, some provisions that appear strong in their protection of the environment when read in isolation (eg the purpose of environmental limits) are fatally undermined by more specific provisions that weaken their effect (eg exemptions and directions to balance with economic concerns).

d. Uncertainties throughout the Bills (including undefined terms and interactions between the Bills) will likely lead to significant and unnecessary litigation. Where tailored appeal or review rights are not provided, challenges will be funnelled into judicial review.

e. There is heavy reliance on the Ministry for the Environment and regional councils to support implementation through the development of national instruments, spatial plans and regulatory plans. A lot of this will be new and will require stability and continuity of institutional knowledge. Yet there is a parallel process underway to disestablish the Ministry for the Environment and transfer its functions to a new entity (a Ministry of Cities, Environment, Regions and Transport), and a proposal for fundamental reform of local government (including the possible abolition or transformation of regional councils), which may risk implementation rollout.

f. There is an unjustified adherence to the protection of perceived private property rights at the expense of legitimate public interest protections.

g. The legislative framework is complex in its structure and application, confusing in its drafting, uncertain in its application and ultimately unworkable. Practitioners will struggle to apply it in practice, which will slow implementation and increase costs.

13. The pervasive and cross-cutting nature of these themes points to a need to slow down resource management reforms, integrate them with other policy processes and undertake a global assessment of the whole package. Using select committee to 'fill in the gaps' in the Bills while so much uncertainty is present in surrounding structures is a poor approach to law making.

Regulatory relief

Introduction

14. The most egregious aspect of the Bills is the regulatory relief framework, which will require compensation where certain kinds of public interest environmental or planning regulation impacts the use of private land. The relevant provisions are found primarily in Part 4 of Schedule 3 of the Planning Bill, which are applied to certain kinds of regulation made under the NEB.

15. There are two separate regulatory relief pathways proposed in the Bills. The first is completely new and applies to things called 'specified rules'. This pathway is unacceptable and needs to be deleted from the Bills.

16. The second is much broader, because it applies to all 'provisions' in plans. Essentially, it is a modified version of section 85 of the RMA. An analogous provision should remain in both the NEB and Planning Bill, but in quite a different form.

17. For the reasons set out below, as currently proposed, the regulatory relief pathways are likely to result in planning chaos. Litigation will be rife due to the largely undefined nature of terms used. Ultimately, public interest regulation is unlikely to be pursued and the natural environment will suffer further degradation as a result.

Philosophical foundation for regulatory relief

18. The Bills' regulatory relief frameworks are premised on a philosophical ideology that people should be able to do what they want with their land. The argument for change is that the RMA has failed to defend people's property rights from regulatory controls such as environmental or cultural planning overlays like significant natural areas (SNAs), outstanding natural features and landscapes (ONFLs) or Māori interests (like sites/areas of significance to Māori (SASMs) or wāhi tapu). This needs to be challenged for two reasons.

19. First, although property rights are very important in a capitalist, liberal society, they are not, and have never been, absolute where the public interest is at stake. We are at a point where environmental issues, including the indigenous biodiversity crisis we face, are of such immense public importance that an absolutist approach to property rights is not defensible.

20. Secondly, the evidence base for the proposition that the RMA has substantially weakened people's property interests, and that dramatic change is therefore required, is weak and largely anecdotal. For example, we are aware of only one council that has costed the total potential cost to landowners of imposing SNA overlays.[7] Further, councils have been cognisant of the need to provide assistance to landowners to help them secure public interest outcomes.[8] Existing safeguards for private land (which cannot be rendered

[7] https://wellington.govt.nz/-/media/your-council/plans-policies-and-bylaws/district-plan/proposed-district-plan/files/hearing-streams/11/council-reports-and-evidence/council-report-and-evidence/appendix-f.pdf

[8] For example, Rotorua Lakes District Council: https://www.rotorualakescouncil.nz/repository/libraries/id:2e3idno3317q9sihrv36/hierarchy/our-council/agendas-and-minutes/livestream/documents/2019/DRAFT%20Plan%20Change%203%20Significant%20Natural%20Areas%20Section%2032%20Report%20Final%20for%20Council%20adoption.pdf

incapable of reasonable use) under section 85 of the RMA have seldom been used, even though they have been available for a long time.[9]

Pathway 1: Regulatory relief for specified rules

21. In this section we examine the regulatory relief framework for 'specified rules'. There are three key steps that need to be considered, and all pose significant environmental risks:

    a. When is a relief framework required?
    b. What does that relief framework look like?
    c. How is it applied on the ground at the property level?

When is a relief framework required for specified rules?

22. A relief framework must be included in a proposed land use plan (made under the Planning Bill) and/or a natural environment plan (made under the NEB) prior to notification if it is reasonably likely that a specified rule will have a significant impact on the reasonable use of land.[10] To understand the potential impact of the specified rules pathway, all these terms need to be unpacked.

23. A 'proposed plan' includes any plan changes (including private plan changes) and variations.[11] However, these only require a relief framework if the relevant rule is 'substantially different' from the operative plan.

24. The term 'substantially different' is undefined. It is not clear whether a change in an activity status from restricted discretionary to discretionary would be a substantial difference. Litigation risk (and the cost of creating the relief framework itself) may encourage councils to be conservative and make only small-scale (not substantially different) changes to relevant rules via plan changes, even if environmental problems necessitate them going further (eg to defend environmental limits).

25. Due to constraints on legal standing (submission and appeal rights – which we address later in our submission), any lack of ambition in plan changes will also be more difficult to challenge. This will weaken expert judicial oversight when it comes to the adequacy of council plan changes containing specified rules which protect things like indigenous biodiversity.

26. 'Plans' do not include national instruments,[12] meaning that standards made by central government do not trigger an obligation for the *Minister* to create a relief framework. That

[9] EDS has discussed this in its 2025 report on resource management reform: see https://eds.org.nz/resources/documents/reports/replacing-the-resource-management-act-risks-and-solutions/
[10] NEB, cl 11; Planning Bill, cl 92; Planning Bill, Schedule 3, Part 4.
[11] Planning Bill, Schedule 3, cl 64; Planning Bill, cl 3.
[12] Planning Bill, Schedule 3, cl 64; Planning Bill, cl 3.

could result in the Minister requiring councils to impose rules in their plans while at the same imposing significant fiscal liability on them to compensate landowners for the effect of those rules. This would be unfair, especially if rates caps are imposed on councils (which will limit their ability to provide relief). It also allows political blame for a lack of effective regulation to be shifted to a place – local government – that may be unable to provide a solution.

27. A rule requires the creation of a relief framework if it is a 'specified rule'. This is defined as a rule 'on a specified topic'. There are four specified topics under the Planning Bill:[13]

    a. Significant historic heritage sites or significant historic heritage structures;
    b. Outstanding natural landscapes or outstanding natural features;
    c. Sites of significance to Māori; and
    d. Areas of high natural character in the coastal environment, wetlands, lakes, rivers, or their margins.

28. There are three further specified topics under the NEB:[14]

    a. An SNA;
    b. A SASM; and
    c. Terrestrial indigenous biodiversity.

29. This broad definition of a specified rule has significant implications, especially when it comes to managing actual and potential adverse effects on indigenous biodiversity:

    a. SNAs are not defined in the Bills, but such areas are crucial for protecting habitat of threatened and at-risk species and for implementing any kind of meaningful 'limit' on indigenous biodiversity loss. There is a risk that national instruments would define them broadly, rendering almost all area-based protection subject to the relief framework and therefore much harder for councils to impose.

    b. Of even greater concern is that a relief framework is required for *all other* rules on the topic of terrestrial indigenous biodiversity. This would include all general vegetation clearance rules across all zones and any tree protections. Its impact is potentially very wide, because all plans under the RMA have at least some provisions controlling the clearance of indigenous vegetation, even when it is not significant.

    c. Specified rules for indigenous biodiversity include only those relating to *terrestrial* indigenous biodiversity. They do not include rules protecting aquatic ecosystems. That provides some constraint on the application of the relief framework. However, the term 'terrestrial' is not defined, leaving the status of some rules (eg wetland protection rules, rules relating to geothermal features, or rules seeking to protect species whose life

[13] Planning Bill, cl 3 ("specified topic").
[14] NEB, cl 3 ("specified topic").

cycles span land and water), unclear. This means that the Bills leave open the possibility that relief could be required for the protection of geothermal systems in the Waikato region, or for the protection of natural inland wetlands.

d. Although rules relating to *indigenous biodiversity generally* do not include aquatic biodiversity, there is no such limitation on rules on the topic of SNAs. For example, the Bills could trigger a relief framework for any protected area in privately owned marine space even though there is no presumption that activities in those spaces can occur without express authorisation.

e. A double standard is also created for biodiversity. This is because relief is triggered by *indigenous* biodiversity protections (eg to prevent felling of an established coastal Pōhutukawa) but not by protections designed to protect *exotic* species (eg an old oak). There would be a perverse incentive for councils to protect only non-native species, given that only the protection of natives would trigger the possibility of compensation.

f. Because specified rules are defined vaguely to mean rules 'on' a specified 'topic', the duty to create a relief framework is arguably triggered by rules imposed on land (eg a farm) that seek to protect indigenous biodiversity on *adjacent* land (including publicly owned land like the conservation estate).[15] In other words, compensation could be required for controls that seek to manage one landowner's spillover effects on the biodiversity of another. Such rules might relate to things like the creation of noise, light or dust that could affect vulnerable species nearby.

   At minimum, a much tighter definition of a 'specified rule' would be expected: one that encompasses rules establishing an SNA or protecting biodiversity *located on* the land to which the rule applies, not on the 'topic' of biodiversity or an SNA generally.

g. Even where rules protecting indigenous biodiversity (eg vegetation clearance) are intended to protect species only on the parcel of land to which the rule relates, the philosophical rationale for compensation is questionable. That is because most protected wildlife is owned by the Crown under the Wildlife Act.[16] This means that although specified rules might have an impact on a landowner's use of their property, it is equally true that doing things like clearing habitat has an impact on *another* party's property (the Crown). There is no provision for a landowner to compensate the public for such impacts.

30. A relief framework is required only if a specified rule is 'reasonably likely' to have a 'significant impact' on an owner's 'reasonable use'. Interpretation of these undefined terms

[15] This is because of how the legislation is drafted. Under cl 64 of Schedule 3 of the Planning Bill, the duty to consider the impact of a specified rule "does not apply to… the *use* of land that is publicly owned" (our emphasis). This suggests that the duty to consider the impact of a specified rule (on the 'topic' of biodiversity) still applies to the use of land that is *privately* owned, even if the impact of that use is on land that is publicly owned.
[16] Wildlife Act 1953, s 57(3).

will largely determine the potential effect of the relief framework on the natural environment.

31. 'Impact' is defined as the impact of a specified rule on the reasonable use of land (presumably to distinguish it from an impact on the natural environment).

32. However, when that impact is 'significant' is not defined. National instruments are left to define methodologies for determining 'levels of impact'.[17] If those are not forthcoming,[18] councils have discretion to define them.[19]

33. This is very concerning, because it makes it extremely difficult to predict what kinds of rules councils will have to provide relief for, and therefore what protections are likely to be abandoned as unaffordable.

34. The term would also be relatively easy to amend as political winds shift, creating an enormous amount of regulatory and fiscal uncertainty. A rule that was regarded as not having a significant impact yesterday might suddenly be deemed to have one today (or vice versa). It is not clear whether landowners would be obliged to reimburse a council if a specified rule, for which compensation had been provided already, is rescinded.

35. Although some assistance might be gleaned from case law under section 85 of the RMA as to what a 'reasonable use' of land is, this has developed in a very different context (where land must be rendered *incapable* of reasonable use) and there is also minimal jurisprudence to draw from (section 85 having been seldom tested).[20]

36. Leaving this term undefined will have big risks for the environment. In particular, the Bills do not constrain 'reasonable use' to activities that will not have significant environmental effects.[21] This may result in councils having to provide relief in circumstances where the use would have resulted in a significant environmental effect.

37. Another risk is that landowners will game the system by playing up their expectations or intentions for using their land in certain ways. Even if it was not a landowner's original intention to (for example) clear old growth forest on a farm or remove protected trees in a residential development, there would be a significant incentive (including the potential for monetary payment) to claim otherwise or change those intentions.

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[17] Planning Bill, Schedule 3, cl 65(2).
[18] Methodologies are discretionary under cl 65(2) of Schedule 3.
[19] Planning Bill, Schedule 3, cl 67(b).
[20] EDS has discussed this in its 2025 report on resource management reform: see https://eds.org.nz/resources/documents/reports/replacing-the-resource-management-act-risks-and-solutions/
[21] Under cl 105(9) of the Planning Bill and cl 122(9) of the NEB, reasonable use is defined "in relation to land" as including "the use or potential use of the land for any activity where the actual or potential effects on any natural resource or on any person (other than the applicant) would not be significant". However, that definition is specifically for the purposes of those sections, not the framework for specified rules in Schedule 3 of the Planning Bill.

38. There is a big difference between a farmer whose land contains native bush that has been in place for decades/centuries (where compensation for protection is questionable, and the land likely purchased with eyes wide open), and a plantation forest in which a population of threatened species has taken up residence in the last decade. Such nuances need to be reflected in a clearer definition of reasonable use.

39. Councils also face the challenge of determining whether a specified rule is 'reasonably likely' to have a significant impact on reasonable use. Although the term 'reasonably likely' is used in other contexts in the RMA, it will not be easy to apply here.

40. That is because it is often not clear at the rule making stage what impact (including cost burden) a rule will actually have on a landowner. Unless a rule prohibits an activity or is linked to a clear and directive avoidance policy, it is hard to assess impacts before the outcome of a consenting process has been reached. For example, there is a big difference in impact (cost and time) between a notified and non-notified consent.

41. Many section 32 reports prepared by councils under the RMA have encountered this difficulty when preparing plan provisions relating to SNAs, in that specific dollar figures or other burdens on landowners have been found to be impossible to calculate.[22]

42. Councils would be forced to take an educated guess about the possible impact of rules, including the likelihood of them being significant.[23] Guesses, even educated ones, are fertile ground for legal challenge.

43. All of the above is likely to result in extensive litigation on a case-by-case basis, creating a playground for lawyers and a tsunami of legal claims against councils. Ultimately, this is likely to create a tangible chilling effect on public interest environmental regulation.

What does a relief framework look like?

44. Once councils have concluded that a relief framework is required, the second step in the 'specified rules' pathway is determining what that framework looks like.

45. First, a council must assess how "material" the impact of the rule is, in order to decide what kinds of relief to provide in its framework. This materiality assessment has to happen at two points:

[22] See, for example, https://www.fndc.govt.nz/__data/assets/pdf_file/0020/18029/section-32-ecosystems-and-indigenous-biodiversity.pdf at 31.

[23] This is supported by cl 66(1)(b) of Schedule 3 of the Planning Bill, which requires an assessment of how 'material' the impacts on land use are not just when setting rules, but also when implementing them at a property level. Essentially, this suggests that councils may not know whether a 'significant impact' threshold is reached until a relief framework is implemented and individual landowners are notified of rules (or even where they seek to conduct activities requiring a permit under those rules).

- When developing the general relief framework (ie determining what impact the rule is likely to have); and
- When implementing the relief framework (ie what impact the rule has on a site-by-site basis; presumably this includes when consents are being considered within the rules framework).

46. There are four statutory criteria for assessing how 'material' an impact would be. These are the extent to which the specified rule:

    a. Restricts or removes development potential;
    b. Imposes obligations for the protection, restoration, or non-use of land;
    c. Creates compliance costs or regulatory constraints that affects the reasonable use or enjoyment of land; and
    d. Affects land value.

47. 'Restricted development potential' is a particularly concerning criterion, because it begs the question: restricted relative to what? Landowners will have an incentive to argue that they intended to develop to the maximum possible extent to maximise their potential relief. It will be very difficult to gauge the true intentions or expectations of a landowner.

48. Consider the Waitākere Ranges, which have potential for medium density housing on Auckland's doorstep. Any rules seeking to protect the low-density, bush-clad character of the Ranges would be highly 'restrictive' if they are compared to other areas on Auckland's urban fringe.

49. Similarly, including a criterion relating to obligations not to use land (the 'non-use' of land) is inappropriate by itself, because protected land may not be realistically capable of productive use (eg steep river valleys). Recognising this fact through regulation is not by itself a material impact.

50. Introducing the concept of "constraints that affects the … enjoyment" of land alongside 'reasonable use' broadens the concept of reasonable use even further, removing the qualifier that such enjoyment must be reasonable in order to be material.[24] A material impact here could mean almost anything.

51. There is also an open-ended power for regulations or national instruments to add other criteria.[25] This adds enormous risk, because regulations could conceivably focus on much broader things (eg the needs of a local economy, the importance of encouraging particular sectors like mining, or the potential to provide employment). The only limits to what can be factored into the materiality of an impact appear to be the Minister's imagination.

[24] Arguably 'reasonable' is intended to apply to 'enjoyment' as well as 'use', but that is not obvious in the drafting.
[25] Planning Bill, Schedule 3, cl 66(2)(b).

52. A council's relief framework must also provide for how landowner eligibility is to be determined.[26] There are some safeguards in place here to prevent the system being gamed. For example, landowners cannot apply for a private plan change or make a submission and then claim relief for the regulation it imposes.[27] Nor can they claim relief for controls that were already in place when they purchased the property (which would have been reflected in the purchase price).[28]

53. However, the relief framework has extensive retrospective effect. Protections for ONFLs and biodiversity that were imposed in plans under the RMA and which are carried over into the new system as 'similar' specified rules, are treated as compensable as long as the landowner owned the property at the time they were imposed (when the most recent RMA plan was notified).[29] This opens the floodgates for a huge number of rules to be challenged, despite having been in place for a very long time.

54. A relief framework is able to provide for different kinds of relief (eg rates relief, reduced fees, additional development rights elsewhere, land exchanges and access to grant programmes), not just cash payments.[30] National instruments can also specify that certain kinds of rules require certain kinds of relief.[31]

55. However, in practice we see a strong potential for lobbying for cash compensation, either as an end in itself or more likely as a mechanism to pressure council to *remove* regulatory constraints. Because relief frameworks are embedded in plans, they are subject to appeal by landowners.[32] Regulatory relief will be an element of them that is heavily litigated.

How is a relief framework applied on the ground?

56. Once it is created in a plan, the third step in the relief pathway for specified rules is applying a relief framework at the property level.[33]

57. Councils must notify landowners of their eligibility and entitlement for relief.[34] There is then a council review process available if landowners consider the framework has not been *applied* properly to their property.[35] This is not an opportunity to review the merits of the

[26] Planning Bill, Schedule 3, cl 69(3)(b).
[27] Planning Bill, Schedule 3, cl 68(2)-(3).
[28] Planning Bill, Schedule 3, cl 68(1).
[29] As long as the land is 'impacted' by the specified rule. Presumably this is shorthand for the '*significant* impact on reasonable use' of the land, which is the test for providing a relief framework for specified rules generally. Cross-referencing this specific test in cl 68(7)(c) rather than just requiring land to be 'impacted' by a similar rule would be more appropriate.
[30] Planning Bill, Schedule 3, cl 70.
[31] Planning Bill, Schedule 3, cl 65(2)(c).
[32] Planning Bill, Schedule 3, cl 34.
[33] Planning Bill, Schedule 3, cl 71.
[34] Planning Bill, Schedule 3, cl 71(2)(b).
[35] Planning Bill, Schedule 3, cl 72 and cl 73. This includes where a landowner considers they should have been notified of entitlement to relief but they were not, and where they consider their were errors in a notification of relief that they did receive.

framework itself, but a landowner can object to the council's review to the new Planning Tribunal.[36]

58. This is another juncture at which extensive litigation will no doubt arise. Although the 'primary' task of the Tribunal is to ensure the relief framework has been applied correctly,[37] it has curiously broad discretion to alter the relief provided; the Tribunal can consider alternative relief mechanisms if "appropriate in the circumstances of the relevant property".[38] This provides another opening for landowners to seek greater (or monetary) compensation for regulatory controls.

59. Only at this point in the process will it become obvious what the true financial implications of a relief framework are likely to be for councils. This will make both regulatory planning and associated financial planning extremely difficult. If relief proves to be unaffordable (which seems likely given rates caps), public interest regulation that triggered the relief framework in the first place may simply fall away.

60. That said, it is not clear whether it would even be possible, at this point, for a council to lawfully decide not to proceed according to the relief framework in the plan. The plan (including its rules) would have legal effect, and a council would be obliged to adhere to it. If it was unable to afford the required relief, it may have to initiate a plan change to weaken the relevant rules.

61. Therefore, even though the NEB envisages no "net loss of indigenous biodiversity" as one of its goals, regulatory relief will make that extremely hard to achieve in practice. Perhaps that is why the NEB only directs councils to "seek to achieve" its goals with little accountability for failure.[39]

Pathway 2: A modified section 85 of the RMA

62. Aside from specified rules, the Bills provide for a second, more general pathway for regulatory relief. This applies to all 'provisions' in plans. This is a modified version of section 85 of the RMA.

63. The key clauses are cl 122 of the NEB and cl 105 of the Planning Bill. These are largely identical, and for the most part simply apply the same test to provisions within the respective jurisdictions of each Bill.

64. Under clauses 122 and 105, the Environment Court (on appeal) can direct a council to provide relief to the holder of an interest in land where any plan provision "severely impairs" the "reasonable use" of the land and "places an unfair and unreasonable burden" on them.

[36] Planning Bill, Schedule 3, cl 74(5).
[37] Planning Bill, Schedule 10, cl 23(3).
[38] Planning Bill, Schedule 10, cl 23(4)(b).
[39] NEB, cl 11.

65. It should be clarified that this only applies if a rule affects an interest in *private* land, not public land (eg a lease/license in a council reserve or conservation land) or land in the common marine and coastal area. It would be inappropriate for relief to be triggered by controls on non-private land, yet this safeguard is not included in clauses 122 or 105 as it is in the specified rules pathway.

66. It is appropriate that relief is not triggered by impacts on the use of property or quasi-property that is *not* land. This means compensation is not payable where there is, for example, a review of consent conditions relating to the use of common pool resources (eg taking of freshwater) or a decision not to renew consented rights (eg occupation rights for marine aquaculture), even if it would "severely impair" a reasonable use.

67. The key difference to section 85 of the RMA is the change from an "incapable of reasonable use" threshold for relief to a lower "severe impairment" threshold.

68. Another difference is that the Bills allow the Environment Court to require forms of relief broader than just buying out a landowner or removing the rules. These are the same as those available for specified rules, and include monetary payment, rates relief, reduction in consenting fees, and land exchanges.[40]

69. As with the term 'significant impact' in the context of specified rules, 'severe impairment' of a reasonable use is not defined. It is unclear whether regulations have the power to provide a definition. It is another point where litigation is inevitable.

70. This change in threshold poses significant risks to the natural environment. For example, consider the importance of protecting our finite supply of highly productive land (especially for vegetable growing), which has long been recognised.[41] Here, rules (or even strong policies)[42] that prevent urban development paving over elite soils in places like Pukekohe may well be interpreted as 'severely impairing' a reasonable use, if a 'reasonable use' is seen to include the provision of housing on Auckland's southern fringe.[43] Given the difference in land value between rural and residential zoned land, and the amount of protected productive land on the city's doorstep, this may impose a significant financial burden on the council that it may be unable to sustain, despite a clear public (and national) interest in security of food supply.[44]

71. Perhaps most concerning, however, is that even activities that generate pollution or degrade common pool resources could pursue relief under cl 122. This could happen as long as their

[40] NEB, cl 122(4); Planning Bill, cl 105(4).
[41] See generally https://www.mpi.govt.nz/dmsdocument/36624-discussion-document-on-a-proposed-national-policy-statement-for-highly-productive-land
[42] Clauses 122 and 105 apply to all provisions in plans, not just rules.
[43] Arguably under the RMA such rules would not render land 'incapable of reasonable use', since vegetable growing is a reasonable use of such land.
[44] See Deloitte *New Zealand's Food Story: The Pukekohe Hub* (2018).

effects were less than "significant" (although they could be more than minor) and the use of land were 'reasonable'.[45] This pathway applies to *every single kind of rule*, not just those protecting biodiversity or landscapes.

72. Consider a scenario where a commercial forest owner planted trees 25 years ago with the expectation that clear-felling those trees and replanting would be a permitted activity. Arguably any more stringent restrictions on harvest method or afforestation could be seen as a 'severe impairment' of a reasonable use in that context, and considered to impose an unfair and unreasonable burden on the landowner (especially if they imposed additional costs), despite the clear potential for such activities to adversely affect the natural environment.[46]

73. In other words, this framework could be used to make the public compensate polluters (including large multi-national corporations) for not polluting. It is the complete opposite of the polluter-pays principle.

74. Similarly, if an existing intensive dairy farming operation on the Canterbury Plains were seen to be a 'reasonable use' of land and the contribution of this individual farm to problems like nitrate pollution was considered to be less than 'significant', a rule requiring a considerable reduction in inputs (eg fertiliser) or land use (eg stocking rates) may be seen as a 'severe impairment' of that use and impose an unfair and unreasonable burden. That is quite a different test to the RMA, because this kind of a rule would not render the land "incapable" of reasonable use. The Bills essentially hard bake in a level of pollution unless compensation is provided. The approach materially weakens a councils' ability to manage cumulative effects.

75. Because natural environment plans are new instruments,[47] there will be an opportunity for landowners to challenge *every* rule when these plans are notified, even if they have been in place under the RMA for years. Rules in plans that create more stringent controls than those in national standards (eg for forestry) may be particularly vulnerable. Even if landowners do not succeed in removing regulatory restrictions on pollution or receiving compensation for those rules, there is still a high risk of litigation as the framework is tested.

76. At minimum, the guiding principle of cl 122 should be that where land uses have negative effects on common pool resources like freshwater, air or the marine space, this is not a

[45] This could not be where there were 'significant' effects on natural resources, by virtue of cl 122(9) of the NEB, because "*reasonable use*, in relation to land, includes the use or potential use of the land for any activity where the actual or potential effects on any natural resource or on any person (other than the applicant) would not be significant". In other words, significant effects are not reasonable uses and cannot be compensated.

[46] Permitted activities under RMA national direction cannot, by definition, include those where effects are 'significant'. However, some harmful forestry activities are permitted activities under National Environmental Standards for Commercial Forestry. This shows the real risks involved in establishing a 'significant' effects threshold, because many activities could have meaningful effects on the environment while triggering regulatory relief under cl 122.

[47] They are not simply deemed to include existing RMA plans.

property right to be defended or compensated even if it imposes burdens or severely impairs a land use. In other words, there is no right to pollute.

Overall assessment of regulatory relief

77. Both pathways for relief are likely to have a significant chilling effect on legitimate public interest environmental regulation.

78. The lack of safeguards for the specified rules pathway, especially for *all* terrestrial indigenous biodiversity protections (including those needed to defend environmental limits), makes it particularly vulnerable to regulatory retreat by cash-strapped councils.[48] The cost of purchasing biodiversity protection across New Zealand would be prohibitive. That means it simply would not happen, or it would happen on a much smaller scale than required to address the biodiversity crisis.

79. Basing the type and quantum of relief on the development potential or land value of property will also create an arbitrary incentive to protect biodiversity on less 'valuable' land, because the value is determined only by the potential for use/profit rather than ecological value. For example, the monetary value of potential residential land on the fringes of Auckland (eg in the Waitākere Ranges) will be much higher than the value of rural land far away from urban centres and places of employment. This will make it more costly for councils to protect ecosystems around the urban places where people live and work, not only for SNAs but also for much smaller but cumulatively significant indigenous biodiversity like stands of urban trees.

80. The risk of regulatory retreat from biodiversity protections near cities will create particularly poor outcomes, because environmental protections (and the ecosystem services they provide, like urban cooling and health benefits) are of particular importance to residents of urban areas.[49]

81. Requiring councils to essentially purchase environmental protections will also create arbitrary distinctions between parts of the country based on their financial capacity to pay (eg a council's rating base or other forms of income) rather than the importance of protecting biodiversity in that place. For example, the financial capacity of the Northland region is much lower than that of Auckland, yet (relatively speaking) it has a high proportion of indigenous biodiversity to protect.

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[48] Terrestrial indigenous biodiversity controls of *all* kinds fall under the more lenient 'specified rules' framework, meaning that section 122 is unlikely to provide any kind of safeguard (since, in practice, it would not be the route taken for those seeking relief for indigenous biodiversity controls).

[49] See EDS's discussion in https://eds.org.nz/resources/documents/reports/exploring-the-fundamental-questions-for-resource-management-law-reform-in-aotearoa-new-zealand-paper-2-the-scope-of-the-system/ from 50.

82. The ability or even willingness of councils (and ratepayers) to pay has little to do with the nationally important values being protected by regulatory controls to which relief would apply. Yet councils are being expected to do so despite rates caps being imposed. It is not clear how much additional income will be available to councils through levies on resource use (if such provisions end up being enacted),[50] or even whether this will be available for the purposes of regulatory relief.

83. Councils will also struggle to protect areas of high natural character and ONFLs. Every rule restricting subdivision to safeguard our stunning stretches of coastline is a 'specified rule' and will be an invitation for landowners to seek either compensation or the rule's removal. Rules requiring a discretionary consent to build a fast-food or big box outlet in the shadow of iconic landscapes and features, or on sacred Māori sites, may require an impecunious council to compensate large corporates for the privilege.

84. There are also many points where litigation will be inevitable, either as a result of new, undefined terms, or new opportunities for landowners to challenge council rules. Litigation risk is high at three points: when relief frameworks are being included in plans and challenged in the Environment Court; when relief frameworks are being implemented and challenged in the Planning Tribunal; and when submissions are made challenging rules under clause 122 of the NEB. Appeals to the higher courts would seem likely given the lack of clear legal guidance. This will create an entire takings industry for lawyers and add to the churn and cost of the system. That is the opposite of what these reforms have promised.

85. Councils will not know the cost of regulating until very late in the piece, meaning that the relief framework will add high legal and fiscal risk that councils will be strongly incentivised to avoid from the outset. They will likely be more conservative and cautious about protecting the public interest.

86. There is a significant risk of landowners gaming the system as well, by overstating their intentions for developing a site.

87. There is also a risk that the relief frameworks will crowd out voluntary measures to protect the environment. If environmentally responsible landowners desire protection, why would they give it up for free when the perceived alternative is not a lack of protection, but rather receiving compensation from their council? Once an altruistic motivation has been lost, and action reduced to a transactional nature, psychological studies show it can be difficult to get back.[51]

88. There are technical problems with the provisions as well. One is that there is no clear link between regulatory relief and the Bills' enforcement mechanisms. There should at least be additional punitive and compensatory measures (eg fines or monetary benefit orders)

[50] NEB, clauses 313-315.
[51] See generally R Thaler and C Sunstein *Nudge: Improving decisions about health, wealth and happiness* (Penguin, 2009).

against landowners who unlawfully breach rules or conditions for which they have received relief.[52]

89. Similarly, there appears to be no mechanism by which landowners are obliged to pay back any relief obtained under a relief framework if the rule for which such relief was provided:

    a. Is removed from a plan;
    b. Is made more lenient; or
    c. Turns out not to actually have a significant impact on reasonable use (eg a consent for a discretionary activity might be granted on a non-notified basis with minimal conditions).

90. The integrity of the whole regime is put at significant risk because of Ministerial and council discretion to define (and therefore change) key words like 'significant impact' and 'impact levels'. Entitlements for relief could see-saw wildly over time.

91. There is also no clear requirement to note any obligations associated with relief (eg a requirement to fence, or an obligation not to clear vegetation) on a property title, a covenant, a contractual term, or other enforceable mechanism. The only formal recognition of a restriction appears to be in the planning rules themselves, which can (and frequently are, under the RMA), changed.

92. Rules in a plan may even change (become more lenient) as a result of a subsequent purchaser of the land actively seeking a private plan change to remove the restriction.[53] One would at least expect a clear and enforceable legal obligation, running with the land, to undertake the obligations for which relief has been provided, in perpetuity.

Solutions required

93. The only meaningful solution to the deep problems with the specified rules relief pathway is to remove it entirely by deleting:

    a. Part 4 of Schedule 3 of the Planning Bill;
    b. Clauses 111 of the NEB and 92 of the Planning Bill; and
    c. Other cross-references to Part 4 of Schedule 3 of the Planning Bill.[54]

94. With respect to the second regulatory relief pathway, changes to clauses 122 and 105 could be made to retain a more workable and pragmatic relief framework, as follows:

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[52] Planning Bill, Schedule 8 (notably clauses 29-30).
[53] It is only the property owner *receiving* the relief that is prevented from receiving it as a result of a private plan change (or submission). This does not clearly apply to a situation where a subsequent purchaser obtains the same financial benefit through a reduced purchase price, but who then pursues a private plan change to weaken the effect of specified rules. See Planning Bill, Schedule 3, cl 68(2): "A person who makes a change request is not eligible for relief as a result of any plan change or private plan change from that request".
[54] For example, NEB, cl 122(3)(c), cl 122(8), and cl 307(1)(za).

a. The threshold for relief should be returned to that in section 85 of the RMA, where land is rendered incapable of reasonable use. This is perfectly capable of addressing situations where there has been true regulatory overreach.[55]

b. The broader range of relief mechanisms provided for in clauses 122(4) and 105(4) of the Bills could remain. Where land *is* rendered incapable of reasonable use (eg where necessary to address natural hazard risk or to retire land to meet environmental limits), it may make sense for councils to respond proportionally by, for example, making monetary payment to a landowner or providing rates relief rather than purchasing the land.

c. It should be made clear that a 'reasonable use' excludes not only where the effects of an activity are significant (as presently drafted), but also (1) where the impacts of a land use are on the commons (polluters should have no recourse to compensation for rules that stop pollution) and (2) where an activity is infringing environmental limits.

d. Clauses 122 and 105 should be more explicitly linked to the planning process in Schedule 3 of the Planning Bill. This should create an additional 'screening' process where councils must proactively consider whether land is likely to be rendered incapable of reasonable use. Councils should be obliged to specifically notify affected landowners and invite them to make a submission. One of the reasons section 85 of the RMA has proved ineffective is because landowners have been unaware of the implications of a plan change, and have not raised the matter in submissions.

95. The Bills' explicit requirement for rules to be proportionate should also remain,[56] as this is a significant protection against true regulatory overreach.

Environmental limits

96. It is positive that the NEB provides for environmental limits, given that the RMA is deficient in that regard (it has consistently failed to impose clear thresholds beyond which harm to the environment is prevented despite countervailing economic or social benefits).

97. There are also many aspects of the limits framework architecture in the Bills which should be retained. However, the framework has significant weak points that in practice will undermine its intention to draw firm lines in the sand. These need to be either removed or amended as discussed below.

The relationship between goals and limits

[55] See EDS's discussion of regulatory takings in its 2025 report on resource management reform: see https://eds.org.nz/resources/documents/reports/replacing-the-resource-management-act-risks-and-solutions/.
[56] NEB, cl 13(c); Planning Bill, cl 13(c).

98. The highest form of normative direction in the Bills is contained in their 'goals' (clause 11 of the Planning Bill and clause 11 of the NEB). Effectively, these are the 'operative' clauses that replace Part 2 (sections 5 to 8) of the RMA. They exist at the top of the hierarchy of instruments, and drive the content of national instruments, which then filter down to spatial plans and regulatory plans (land use plans and natural environment plans) at the regional level. This makes the scope, wording and effect of the goals very important.

99. Of particular importance is the relationship between goals and the concept of an environmental limit under the NEB.

100. One of the goals of the NEB (in cl 11(a)) is to "enable the use and development of natural resources within environmental limits". That is generally positive, because it elevates environmental limits to the highest rung of the legislative ladder.

101. That said, drafting should be strengthened so that a clear, standalone goal is focused firmly on the establishment and defence of environmental limits for their own sake. At present, the active part of the goal is enabling use and development (this is what decision makers are directed to *do*), with limits simply being a passive constraint for that development goal. This fails to recognise that limits need to be proactively established, defended and monitored for reasons other than just constraining use and development (eg to help natural environments adapt to a changing climate).

102. EDS recommends the following drafting:

All persons exercising or performing functions, duties, or powers under this Act must seek to achieve the following goals…

~~*(a) to enable the use and development of natural resources within environmental limits:*~~
(a) to establish and defend environmental limits:
…
(g) to enable people and communities to provide for their social, economic, and cultural wellbeing within environmental limits.

103. Furthermore, cl 11(a) is only one goal among many. In particular, it exists alongside many others in the Planning Bill, which are focused almost exclusively on development outcomes.[57] There is no hierarchy between these goals (or between the Bills generally), leaving open the argument that the goals allow for trade-offs to be made between the defence of limits and the pursuit of other goals (such as "to support and enable economic growth and change by enabling the use and development of land").[58]

[57] Planning Bill, cl 11.
[58] Planning Bill, cl 11(1)(b).

104. This is how the RMA was (and still is, despite some nuance from *King Salmon*)[59] interpreted despite the intention that the term 'while' in section 5 of that Act would act as a biophysical bottom line.[60] It has led to a lack of clear environmental bottom lines.

105. Even if goals relating to limits were given primacy, there is another issue: the NEB only requires decision-makers to "seek to achieve" the Bill's goals. This may be appropriately aspirational wording when applied to some other goals, like enabling use and development (where it is hard to say whether someone has 'achieved' the goal or not). But it is a fatally weak direction when applied to environmental limits, which are very clear, presumably numerically defined indicators of environment health. Success and failure can be measured, and accountability is required for failure. The Bill essentially enables decision-makers to say 'we tried our best to enable development within limits but we didn't succeed'. That is completely inadequate.

106. The direction is also much weaker than section 6 of the RMA, which requires decision-makers to "recognise and provide" for its matters of national importance. That risks the limits framework being even weaker than the RMA.

107. Overall, the NEB needs to:

a. State that its goals in cl 11 are the only relevant goals that decision-makers can consider when making decisions within the jurisdiction of the NEB (especially when it comes to setting limits);

b. State that even its own broader goals are subject to its more specific goals relating to the defence of environmental limits, and that such goals *must* be achieved. This may be particularly important to the extent there is conflict between a limit for indigenous biodiversity (protecting a threatened species' habitat) and a goal of no net loss in indigenous biodiversity (which may allow for offsetting and compensation across a broader management unit).

108. Another big weakness is that all goals are, under cl 11, explicitly subject to another clause that includes the power for the Minister to make national direction.[61] The explicit intention is for conflicts between goals (including conflicts arising between the Bills) to be resolved through national instruments where reasonably practicable.[62] There is no 'meta-direction' (as there is in the word "while" in section 5 of the RMA, and as there was under the Natural and Built Environment Act) that tells the Minister *how* to resolve such conflicts in national direction. Instead, it is left to discretion.

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[59] See *Muaūpoko Tribal Authority Incorporated v Minister for Environment* (2022) CA250 at [49], [145]. The *King Salmon* jurisprudence does not change the "deliberate openness" of Part 2 of the RMA itself.
[60] SD Upton "Purpose and Principle in the Resource Management Act" (1995) 3 Waikato Law Review 17.
[61] NEB, cl 69.
[62] NEB, cl 69(2)(c).

109. There is a significant risk that the Minister will set national direction that resolves conflicts in a way that prefers development outcomes. This risk is reinforced by other provisions across the NEB:

a. Under clauses 78(1)(b) and 81(1)(a), the NEB specifically allows national policy direction, where it is for the purpose of resolving inter-statute conflicts, to consider any or all goals of *either* Bill. This is an invitation to cherry pick some goals and demote others.

b. Under cl 78(3), the NEB allows such an instrument to be promulgated under the Planning Bill (which deliberately excludes considerations of environmental protection), not under the NEB.

c. Under cl 69(2)(b), the NEB specifies that not all goals need to be achieved in all places at all times. This is inappropriate for goals relating to limits, which by definition need to be achieved in all management units at all times.

110. Policy direction on environmental matters should not be determined under or even influenced by the Planning Bill, given that it deliberately contains no real goals about environmental protection. That is particularly so when it comes to balancing the economy against the NEB's goals relating to environmental limits, since these are meant to be shielded from development imperatives.

111. Furthermore, in making national direction under cl 81(1)(b) of the NEB, the Minister only has to *consider* whether national policy direction enables development to occur within environmental limits, and any impacts on people and the natural environment. Unlike national standards,[63] there is no *requirement* that national policy direction adheres to limits or even that it is consistent with the purpose of limits. This means that development goals in the Planning Bill can be prioritised by the Minister provided only that the impacts on the natural environment are *considered*, even where they directly conflict with goals relating to environmental limits in cl 11(a)-(c).

112. In making national policy direction, there is also the ability to consider "any other matter the Minister considers relevant".[64] In practice, this would allow *additional* goals to be considered and weighed up. Because national policy direction is at the very top of the so called 'funnel', there is then no opportunity to revisit such decisions in spatial plans or natural environment plans.[65]

113. Under cl 80(2)(b) of the NEB, national policy direction can even require that "compliance with its objectives, policies, or directives are the *only* ways in which a goal may be

[63] See the discussion further below on how national standards relate to environmental limits.
[64] NEB, cl 69(6)(b).
[65] NEB, cl 12.

achieved". In making such a requirement, the Minister must be satisfied that doing so "does not unreasonably restrict the achievement of other goals".[66]

114. This further weakens the limits framework, because any efforts to impose a strictly protective approach (eg 'avoidance' policies) to safeguard life-supporting capacity or protect human health are not allowed to "unreasonably restrict" the achievement of other goals. This is inappropriate, because the whole point of environmental limits is to draw a line in the sand, irrespective of how reasonable an activity might seem. "Unreasonably restrict" is also not defined (and it does not say that limit setting regulation is a 'reasonable' restriction), leaving the ability to balance goals wide open.

115. National policy direction is also able to restrict *how* a "specified key instrument" (national standard, spatial plan or natural environment plan) achieves a goal.[67] This is concerning when applied to goals relating to limits, because (as described further below) there are significant barriers to putting in place regulatory tools to defend limits in plans.[68] National policy direction could conceivably turn these statutory hurdles into brick walls by, for example, prohibiting the use of input controls or land use controls to defend a freshwater quality limit for nitrates. So, despite regional councils having sole *responsibility* for setting limits, the Minister is still able to constrain how they can be achieved and therefore impact their effectiveness.

116. There are two key constraints on this power, but they are both relatively weak:

a. First, national policy direction cannot "unreasonably restrict the ability of local authorities to undertake their functions and responsibilities to manage natural resources".[69] However, "unreasonably" is not defined so considerable discretion exists. It is not clear when constraining regulation would "unreasonably" restrict regional council limit setting functions.

b. Secondly, it cannot "result in severe and irreversible adverse effects to people and the natural environment".[70] Preventing "severe *and* irreversible" effects is a test that is much weaker than achieving the purpose of environmental limits themselves (safeguarding life-supporting capacity). For example, it would be possible to create national direction constraining council regulation on input controls (like a maximum volume of fertiliser) if it prevented an "irreversible" effect, *even if this effect was severe and it failed to safeguard life-supporting capacity*. Many water quality issues are *reversible*, but they

[66] Cl 80(2)(b).
[67] Cl 80(2)(c). Curiously, a "specified key instrument" is not defined or mentioned elsewhere in the Bill. Presumably it refers to the "key instruments" under cl 12 (national standards, spatial plans and natural environment plans).
[68] See the discussion further below on how limits are translated to tools. In short, regulatory restrictions on land use and inputs are not allowed unless other mechanisms, including non-regulatory mechanisms, are insufficient.
[69] NEB, cl 80(2)(b).
[70] NEB, cl 80(2)(c).

may take a long time to resolve (and in the meantime have significant impacts on ecological health and stock drinking water).

c. This creates a huge tension in the system, because plans on the one hand must safeguard life-supporting capacity, but on the other hand they are also obliged to give effect to national direction (and the latter cannot be challenged in any submissions or appeals on plans by referring back to the limit-setting goals of the Bills).

117. National policy direction needs to be more clearly subject to the goals of the NEB relating to environmental limits, rather than having the power to balance, override or constrain them. Conflicts between the Bills should not be able to be resolved through national policy direction when it comes to environmental limits.

118. The Bills' goals are not just important for recognising limits, but also for protecting and enhancing the environment more generally.

119. It is inappropriate for an environmentally focused law to direct decision-makers to 'enable use and development' within environmental limits but not within *other* environmental constraints. Limits are minimum acceptable outcomes and, as described below, even they are not robust environmental bottom lines. Decision makers should not be directed to enable development all the way down to a limit. Yet this is the effect of cl 11(a) of the NEB.

120. The other goals in cl 11(b)-(d) also suggest that development has to be enabled all the way down to limits. That is because goals like 'safeguarding the life-supporting capacity of air, water, soil and ecosystems' and 'protecting human health' provide no additional protection than limits themselves (they simply reflect the purposes of the two types of limits in the Bills). Provided limits are complied with, there is very little scope for making trade-offs above them that recognise the value of the natural environment. That is very different to sections 6 and 7 of the RMA.

121. Clause 13(e) also directs all persons with functions, powers or duties to act "in an enabling manner". Although this is described as a 'procedural principle', it is phrased very broadly (it is unclear exactly *what* decision-makers have to 'enable') and has potential to conflict with goals relating to limits in cl 11 (which by definition are about lines in the sand that should *not* enable development).

122. "No net loss of indigenous biodiversity" is the only environmental goal in cl 11 that is not linked to limit setting. That is positive in principle (as long as offsetting and compensation, or other incentives to achieve it, are robust) but it should be strengthened to involve net *gain*, as is the case in the United Kingdom, which recognises that an enormous amount of biodiversity has already been lost.

123. However, overall, the more nuanced matters in sections 6 and 7 of the RMA have been completely lost in favour of enabling development all the way down to limits. These include

"the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna" (which is broader than the concept of no net loss); the ethic of stewardship and kaitiakitanga; the efficiency of resource use and the finite characteristics of resources (which presumably are now to be left entirely to the market); the intrinsic value of ecosystems (which encompasses the idea that extinctions are morally wrong); and the maintenance and enhancement of the quality of the environment (enabling within limits is not a direction to improve the quality of the environment). These matters should be incorporated in the NEB's goals.

The conceptualisation of limits

124. The NEB essentially defines a limit as one of two things. It can be expressed as:[71]

a. A description of a minimum acceptable biophysical state for one or more domains; or
b. A description of a maximum amount of harm to an aspect of the environment.

125. This means a limit is descriptive, not normative. In other words, it is not itself a 'limit' on human activity that stops or requires anything.

126. This conceptualisation is not necessarily inappropriate. However, it has implications for the effectiveness of the overall framework. The fact that a 'limit' does not include an actual restriction on human activity means that requiring a limit, and then setting it, is only one half of the equation. The other half is how that limit is translated into effective tools that deal with what people can and cannot do. We return to this point further below when we consider how limits affect various subordinate instruments made under the NEB and Planning Bill.

The coverage of limits

127. The Bills recognise that there are many different domains requiring protection in order to achieve the purpose of limits (the protection of human health and safeguarding of life-supporting capacity). Limits for human health must be set for freshwater, coastal water, land and soil, and air. Ecosystem health limits must be set for freshwater, coastal water, land and soil, and indigenous biodiversity.[72]

128. This overlap is appropriate, because limits needed to achieve one purpose (human health) may not be good enough to achieve the other purpose (ecosystem health), or vice versa.

129. However, it leaves significant ambiguity about the kinds of environments that require limits to be set. For example, a requirement to set limits for 'freshwater' and 'coastal water' does not clearly require a limit to be set for estuaries, which is where particularly difficult

[71] NEB, cl 48.
[72] NEB, clauses 49(1), 50(1).

issues around sedimentation and eutrophication can occur (and which were specifically identified for limit setting in the Natural and Built Environment Act 2023).[73]

130. It also does not require limits to be set within a domain for particular attributes. There is only an obligation (in cl 50) to set limits 'for attributes', but no indication of what those attributes should be. Although there should be discretion to set limits for any attribute, some are so self-evidently appropriate (eg nitrates, *E. coli* etc) that they should be required by law. By comparison, primary legislation in the European Union is far more specific and directive about the maximum allowable concentration of particular pollutants in waterways (including nitrates) to achieve good ecological condition.[74]

131. The NEB is also not clear whether limits can be set for *other* domains not covered by clauses 49 and 50. As there was under the now-repealed Natural and Built Environment Act 2023, there should be a discretionary power to set limits for other aspects of the natural environment where they accord with the purpose for setting environmental limits.[75] This might, for example, be important when it comes to protecting non-indigenous biodiversity where it is performing valuable ecosystem functions (eg pollination, flood protection, temperature regulation etc) or where it serves as an indicator of environmental health (eg the habitat of trout and salmon).

The geographical scale of limits

132. The NEB requires limits to apply to a management unit.[76] The size and location of a management unit is extremely important to the integrity of the limits framework, because limits are measured across the whole unit. This means that harm in one part of a unit can be offset in another, while still complying with the overall limit.

133. Under cl 58(4)(a), size and location must be appropriate to achieve the purpose of the environmental limit. For ecosystem health limits, that purpose is safeguarding life-supporting capacity.

134. One problem, however, is that life-supporting capacity is defined in a way that does not encompass the need to protect threatened, vulnerable or rare species.[77] Yet this is one of the core reasons why biodiversity limits are required. This could result in management units for "biodiversity" generally that span extremely large areas, where limits may well drive no net loss in ecosystem services or the overall extent of vegetative cover, but where a particular species is pushed closer to extinction in one particular location or niche. It might

[73] See generally https://pce.parliament.nz/publications/managing-our-estuaries/
[74] See https://water.europa.eu/freshwater/freshwater/europe-freshwater/water-framework-directive/ecological-status-of-surface-water;
https://environment.ec.europa.eu/topics/water/nitrates_en
[75] Natural and Built Environment Act 2023, s 109(2).
[76] NEB, cl 58(2).
[77] NEB, cl 45.

also justify decisions to focus only on biodiversity protection on public rather than private land, especially given pressures arising under the regulatory relief framework.

135. This demonstrates the importance of having more specific domains or attributes for which limits have to be set. For example, if a limit has to be set for the capacity of habitat to support certain species identified in the national threat classification system, that would require a management unit which reflects its particular needs (potentially a very specific habitat/location or an individual SNA).

136. It also shows the importance of defining 'life-supporting capacity' in a way that recognises threatened species. An environment does not truly have the capacity to support life if it leads to the extinction of a species.

137. Furthermore, it highlights the necessity to put stronger guardrails around the use of offsetting (especially when measuring compliance with limits). Under the NEB, there is significant discretion for the Minister to determine when offsetting is 'appropriate' through national instruments.[78] It needs to be made clearer in the primary legislation that offsetting is *not* appropriate in certain circumstances, referring to the criteria in the NPS for Indigenous Biodiversity.

138. Under cl 58(4)(b) of the NEB, a management unit must be determined by reference to scientific knowledge and evidence. It is important that this clause remains, in order to prevent management units being delineated according to other factors (such as a desire to allow more economic activity in one part of a unit at the expense of another). However, it should be strengthened by requiring units to be determined *only* by reference to scientific knowledge and evidence.

Responsibilities for setting limits

139. Different types of limits will be set by different decision-makers under the NEB. The Minister is responsible for setting limits for human health, via national standards.[79] Ecosystem health limits are to be set by regional councils.[80] The Minister is specifically not authorised to make those limits directly (despite a more general provision that authorises national instruments to apply to specific districts, regions or parts of New Zealand).[81]

140. Given the overlap in purpose and coverage, there is a significant grey area between human health limits and ecosystem health limits. This provides a lot of uncertainty about what the power of the Minister actually is, and what national direction might be contemplated by the NEB. For example, national standards relating to contaminated land, telecommunication facility radiation and drinking water sources are squarely about human

[78] NEB, cl 15(2)(c).
[79] NEB, cl 53.
[80] NEB, cl 50-51.
[81] NEB, cl 54(3)(c).

health. But it is much less clear for other aspects of freshwater (eg *E. coli* when it comes to primary contact with water, or nitrates in groundwater outside human drinking water sources).

141. What is reasonably clear is that there will be fewer national bottom lines for environmental health than under the RMA. This would be a step backwards, after decades of work on freshwater quality (going back to the Land and Water Forum) and extensive efforts to reach consensus and compromise on indigenous biodiversity protection.[82]

142. Combined with the open-ended criteria for setting ecosystem health limits (see below), relying solely on regional councils to set limits in their own jurisdictions will result in the same kinds of poor outcomes that have occurred under the RMA. Strong national direction has been the engine room driving improvement in environmental outcomes for freshwater in the last decade or more.

143. A retreat from national involvement in setting limits for ecosystem health is also philosophically unsound. Although it took many years to occur, the RMA envisaged from the outset that national direction would be promulgated for matters having national significance. Preventing national minima for things like freshwater quality/flows and indigenous biodiversity is essentially saying that the people who live in (or own property in) a region are the only ones to whom decision-makers should be accountable for environmental outcomes having national significance. This creates a postcode lottery approach that would now be unthinkable for other nationally important outcomes. It also threatens nationally important economic and social interests, because locally set limits may not sufficiently recognise the importance of the environment to sectors like tourism or outcomes like physical and mental wellbeing that have national costs and benefits.

144. That said, there remains some uncertainty about the powers of the Minister to establish ecosystem health limits. Under cl 54(3)(b), national standards may specify "minimum acceptable levels for ecosystem health limits" but not the limits themselves. The term "minimum acceptable level" is not defined, leaving its meaning completely unclear.

145. Even if this confers an ability for the Minister to set 'limits' of a sort, significant latitude is still left for regional councils to erode them. Under cl 51(4), a limit can be less stringent than a minimum acceptable level if the council[83] produces a justification report. This involves the production of a cost-benefit analysis (a balancing approach)[84] and defeats the point of having "minimum levels" set nationally.

146. The *process* for setting limits also involves relatively little independent expert input. Although the natural environment plan making process provides for recommendations from

[82] Reflected in the recommendations of the Biodiversity Collaborative Group: see https://environment.govt.nz/assets/publications/biodiversity/report_of_the_biodiversity_collaborative_group.pdf

[83] Or an independent hearings panel in its recommendations.

[84] The requirements for this are found in the Planning Bill, cl 89 and Schedule 3, cl 11.

an independent hearings panel,[85] there is no comparable involvement of an independent 'limits and targets review panel' that existed under the Natural and Built Environment Act[86] or any substantive input by the Environmental Protection Authority. Furthermore, there are considerable constraints on submissions and merits appeals, weakening the oversight of the Environment Court with respect to environmental limits (see later section on standing and public participation).

Criteria for setting limits

147. Within a management unit, the Bills provide a range of criteria to guide exactly where environmental limits are set for a domain (or an attribute within a domain). The actual limit will vary according to the nature of the environment in which they are set, but the criteria (what they are trying to achieve or prevent) are the same.

148. As mentioned above, there are two types of limit, and each has its own purpose.

149. Limits for human health must be set to protect human health,[87] which under cl 53 must be to an 'acceptable standard'. Various considerations inform what an 'acceptable standard' means.[88] Such limits must, "as a minimum, prevent significant or irreversible harm to people and communities".[89]

150. The purpose of ecosystem health limits is to protect the life-supporting capacity of the natural environment.[90] This is defined as:[91]

> the ability of ecosystems[92] of the natural environment—
>
> (a) to support and sustain a diverse range of indigenous life over time; and
> (b) to be resilient.[93]

[85] Planning Bill, Schedule 3, cl 23.
[86] Schedule 5, cl 3.
[87] NEB, cl 46(a).
[88] NEB, cl 53(2).
[89] NEB, cl 53(1)(b).
[90] NEB, cl 46(b).
[91] NEB, cl 45.
[92] *Ecosystem* includes—
(a) biological life—the abundance and diversity of biota, including microbes, fungi, invertebrates, plants, fish, birds, and mammals; and
(b) physical and chemical habitat—the abiotic components, including the physical form, structure, and quality of habitat, in relation to its suitability to support life; and
(c) ecological processes—the interactions among and between biota and their physical and chemical environment.
[93] *Resilience* means the capacity of an ecosystem to withstand or recover from pressure and disturbances while retaining its essential qualities and functions.

151. As mentioned above, this definition does not separately focus on threatened, rare or vulnerable species.[94] This means that the purpose of limits could be met even if a species were driven to extinction, as long as the diversity and resilience of a whole ecosystem were maintained across a management unit.[95] For example, the survival of the iconic kakapo (let alone a rare native fish) may not be regarded as essential to the life-supporting capacity of the natural environment under the definition provided.

152. Under cl 55, there is also no requirement (as there is for human health limits) for limits to prevent 'significant or irreversible harm' to the natural environment. Instead, alongside a general direction that limits must 'achieve the purpose of ecosystem health limits'[96] (life-supporting capacity) there is only a much weaker range of considerations. These considerations have the potential to completely undermine the limits framework, and it is not clear how they interact with the obligation to safeguard life-supporting capacity in cl 54(2)(c) if those things are found to be in conflict.

153. In particular, when setting an ecosystem health limit a regional council must consider "the impact of the proposed limit" under cl 56. When setting methodologies for regional councils to follow (and, presumably, also when setting 'minimum acceptable levels' for limits)[97] the Minister must also consider the factors in cl 56.

154. Clause 56 requires an assessment of not only how a proposed limit would achieve its purpose (ie its impact on the *environment*), but also how it might affect resource use and development. Decision-makers must consider:

a. the needs or aspirations of communities for the economy, society, and the natural environment
b. the magnitude and spatial extent of any natural resources likely to be available for allocation as a result of the proposed limit or methodology
c. the implications of the proposed limit for the current and future use of natural resources and the benefits associated with that use
d. cost of available methods to manage effects within the proposed limit
e. alternative ways of providing for natural resource use that are consistent with protecting or enhancing the natural environment.

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[94] Although, confusingly, the term "diverse range of indigenous life" is used, the comparable term *indigenous biodiversity* means "(a) the variety of indigenous living organisms and the ecological complexes of which they are a part; and (b) includes diversity within species, diversity between species, and the diversity of ecosystems".

[95] And as long as the "existing capacity of the natural environment to withstand or recover from pressures and disturbances" is *considered* under cl 57. This involves an *assessment* of "important species, habitats, and ecosystems, especially those that are rare, threatened, or endangered" under cl 57(f), but does not require effects on those species, habitats and ecosystems to be avoided as long as they comply with the overall purpose of 'life-supporting capacity'.

[96] This contradicts the direction in cl 11 of the NEB to 'seek to achieve' the goal of enabling use and development within limits. This is ripe for litigation, since the goals arguably have pre-eminent status.

[97] This is not specified under cl 56.

155. These are phrased in open-ended ways and potentially invite decision-makers to balance the desirability of limits against their potentially negative impacts on the economy. This is completely inappropriate. A limit needs to be set using *only* biophysical criteria.

Translating limits into regulatory tools

156. An environmental limit is not itself a regulatory restriction, even though it must be contained in a natural environment plan (and therefore prepared as part of the formal planning process). This means that even if a limit itself is robust (a description of the minimum acceptable state of a domain/attribute), to have a meaningful effect it must still be translated into effective tools to stop human activities. This is an area of the Bills of considerable concern and requires extensive amendment.

157. Regional councils have a general duty to avoid breaching an environmental limit.[98] This is positive and needs to remain. But councils also need to be provided with effective tools to actually do that.

158. There are 6 places where limits can be translated into meaningful restrictions, and we address them in turn:

a. National policy direction
b. National standards
c. Spatial plans
d. Natural environment plans and land use plans
e. Private plan changes
f. Consents (permits) and designations.

Environmental limits and national policy direction

159. With respect to national policy direction, the key issue is its relationship with the Bills' goals (including the goals relating to environmental limits). We dealt with this point earlier. The key change needed is to require national policy direction to be consistent with, or give effect to, the purpose of environmental limits, rather than balance this against other goals (including those under the Planning Bill).

Environmental limits and national standards

160. National standards (regulatory controls) prepared by the Minister must enable natural resource use only *within* environmental limits.[99] That is a clear and effective statement and should be retained.

[98] NEB, cl 66(1).
[99] NEB, cl 85. Note: there are typographical errors in the heading of cl 85 and in cl 85(3).

161. However, the Minister only has to use 'reasonable endeavours' to ensure that limits are not breached. This qualifier should be removed, to make it comparable to the general duty on regional councils not to breach an environmental limit.[100] The obligation should be absolute, especially when it comes to national standards that provide for permitted activities (where no further meaningful assessment of environmental impacts will be possible).

162. If national standards pose a risk of environmental limits being breached, cl 85(3) imposes obligations on the Minister to avoid a breach. That is also positive and needs to be retained. In particular, it is positive that standards *must require* a rule or condition that is more restrictive than the standard itself where there is a "possibility" of a breach, including changing an activity status (for example, from a permitted to a discretionary activity).

163. However, a stronger link needs to be made to cl 108, to clarify that in such situations a justification report (required where councils depart from national standards, and which imports a cost-benefit approach rather than a strict adherence to limits) is not required.

164. It is also positive that clauses 85(4)(a) and 85(4)(b) require the Minister to monitor and evaluate national standards (or enable that to happen), and to review national standards to account for *new* environmental limits. The latter is of critical importance, because limits themselves are set by regional councils in natural environment plans, which have no power to override national standards. If a national standard authorising an activity is inconsistent with a limit, the standard itself needs to be changed.

165. Clause 85(2) should, however, be drafted more clearly to specify that:

> *the Minister must identify any reasonably foreseeable adverse risks <u>that an</u> ~~of~~ environmental limit~~s being~~ <u>may be</u> breached.*

166. At present, the drafting would allow consideration of the biophysical risks of allowing a limit to be breached (whether a breach would be bad), rather than focusing on the likelihood of a limit *being* breached. Once a limit is in place, there should be no ability to reassess the pros and cons of breaching it.

167. Of most significant concern is the ability of national standards under cl 86 of the NEB to authorise a breach of environmental limits for significant infrastructure (despite cl 85).[101] We deal with this point further below in the context of permits.

Environmental limits and spatial plans

[100] NEB, cl 66(1).
[101] Clause 86.

168. Spatial plans must be "consistent" with environmental limits and map out their "spatial implications".[102] That direction is positive and needs to be retained, because it is broad enough to contemplate strategic land use change of whole areas where that is required to meet limits (rather than just mitigating the effects of existing activities). The NEB should, however, make that explicit by stating that the 'spatial implications' of limits includes the prospect of strategic land use change where existing land use patterns are inconsistent with the defence of limits.

169. There is a significant transitional issue due to the timing of different instruments. Environmental limits are to be set in natural environment plans, but these (and the methodologies for setting them) are to come after spatial plans (and national direction relating to those spatial plans).[103] Spatial plans are likely to identify corridors and locations for significant infrastructure having environmental effects. And once investment decisions (and possibly even physical works) have started in reliance on a spatial plan (which natural environment plans have to implement),[104] it will be extremely hard to undo those decisions based on the 'spatial implications' of any new environmental limits.

170. Even though natural environmental plans do not *legally* have to adhere to spatial plans if there is new information (which presumably would encompass the creation of limits) or a significant change in circumstance,[105] in practice that may well be impossible if contracts have been signed or regulatory approvals (permits, consents or designations) obtained.

171. The Planning Bill should therefore specify that spatial plans cannot come into effect until limits have been established under natural environment plans.

172. There is also an inappropriate power for the Minister to intervene directly in decision-making on spatial plans under cl 19 of Schedule 2 of the Planning Bill. This allows the Minister, instead of the relevant local authority, to make a final decision[106] relating to "infrastructure or a matter that will support or impact a matter of national interest included in national instruments, a government policy statement, or other national plan or strategy".

173. This power of intervention is extremely broad. Essentially, it would allow the Minister to rely on a non-statutory plan, for example for the development of a particular industry (eg for aquaculture), as a justification to create an "alternative solution" to that proposed by a spatial plan committee or one recommended by the independent hearings panel. The only constraint is that this must be within "the scope of submissions" (which might include the Minister's *own* submission).

[102] Planning Bill, Schedule 2, clauses 2(a) and 3(1)(b).
[103] Planning Bill, Schedule 1, cl 2.
[104] NEB, cl 97(2)(a)(iii).
[105] NEB, cl 97(3).
[106] That is, a decision on the recommendations of the independent hearings panel.

174. Most alarming is that, in such a scenario, the Minister must simply "consider" whether their decision is consistent with the requirements of the Planning Bill.[107] There is no obligation to actually *adhere* to those requirements. This means that there is no legal obligation on the Minister to ensure that spatial plans are consistent with, or reflect the spatial implications of, environmental limits if, for example, the government has a plan for the expansion of coal mining in a particular place (or supports a particular project). Natural environment plans and land use plans then have a legal obligation to implement a spatial plan.

175. It is ambiguous whether the Minister's decision referred to above can be appealed (whether on a question of law or on the merits) to the Environment Court, under clauses 24-25 of Schedule 2 of the Planning Bill.

176. This power of intervention is entirely inappropriate and cl 19 of Schedule 2 of the Planning Bill should be removed.

Environmental limits and natural environment plans

177. The legal relationship between limits and natural environment plans requires significant strengthening. In fact, this requires the *greatest* attention because these plans are where limits are intended to have most direct impact on what people can and cannot do. If they are weak, the whole framework will be ineffective.

178. The NEB provides a general direction that natural environment plans must comply with environmental limits once they are set.[108] This is positive starting point and should remain intact. However, it needs to be strengthened as follows:

a. By strengthening the purpose of natural environment plans
b. By deleting the framework for regulatory relief for specified rules and putting safeguards in place for the more general regulatory relief pathway
c. By strengthening the ability to establish an effects management hierarchy in natural environment plans
d. By removing constraints on the use of regulatory tools in natural environment plans where they are needed to defend limits.

The purpose of natural environment plans

179. First, the purpose of natural environment plans in cl 92 needs to be amended to refer explicitly to the establishment and effective defence of environmental limits. At present, their purpose is to "enable and regulate the use, protection, and enhancement of natural resources within a region" and "assist regional councils in carrying out their functions and responsibilities".

[107] Planning Bill, Sched 2ule, cl 19(5).
[108] NEB, cl 97.

180. There is a risk that this general purpose (especially its direction to enable use) is interpreted as trumping or tempering councils' obligations to create effective tools to defend limits (as has been the case under the RMA, using the 'open textured' nature of Part 2). The reason is that specific obligations (such as the creation of caps and land use regulations) are already relatively weak and optional (see below), and therefore particularly vulnerable to any provisions that suggest they might not be needed.

Regulatory relief and natural environment plans

181. Secondly, regulatory relief is a significant threat to the effective defence of environmental limits in plans and needs to be fundamentally reimagined. This is the case especially for regulatory controls on indigenous biodiversity (specified rules), because (as explained earlier) relief must be provided for *any* regulatory controls on indigenous biodiversity on private land if they have a significant impact on reasonable use. There is no exception for where such rules are necessary to comply with environmental limits, meaning that rules will not be forthcoming where councils cannot or will not provide relief (including, potentially, monetary compensation). Rates caps and general fiscal constraints make that a very likely scenario. The specified rules pathway needs to be removed for this reason (among others).

182. Even for other domains like freshwater, there is a risk that the more general relief pathway in cl 122 of the NEB (triggered where any provision "severely impairs" reasonable use of land and there is an unfair and unreasonable burden imposed) interferes with effective regulatory tools for defending limits. For example, this could require a council to provide relief (and potentially pay monetary compensation) to a forestry company for regulations requiring slash control or restricting harvesting methods where needed to defend water quality limits in a catchment.

183. This could be resolved relatively easily, by specifying that *any* use of land that risks breaching an environmental limit is deemed not to be a "reasonable use", or that a "significant impact" (which is already deemed not to be a reasonable use under cl 122) includes any activity that risks breaching a limit.

The effects management hierarchy and natural environment plans

184. Thirdly, the NEB imposes serious constraints on when natural environment plans can impose an effects management hierarchy. Although cl 15(1)(a) requires regional councils to *consider* how adverse effects are to be avoided, minimised or remedied "where practicable" and how they are to be offset or compensated "where appropriate", there is no *requirement* for them to do so. Clause 15(4) even states that "the order in which an approach to managing effects appears in this section does not assign an order of importance to how effects are managed". This jars with the direction to use offsetting and compensation only where "appropriate", and potentially allows decision-makers to jump

straight to a preference for compensation irrespective of the severity or irreversibility of an activity's effects.

185. In any case, under cl 15(2)(b)-(c) the Minister has broad discretion to define what "practicable" and "appropriate" means. So not only is there is nothing in the Bill to require effects that would breach limits to be avoided, the Minister could also simply specify that avoidance of such effects is not practicable and that compensation is appropriate.

186. In fact, cl 15(2)(a) gives free reign for national instruments to state "how, and in what order, adverse effects are to be avoided, minimised, or remedied, offset, or compensated". So although plans must comply with limits, they also have no ability to override national instruments. And because the NEB's goals relating to limits are expressly subject to the provisions about adhering to the 'funnel' of instruments (with national instruments at the top), a national direction would trump any efforts by regional councils to create strong avoidance requirements.

187. If national instruments choose not to provide a framework guiding offsetting and compensation, "the management of adverse effects must not be undertaken except in the context of determining an application for a permit".[109] In other words, if national instruments are completely silent as to when offsetting and compensation are appropriate, regional councils are not even allowed to create provisions that prefer the avoidance of effects (or any other hierarchy) in their plans, even if limits are at risk of being breached by such effects. Instead, the practicability of avoidance and the appropriateness of compensation must be left entirely to the consenting stage.

188. That weakens the limits framework, because, by definition, limits will require certain effects to be avoided (eg where they would result in extinctions), not just remedied, mitigated or offset/compensated. It is particularly risky for domains/attributes where the use of offsets and compensation is not well developed (eg for marine biodiversity), because it is likely that national instruments will not be forthcoming in the near future. That means that the management of such effects likely *will* be left to the consenting stage.

189. Leaving effects management to the consenting stage also provides significant uncertainty to all parties as to the outcome of that process. It undermines the certainty provided by the funnel approach and would encourage litigation.

190. Clause 15 needs to be fundamentally reworked so that it does not apply to the defence of environmental limits. Instead, there needs to be an explicit preference for natural environment plans to establish clear avoidance policies where effects would breach limits, and more statutory guidance about when offsetting and compensation are *not* appropriate (building on the provisions in the current National Policy Statement for Indigenous Biodiversity).

[109] NEB, cl 15(3).

The use of regulatory tools to defend limits in natural environment plans

191. Fourthly, and perhaps most importantly, the NEB imposes unjustified constraints on the use of regulatory tools to defend environmental limits. This is not due to uncertainty about how the limits framework interacts with more general provisions in the Bills (which may partly explain the inadequacy of the effects management provisions discussed above). Instead, such constraints are located squarely in the provisions on environmental limits themselves, and they are a deliberate decision to kneecap the tools used to defend them where they affect people's use of land.

192. Under cl 60 of the NEB, there are two tools available to councils to manage resources subject to a limit: a cap on resource use, and an action plan.

193. A "cap on resource use" is the maximum amount of resource use that can occur without breaching an environmental limit. It can be expressed in three ways: a land use (eg extent of an activity), an input (eg maximum amount of fertiliser), or an output (eg nitrate volume). This is a curious conceptualisation, because it does not comfortably encompass limits other than those for pollution (eg those relating to the taking or diversion of freshwater).

194. An "action plan", on the other hand, is an open-ended suite of other interventions that a regional council (and others) can take. An action plan *can* include a cap, but it does not have to.

195. These two tools provide two pathways by which limits can be translated into mechanisms that change behaviour. First, under cl 60(3) a regional council "must give first preference to only using a cap on resource use". That is positive, because a cap (in theory) translates a clear description of the minimum acceptable state of an environment (a limit) into an equally clear statement of what the constraints on total human activity are.

196. However, there are broad exceptions that can quickly send councils down the second "action plan" pathway. Under cl 60(3)(b), national standards can simply direct councils *not* to prefer just a cap. Under cl 60(3)(a), councils can also take their own initiative and reject a cap if it considers, "in accordance with any criteria prescribed in regulations, that it is not effective or feasible to do so".

197. Feasibility is of particular concern. This term is not defined, leaving it wide open to interpretation. For example, a cap might be considered unfeasible if a local economy is reliant on intensive farming or employment from mining, or if consented rights have already been granted in excess of a cap.

198. Under cl 60(4), feasibility specifically depends on whether "the resource is affected by a range of different causes". This is a big concern because almost all modern environmental problems (including diffuse pollution of waterways from nutrients and sediment, or biodiversity loss) *do* have multiple causes. For example, for freshwater one might claim that

elevated nutrient levels lower in a catchment are caused by ducks and not just intensive farming, or that there is natural variability in nutrient levels in a catchment, so a cap on intensive agricultural land use is not feasible (since it would address only part of the issue). This could act as a get out of jail free card for polluters who wish to see softer, non-regulatory methods, and is bound to be litigated.

199. Once a decision has been made that a cap is not feasible by itself, a council must create an action plan. An action plan is a useful concept if used appropriately, because it can provide a more integrated approach to regulatory and non-regulatory interventions. For example, it might align the operational and investment decisions of various agencies (eg the purchase and retirement of land in sensitive environments, or riparian planting programmes) with rules in a natural environment plan.

200. However, a decision to create an action plan brings with it constraints on regulatory interventions. Under cl 64(2), an action plan is not allowed to include[110] any controls on inputs (eg fertiliser) or land use (eg stocking rates) unless the council is satisfied that other tools, including freshwater farm plans and "non-regulatory measures" would be insufficient in achieving its purpose.

201. Controls on land use or inputs are defined in cl 64(3) as "rules in a natural environment plan that restrict or determine how land is used and what it can be used for (for example the type of forestry planting, construction or use of urban or built areas, or fertiliser application rates)". This is so broad that it effectively means that regional councils are left to manage effects as best they can rather than using regulation to address the causes of those effects.

202. Furthermore, the concept of "non-regulatory measures" is open-ended. It means that councils must be satisfied that almost *any* intervention will be insufficient before being able to impose regulatory restrictions on land use or inputs. For example, the "non-regulatory" measures used to reduce the impact of nitrates on Lake Taupo included the use of $80 million of public money to do things like buy out consented rights to pollute.[111]

203. Overall, cl 64 and the "action plan" pathway create an inappropriate onus of proof on any council wanting to impose effective regulation to prevent the degradation of *common pool* resources, not just land. This is not the protection of private property; it is the *extension* of private property rights into the commons. This flips the Bill's "first preference [for] only using a cap" completely on its head as soon as strict controls are seen as not "feasible".

204. In principle, the first pathway for translating limits into tools (using only a cap) is more promising. However, it also has significant weaknesses and uncertainties.

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[110] It is not at all clear that an action plan *can* include 'controls' in the sense of enforceable regulation unless these are first translated into a natural environment plan. A more sensible interpretation is that an action plan can 'contemplate' that such controls will be created.

[111] See https://www.waikatoregion.govt.nz/assets/WRC/WRC-2019/TR201334.pdf

a. Caps do not, by themselves, appear to have direct regulatory effect. There is ambiguous language. For example, caps must 'inform' allocation decisions and 'describe' maximum amounts of resource use that can occur without breaching an environmental limit.[112] Nowhere are they themselves described as *rules* or *standards*.

b. This interpretation is supported by the ability of national standards to specify a "process for setting a cap", implying that this is something other than the process for a natural environment plan set out in Schedule 3 of the Planning Act.

c. It is also unclear how caps *flow through* to rules in natural environment plans or decision-making on permits. There is no clear line of sight by which plans have to *include* or even *give effect* to caps. Instead, it appears that these are quite separate tools that are intended to stand alone, be published on a council's website,[113] and only 'inform' regulatory plans.[114]

d. There are also significant barriers when it comes to translating these caps into certain forms of regulation. Under cl 106 of the NEB, land use controls or input controls[115] are only allowed in natural environment plans if councils can show that other measures (including non-regulatory measures) are insufficient.[116]

e. This is highly unusual, because in such a scenario a cap – which under cl 62(c) can specifically be expressed as including a land use or an input – has *already* been accepted as feasible and effective under cl 60 and therefore the "first preference". Yet when it comes to translating this cap to controls on those very same land uses and inputs, non-regulatory measures have to be preferred.

f. As mentioned earlier, non-regulatory measures could mean almost anything, meaning that it will be very hard for councils to satisfy themselves that all such measures would be "insufficient".

g. When it comes to caps on indigenous biodiversity specifically, regulation is even harder. Aside from the requirements to provide regulatory relief and the chilling effect this would have (see earlier), any control protecting indigenous biodiversity on private land is a 'specified rule' and requires a justification report. This process introduces a 'balancing' approach through a cost-benefit analysis, taking such rules far away from the fundamental premise of an environmental limit.[117]

[112] NEB, cl 62(1)(b). Incidentally, this makes the concept of a cap hard to distinguish from a limit itself, since a limit can be expressed as a maximum amount of harm.
[113] NEB, cl 62(2).
[114] NEB, cl 62(a)-(b).
[115] Specific examples are given in the primary legislation.
[116] NEB, cl 106(4).
[117] NEB, cl 108(3)(f).

205. The process by which caps and action plans are created is also important. This is not set out in the Bill. Instead, Ministers are empowered to create a process.[118] This approach to the creation of caps (both standalone and within action plans), which should be core regulatory tools, risks them being less robust and potentially inconsistent with natural environment plans themselves. Caps should be set as *part* of the regulatory process for developing natural environment plans, with a clear line of sight to rules within the plan. This means they will be subject to submissions and appeals to the Environment Court.

Environmental limits and land use plans

206. Land use plans are prepared by territorial authorities under the Planning Bill, and are subject to its goals (which do not include any goals relating to limits). This means that any meaningful environmental constraints on land use (other than for landscape) will occur only under natural environment plans.

207. However, detailed land use provisions in district plans (eg zoning and subdivision rules) have significant implications for the natural environment. There is also a power for the Minister to require effects to be managed under the Planning Bill rather than the Natural Environment Bill.[119] This means that the two types of plan cannot be treated as silos. A strong and direct link is needed between environmental limits made under a natural environment plan and land use decisions made under a land use plan.

208. As currently drafted, the Planning Bill is completely silent about the need for land use plans to align with natural environment plans except to the extent they deal with adjacent marine space.[120] At minimum, land use plans should be required to be "consistent with" limits set in a natural environment plan (even if they are not expected to "implement" them). Clause 101 of the Planning Bill should also be expanded in its application so that disputes as to whether land use plans *are* consistent with environmental limits can be referred to the Environment Court for resolution.[121]

209. The fact that spatial plans must be consistent with (and reflect the spatial implications of) limits is some safeguard, because land use plans must, in turn, implement spatial plans. However, spatial plans may be relatively high-level instruments (they are directed to include matters only if they are of "strategic importance")[122] and might not reflect the more granular land use decisions made in the rules and standards of land use plans.

210. It also appears that spatial plans are not intended to be the same kind of instruments as regional policy statements under the RMA. Regional policy statements are crucial because

[118] NEB, cl 61.
[119] NEB, cl 15(2)(d).
[120] Planning Bill, cl 80(4)(c)(i)(B).
[121] At present, cl 101 only allows resolution of disputes as to whether a land use plan implements national instruments or a spatial plan.
[122] Planning Bill, Schedule 2, cl 2(3)(a); Schedule 2, cl 4(4).

they contain objectives and policies (some of which are quite specific, and in the nature of rules) relating to environmental outcomes to which district plans must give effect. It is not clear that spatial plans will be able to provide regional councils with a mechanism (like objectives and policies) to influence land use in this way. Instead, they must provide for 12 mandatory matters, most of which suggest that spatial plans will be mostly comprised of maps.

211. If the intention is for combined plans at a regional level to meaningfully align spatial plans, natural environment plans and land use plans, it makes sense for there to be a clear mechanism by which spatial plan committees, independent hearings committees and the Environment Court on appeal can ensure this happens.

Environmental limits and private plan changes

212. Private plan changes are important too. Positively, private plan changes to natural environment plans can be rejected by regional councils (at the point at which an application is received) on the grounds they would be inconsistent with limits.[123] However, cl 52(d) of Schedule 3 of the Planning Bill does not *require* private plan change applications to be rejected on such grounds. Furthermore, the same problems outlined above with respect to natural environment plans generally apply to the decision-making framework for private plan changes if they are not rejected, and instead proceed for decision.[124]

Environmental limits and permits

213. The relationship between environmental limits and natural resource permits (essentially, the equivalent of regional resource consents under the RMA) requires additional safeguards. The starting point under cl 164(c) is positive: permits under the NEB cannot be granted if they would result in the breach of an environmental limit. However, we have three significant concerns.

214. First, the safeguards provided by cl 164(c) are not triggered unless a permit is required in the first place. The intention is for many more activities to be made permitted activities (where a permit is not needed) than under the RMA. This makes regulatory safeguards in the plan-making process extremely important (see earlier). At present, they are far too weak. There needs to be a clear statement that an activity cannot be provided for as a permitted activity if there is a risk of an environmental limit being breached.

215. Secondly, under cl 164(c) a breach of an environmental limit (whether for human health or ecosystem health) is expressly allowed if authorised by national standards made under

[123] Planning Bill, Schedule 3, cl 52(d). This is applied to natural environment plans (including private plan changes) by cl 3 of the Bill (interpretation section). More specifically, it can be rejected if it would make "the natural environment plan inconsistent with subpart 3, 4, or 5 of Part 2 or subpart 2 of Part 3 the Natural Environment Act 2025".

[124] Under cl 51 of Schedule 3 of the Planning Bill they can be adopted by the council, or they can be processed as a private plan change.

cl 86 or separate water services standards. Clause 86 allows national standards to establish a consenting pathway for "significant infrastructure". This contains few environmental safeguards. In practice, it will provide carte blanche for large development to circumvent the limits framework:

a. "Infrastructure" is not defined under the NEB, and it is defined under the Planning Bill only with respect to its provisions on designations. "Significant" is also not defined.

b. Infrastructure must have "significant public benefits" to be eligible, but this term is not defined and could mean almost anything. For example, a private irrigation scheme may be considered to have significant public benefit for a local economy.

c. Users must first take all practicable steps to "carry out the activity without breaching environmental limits". However, it is not clear what "practicable" means (and the extent to which additional cost would affect practicability).

d. It is doubtful whether "carrying out" an activity would include considerations of placing it in a different location. For example, once a large infrastructure project like a wind farm were proposed in an SNA, it is doubtful that a practicable step to carry out *that* activity would include placing it elsewhere. There is not even a requirement in the Bill for infrastructure to have a functional or operational need to locate in a particular place, as there is under RMA national direction.

e. There is a strong direction in cl 86(2)(c)(i) to "minimise any breach" as much as "reasonably possible". However, there is no bottom line where an authorisation is *not* allowed (for example, if infrastructure would cause severe or irreversible damage).[125]

f. Furthermore, under cl 86(3) national standards are able to specify "detailed requirements" for all of these matters. This is essentially code for defining key terms in a way that the Minister sees fit. It is also conceivable that national standards could cherry pick particular projects for specific exemptions, rather than general categories like renewable electricity facilities.

g. In addition, when authorising breaches of environmental limits, the Minister is obliged to consider broad and vague matters such as "the wider implications for natural resource use" and the criteria for which limits are established in the first place. As noted earlier, these include things like the economic aspirations of a community.

[125] Under cl 80, national *policy* direction is not allowed to result in severe *and* irreversible effects, but this only applies to national policy direction that is seeking to restrict how the Bill's goals can be achieved. This does not comfortably encompass national *standards* or provisions in them allowing breaches of limits.

h. Because limits are the only real safety net (other than no net loss of biodiversity) in the NEB's goals, once an exemption is obtained from limits then there would be very little, if any, environmental justification for refusing a permit for significant infrastructure.

i. Finally, it is unclear what, if anything, happens to the broader limits architecture as a result of exemptions for infrastructure (eg if a new hydro dam is authorised to dam/take freshwater beyond a limit). The more general architecture around limits appears to be unaffected, including the general obligation for natural environment plans not to allow breaches of limits, or the duty for regional councils to ensure limits are not infringed. It is unclear, for example, whether this then requires councils to 'make up' for the breach in other ways so that overall limit is maintained (by removing rights from others), or if the whole system is simply allowed to exist in a new, degraded, state.

j. In particular, it is unclear what the relationship is between the exemptions framework in cl 86 and the obligation of regional councils to take action if a breach is likely (cl 66) or if a breach occurs (cl 67). The strong implication of cl 67(4) is that the council only has an obligation to *notify* such a breach, but not to *remedy* it. This will undermine the entire limits framework.

k. The relationship between exemptions and regulatory relief is murky. For example, it is unclear what would happen if a wind farm were to obtain an exemption from complying with limits in the form of an SNA, yet regulatory relief had already been provided on the basis that such restrictions would be permanent.

216. Thirdly, the Fast-track Approvals Act remains substantively unaffected by the NEB and its limits framework. Consequential amendments to that Act in Schedule 7, Part 1 of the NEB are only minor and technical in nature. This means that decision-makers on permits for listed and referred projects under the fast-track regime have no obligation to comply with limits established under the NEB. Under fast-track, a permit could even be granted for prohibited activities in a natural environment plan, including where that status is necessary to defend limits.

217. Overall, the whole process of translating environmental limits into meaningful controls on human behaviour becomes weaker and weaker the closer one gets to actual regulation. Even if a limit itself reflects a sensible line in the sand, and even if a robust cap on human activity is created in response, the actual regulation needed to defend it will, if anything, be *harder* to impose than under the RMA.

Situations where limits are likely to be breached

218. The NEB contemplates a situation in which limits are likely to be breached.[126] Under cl 66(1), a regional council is obliged to take action to avoid it.[127]

[126] NEB, cl 66.
[127] NEB, cl 66(3).

219. That is positive and cl 66(1) should be retained. But the general duty to ensure limits are not breached should also apply to territorial authorities, who remain responsible for decisions on land use under the Planning Bill that may have cumulative effects on the environment.

220. However, the threshold of a "likely" breach is much too low. This could be interpreted as "more likely than not", which is not a sufficiently precautionary approach to trigger preventative action. It is vital that breaches are prevented, not just remedied after the fact. For example, a sudden but temporary burst of sediment into a stream can kill substantial amounts of aquatic life, even if the sediment flow is subsequently reduced. Action should be triggered wherever evidence suggests a "real possibility" of a breach.

221. It is also unusual under cl 66(2)(a) that a regional council must evaluate the likelihood of a breach only where this is a risk in the 'medium to long term future'. There appears no reason why a short-term risk of a breach should be excluded from evaluation.

222. Under cl 66(3)(a), a regional council must e*ither* prepare an action plan *or* change its natural environment plan in response to a likely breach. This is a relatively weak obligation, because action plans do not themselves put in place regulatory measures to defend a limit. They could be entirely focused on non-regulatory or even voluntary interventions. There is no standalone requirement to change a natural environment plan, let alone a *rule* in a plan. Even if a council elects to change a natural environment plan, the obligation in cl 66(3)(a) could be met by changing another provision, such as an objective, policy or other method.

223. Furthermore, if a council elects to change its natural environment plan, cl 64 imposes exactly the same constraints on regulation as where limits are *not* likely to be breached: namely, that controls on land use and inputs are not allowed unless other measures (including non-regulatory measures and freshwater farm plans) will not be sufficient. This is deeply inappropriate where there is an imminent risk of a limit being infringed, especially where that limit protects common pool resources from harmful land uses.

224. Under cl 66(3)(b), a regional council must *also* take any other action the council "considers necessary" to avoid a breach. These are more specific, and include:

a. making or changing a cap on resource use
b. preparing or changing a rule in a natural environment plan
c. reviewing the conditions (specified in the plan) that apply to natural resource permits and making any necessary adjustments
d. establishing a safety margin within environmental limits (to account for uncertainties, natural variability, errors, or unexpected events)
e. widening that safety margin
f. changing the way that natural resources are allocated.

225. These responses are positive. However, the obligation to pursue them is weaker than the obligation in cl 66(3)(a), because it includes the qualifier that the council considers it "necessary". It means that the specific actions listed in cl 66(3)(b) are less likely to be adopted.

226. In particular, only requiring the creation or amendment of a cap on resource use, or a change in rules, where council considers it "necessary" (rather than useful) means that there may continue to be a disconnect between the limit itself and the tools constraining actual human activity. A clear cap, and a change to a regulatory rule, should be automatic requirements where there is a risk of a limit being breached.

227. Clause 66(3)(b) also requires the review of conditions in permits where "necessary". This sounds positive on its face. However, it applies only to "reviewing the conditions (specified in the plan) that apply to natural resource permits". In other words, even if a council considers it necessary to defend a limit from being breached, there is no obvious legal obligation to review the conditions of *existing* permits. Instead, the clause appears to provide only for the review of mandatory or model conditions specified in the plan itself (which would, presumably, apply only to *subsequent* permitting decisions).

228. There is also no reference to *cancelling* existing consents. Both of those actions may be necessary where limits are close to being breached, as they are likely to be in a number of catchments when it comes to freshwater.

229. Similarly, the reference to "changing the way resources are allocated" does not clearly apply to reducing *existing* allocation if it becomes apparent that a limit will be overshot from existing consented activities.

Situations where limits are breached

230. Clause 67 of the NEB contemplates a situation in which limits *are* breached.

231. The Bill's drafting is very confusing here, since cl 67(3) imposes its obligations not only where a limit is breached but also where a limit is "likely" to be breached, even though this situation is already covered by slightly different obligations under cl 66 (see above). This may be a drafting error. If not, its intention and effect should be made clearer.

232. It is also not clear whether cl 67 is intended to apply only to a situation where a limit is set and *then* breached (the act of breaching), or whether it also applies to situations where an environment already exceeds a limit at the time it is established (the state of being in breach). It should be clarified that it covers both scenarios, given that the current state of many environments is below levels required to safeguard life-supporting capacity (or any other meaningful purpose limits might have).

233. If an environmental limit is breached, under cl 67(2) a regional council must publicly notify the breach, and its extent and cause. This transparency is positive.

234. However, the obligation for regional councils to actually respond to a breach is too weak. There are two automatic consequences of a breach.

a. First is the preparation of an action plan "detailing how the council will manage natural resource use to remedy the breach". Again, this is a weak requirement because such plans do not have any prescribed content and are able to rely entirely on non-regulatory actions.

   Under cl 64, it is difficult for action plans to contemplate regulatory responses *even where a breach has occurred*, since controls on land use or inputs are still not allowed unless non-regulatory mechanisms are considered insufficient.

   Such plans are entitled to rely heavily on other agencies' interventions, despite councils having no powers to bind them (or their budgets).

   Furthermore, under cl 65, an action plan designed to remedy a breach only has to set an open-ended timeframe (10 years plus) by which compliance with a limit needs to be achieved (a target). Targets must include five yearly interim limits if a target is more than ten years in the future.

   Targets and interim limits must avoid 'unnecessary' delay. However, timeframes also have to be "credible" and "achievable". What informs this concept of 'achievability' and whether a delay is "unnecessary" is not specified, meaning the journey to compliance may be an extremely long one based on a multiplicity of factors (including potential impacts on the economy and communities). The Bill provides a fast road to breaching a limit, but a long road to recovery.

   b. The second mandatory response to a breach under cl 67 is to review any relevant cap on resource use. Positively, this has to happen *as well* as an action plan, not as an alternative (as it is where a limit is *likely* to be breached).

      A cap is stronger than an action plan, because it envisages a clear limit on human activity. However, it still not strong enough if such a cap does not itself have regulatory force and has an unclear path to implementation via rules in a natural environment plan (see earlier discussion). A mandatory "review" of a cap also does not necessarily mean a mandatory "reduction" in the cap. It is not clear if the requirement in cl 60(3) for a cap to be "feasible" also applies to such a review.

      Furthermore, if a cap does not exist at all at the time of a breach, there is only a weaker obligation to create one if council considers it necessary.[128] This is unusual, since under normal circumstances (where limits are not breached) the "first preference" is for a cap to be created *instead* of an action plan.

235. There is no automatic requirement to create or strengthen regulation if a limit is breached. Instead, preparing or changing a rule in a natural environment plan is listed as something that a regional council must do if it considered "necessary".[129] That is not strong enough.

[128] NEB, cl 67(3)(c)(i).
[129] NEB, cl 67(3)(c)(ii).

236. Other responses are also required under cl 67(3)(c) only if a council considers it "necessary". These include "reviewing the conditions of a permit and making any necessary adjustments".[130] This is more appropriate wording that the equivalent provision in cl 66(3)(b)(iii) (where limits are likely to be breached in the future), because it more clearly applies to *existing* permits.[131] In other words, it more clearly provides for existing permit holders to take a 'haircut' where limits have been exceeded. However, it is still weakened by the fact that councils only have to review permits where they consider it *necessary*. A review of relevant consents should be an automatic response to overallocation.

237. It is also strongly implied by cl 67(4) that there is no obligation for a regional council to review the conditions of permits for infrastructure that is exempt from complying with limits, *even if* council considers that would be "necessary" to remedy a breach. The only obligation is for the council to notify the breach and its cause. This is a glaring hole.

238. Although it is not specified in cl 67, a different response is possible if a limit is breached: to shift the goalposts by changing what the limit *is* (based on community aspirations for the economy and society). Doing that may mean that a limit is, technically, no longer being breached, and as such there are no further obligations to respond. There is a history of such sleights of hand under the RMA,[132] and it reinforces the importance of shoring up the way in which limits are established and changed in the first place.

Public participation and legal standing

239. Both Bills excessively constrain the ability of the public and environmental groups to be involved in decision-making on plans and consents. This will result in weaker checks and balances in the system (and therefore poorer quality regulations), less transparency, and less community ownership of plans. This is likely to reroute community dissatisfaction to judicial review.

240. Constraints on participation are particularly concerning under the NEB, which deals with significant impacts on common pool resources that are not owned by anyone and in which all New Zealanders have a legitimate interest.

241. We deal first with the consenting context. The ability to submit on consent applications has been drastically curtailed. Under the Planning Bill, public notification of consents has to occur where the effects on the built environment or people are more than minor.[133] This is the same threshold as under the RMA and is broadly appropriate.

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[130] NEB, cl 67(3)(c)(iii).
[131] And not just conditions specified in a plan that might be imposed on *future* permits.
[132] For example, changes to *E. coli* "classification thresholds in 2017, turning 13% of New Zealand rivers from 'unswimmable' to 'swimmable' overnight": see B Blue and M Tadaki "Getting the measure of nature: The inconspicuous geopolitics of environmental measurement" in S O'Lear (ed) *A research agenda for environmental geopolitics* (Edward Elgar, 2020) at 16–29.
[133] NEB, cl 125.

242. However, under the NEB, public notification of consents will be allowed only where an activity would generate "significant" adverse effects on natural resources or people.[134] That is a much higher threshold than under the RMA or under the Planning Bill. It is a very unusual distinction to make, given that impacts on the resources for which NEB consent applications are needed are largely not in private ownership (eg freshwater, the coastal marine area, air). The public therefore has *more* of an interest in their protection than many impacts dealt with under the Planning Bill (largely relating to land), not *less*. The threshold for public notification needs to be lowered to where there are more than minor impacts.[135]

243. Even where a proposal *does* have significant adverse effects on natural resources, a person is eligible to submit on a consent under the NEB only if he or she resides in the relevant region.[136] A resident is defined to include ratepayers, infrastructure providers, non-natural persons who operate in the region, and those whose primary address is in the region.

244. The definition cuts out many who have a legitimate public interest in environmental protection across the country, including watchdogs and NGOs who operate at the national level but are concerned about environmental outcomes that affect everyone (eg mining on the West Coast or freshwater quality in Canterbury). It is particularly jarring that an Auckland based landlord of a residential investment property in Southland would be eligible to submit on a consent sought by a farmer to discharge a contaminant to freshwater, but an Auckland-based NGO intimately concerned with freshwater quality would not. This is a very different scenario from (for example) someone in Hamilton objecting to a McDonald's in Wanaka because they do not like fast food outlets.

245. Participation is also unjustifiably constrained in the plan-making process. Most of this process is outlined in Schedule 3 of the Planning Bill, but through cross-referencing is applied to the preparation of natural environment plans under the NEB as well as land use plans under the Planning Bill itself. The Bills' constraints on standing upend the longstanding position under the RMA that broad public involvement in planning is useful, indeed vital, to enduring and robust environmental and community outcomes.

246. There are two offending elements. The first is that submissions on notified plans are only available to residents (as is the case with consents). The only way for non-residents to submit is to demonstrate an interest greater than that of the general public.[137]

247. This presents an additional hurdle to those with genuine environmental interests, including environmental NGOs whose job is to advocate for nature, but also people all around the country who have a close connection with places that they no longer live. If someone has lived all their life in the Waitākere Ranges and has intimate knowledge of its

[134] NEB, cl 146(6).
[135] Although other requirements for notification in the Bill should remain, such as where plans require notification.
[136] NEB, cl 152.
[137] Planning Bill, Schedule 3, cl 17(1)(b).

environment, but they have recently moved their primary address to another region, they may be cut out.

248. Not only does this silence people with genuine interests in environmental wellbeing from having a voice, it also restricts the provision of potentially valuable technical evidence to decision-makers. Expert evidence provided by NGOs has, under the RMA, often been extremely valuable in ensuring that plans comply with the law and are based on independent science.

249. Tangata whenua must be consulted on the content of a proposed plan before public notification, and must be specifically notified when notification occurs,[138] There is also a requirement for plans to be prepared and changed in accordance with "any applicable iwi participation legislation, any agreement under that legislation, and any existing or initiated Mana Whakahono ā Rohe".[139]

250. However, it is not clear that this confers on tangata whenua the automatic standing to make a submission on a plan. Under cl 17 of Schedule 3 of the Planning Bill, they must still either be "qualifying residents" or demonstrate an interest in the proposed plan greater than that of the general public. It should be made clearer that tangata whenua have automatic standing to submit on notified plans.[140]

251. The second offending element of the planning process is that participation is indirectly, but significantly, constrained by what people are allowed to say *in* their submissions. There is little point giving people nominal standing and then preventing them from saying what the real issues are.

252. This is because submissions on land use and natural environment plans (and therefore standing to lodge merits appeals) are allowed only to the extent that a plan departs from standardised provisions (eg standard zoning rules) set in national direction.[141]

253. If a council decides to *include* a nationally standardised plan provision, or decides not to depart from it, appeals are only available on points of law.[142] The only exceptions are where there has been a change in circumstance or new information.[143]

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[138] Planning Bill, Schedule 3, cl 5, cl 14 and cl 15(3).
[139] Clause 3 of Schedule 3 of the Planning Bill.
[140] This may be unintentional, given that tangata whenua have automatic standing to submit where a proposed plan is subject to *targeted* notification under cl 17(2) and cl 16(2)(d) of Schedule 3 of the Planning Bill.
[141] Planning Bill, Schedule 3, clauses 33, 32(3); NEB cl 94 (which applies Schedule 3 of the Planning Bill to natural environment plans).
[142] Planning Bill, Schedule 3, cl 32(3).
[143] Planning Bill, Schedule 3, cl 32(4)(b). Submissions are allowed to the extent they relate to the spatial application of a provision on a specified topic (ie where overlays like SNAs and ONFLs have been painted and not painted), but not the content of the rules applying to them.

254. Effectively, this means there will be no meaningful standing to submit or appeal if a council chooses simply to 'paint by numbers' by placing a limited range of standard zoning rules across a region or district. The Bills are inconsistent with what was recommended by the Expert Advisory Group, which said that merits appeals should be available to the extent that councils choose *not* to include bespoke provisions.[144]

255. There will be significant fiscal incentives for councils (who will likely be subject to a rates cap) to take the path of least resistance, and therefore least cost. Appeals can be costly, so unless there is significant community pressure to depart from standardised zoning rules, councils will be incentivised to apply them even though they may not be fit for purpose in many environments (eg sensitive ecosystems like the Waitākere Ranges, Fiordland or the Mackenzie Basin). In many rural environments, bespoke rules to protect the natural environment will need to be the expectation, not the exception, so submission and appeal rights should be enabled for decisions *not* to impose bespoke rules under the NEB.

256. Weakening standing not only undermines the social license that is vital to community buy in; it also removes the vital expert oversight role of the Environment Court. The Court is powerless to intervene unless someone has standing to take a legal challenge.

257. Decisions at the planning level can further constrain standing at the consenting level. This is because plans are able to specify notification status (that certain activities must *not* be notified) and provide for permitted activities (which by definition cannot be notified because they require no consent). In other words, constraints on participation at the planning stage cannot be rectified by relying on participation at the consenting level.

258. In addition, there are fewer constraints when it comes to the use of permitted activity status in plans (indeed, there is active encouragement to use it). In particular, there is no longer a requirement (as there is under the RMA) for plans/regulations to include permitted status only where decision-makers are satisfied that effects on the environment will be less than 'significant'. This aspect of the planning process further weakens participation at the consenting level, because, as mentioned above, no consenting process (and therefore no ability to submit or appeal) can be triggered by permitted activities.

259. Schedule 2 of the Planning Bill outlines the process for the preparation of spatial plans. These have significant implications for environmental outcomes, because natural environment plans must implement them. Although broad public involvement is possible for spatial plans under cl 14 of Schedule 2 (any member of the public can make a submission), merits appeals to the Environment Court appear to be significantly constrained to:[145]

> a person who submitted on a draft regional spatial plan … in respect of a decision to reject the independent hearings panel's recommendation relating to infrastructure.

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[144] *Blueprint for resource management reform: A better planning and resource management system 2025* (March 2025, Ministry for the Environment) at [325].
[145] Planning Bill, Schedule 2, cl 25(1).

260. This appears to close down any merits appeals where a council (or Minister, in certain situations)[146] rejects the recommendations of the independent hearings panel for a provision not relating to infrastructure. On an ordinary reading, that would include any element of a spatial plan outlining the "spatial implications of limits". It is completely inappropriate to limit merits appeal rights to infrastructure. Clause 25(1) should include all decisions that reject the recommendations of an independent hearings panel.

261. The evidence base for constraining participation rights in the ways envisaged by the Bills is weak.[147]

a. The Environment Court has effective case management processes in place to resolve appeals, including mediation and expert conferencing.
b. There are already effective mechanisms under the RMA for striking out vexatious submissions.
c. Submissions and appeals have not, overall, had a significant impact on activities conducted under the RMA. Almost all consent processes are non-notified. The Ministry of Regulation has noted that public involvement has not been a barrier to large scale renewable electricity development.[148]

262. By contrast, appropriate public and expert engagement in plan-making and consenting processes not only improves transparency and social license, but also improves outcomes and promotes compliance with the law.

263. Finally, artificially constraining participatory rights is likely to lead to increases in the less appropriate and more costly mechanism of judicial review. This has been the case in the United Kingdom and Ireland where people's ability to be heard on matters of public interest has been artificially constrained.[149]

264. At the very least, checks and balances in the system need to be maintained by allowing full submission and merits appeal rights to environmental watchdogs and interested parties. This was the approach taken in the COVID-19 fast-track legislation, where particular national-level organisations were specifically listed as parties entitled to comment on proposals.[150]

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[146] Under cl 19 of Schedule 2 of the Planning Bill.
[147] See generally https://eds.org.nz/resources/documents/reports/replacing-the-resource-management-act-risks-and-solutions/
[148] Regulatory-Impact-Statement-Consenting-I-package.pdf at 12, concluding that the "overall efficiency of the resource consent process is good for renewable energy projects".
[149] See https://hansard.parliament.uk/commons/2025-01-23/debates/25012331000008/InfrastructurePlanningAndJudicialReviewReform; https://www.linklaters.com/en/knowledge/publications/alerts-newsletters-and-guides/2023/december/04/a-legal-and-political-paradoxhow-a-government-determined-to-restrict-judicial-review-ended-up-expa; See generally Hyde "Judicial review of planning permissions for housing developments" (2021) 1 Irish Planning and Environmental Law Journal 1.
[150] COVID-19 Recovery (Fast-track Consenting) Act 2020, Schedule 6, cl 17.

Scope

265. The scope of the Bills to control environmental effects has been narrowed considerably, and excessively, compared to the RMA. The most obvious place where this has occurred is in the Planning Bill, but more subtle and, from an environmental perspective, equally significant scope constraints have been imposed under the NEB as well.

266. Clause 14 of the Planning Bill specifically excludes certain types of effect from being considered by any person exercising or performing a function, duty or power under the Bill as follows:

a. The internal and external layout of buildings on a site (for example, the provision of private open space)
b. Negative effects of development on trade competitors, including on competing providers of input goods and services
c. Retail distribution effects
d. The demand for or financial viability of a project unless it is a matter to which section 11(1)(b) or (d) relates
e. The visual amenity of a use, development, or building in relation to its character, appearance, aesthetic qualities, or other physical feature
f. The following matters:
   i. The type of residential use
   ii. The social and economic status of future residents of a new development
g. Views from private property
h. The effect on landscape
i. The effect of setting a precedent
j. Any matter where the land use effects of an activity are dealt with under other legislation.

267. Several matters are then specifically carved out from the cl 14(1) exclusions under cl 14(2) (meaning these things *can* be considered and managed):

a. Areas of *high* natural character within the coastal environment, wetlands, lakes, rives, and their margins
b. *Outstanding* natural landscapes and features
c. Sites of *significant* historic heritage
d. Sites of significance to Māori
e. The effects of natural hazards.

268. Some of the constraints in cl 14 are appropriate in principle. These include trade competition effects (to prevent the misuse of the Bill for anti-competitive behaviour), the social and economic status of future residents (eg to prevent complaints about social housing), and the type of residential use (eg to prevent NIMBY opposition to apartments rather than detached housing given some people's preference for low-density neighbourhoods).

269. However, even for these matters there are technical issues that need to be fixed. In particular:

a. The "negative effects of development on trade competitors, including on competing providers of input goods and services" is far too broad, because it excludes consideration of all negative effects on people who are trade competitors, not just trade competition effects. This would prevent genuine effects on such persons (eg noise, vibration, shading) being managed. Not all trade competitors engage for illegitimate reasons.

b. Excluding "the demand for or financial viability of a project unless it is a matter to which section 11(1)(b) or (d)" is also too broad. This is because the exceptions in clauses 11(1)(b) and (d) only relate to (1) supporting and enabling economic growth and change by enabling the use and development of land; and (2) enabling competitive urban land markets by making land available to meet current and expected demand for business and residential use and development.

   This would prevent consideration of another extremely important reason for thinking about whether there is demand for a development: the provision of public infrastructure (eg water pipes, roads, parks, libraries etc) to support it. This goal is explicitly contained in cl 11(e) ("to plan and provide for infrastructure to meet current and expected demand"). Yet the question of whether there *is* demand for a particular urban development project could not be taken into account when deciding to grant or refuse consent, even if it would require considerable investment in supporting public infrastructure.

   A similar issue arose in Ireland, where large scale greenfields (in some cases non-contiguous) urban development led to the creation of failed housing projects across the countryside ("ghost estates") when the global financial crisis led to developers reneging on their plans. Public infrastructure investment in these developments were wasted. In response, Ireland learnt its lesson and now takes a much more plan-led approach to where growth occurs (especially around metropolitan areas like Dublin where demand for infrastructure is high). In other words, the demand for (and viability of) projects is important to consider.

c. The inability to consider the "type" of residential use (eg high density housing, the number of bedrooms, subdivision into lifestyle blocks) may also prevent the management of urban sprawl. It may result in the proliferation of low-density development on simpler and less efficient (when a long-term view is taken) greenfields space rather than focusing on more efficient but sometimes more complex (and less commercially attractive) infill or brownfields development. The long-term environmental and social risks of urban sprawl, even where the immediate infrastructure costs are internalised to a developer (eg the initial provision of roads and water), are well-

attested.[151] There is a need for careful planning that balances urban growth both "out" and "up", as well as long-term planning based on demographic projections (eg an aging population requiring a fit for purpose housing stock, such as smaller one-bedroom units at ground level close to services and amenities).

270. Other exclusions in cl 14(1) require more fundamental revision:

a. Landscape is a complex and varied concept, and plans under the RMA contain important protections that go beyond the protection of landscapes or features that are *outstanding* (eg rural amenity landscapes).[152] The Bills would, for example, invalidate ridge protections in the Waitākere Ranges. While it is important that such regulation is proportionate, it should not be entirely beyond the scope of consideration in regulatory or non-regulatory tools.

b. Removing the ability to protect all visual amenity values is concerning, particularly in the urban context. Such protections are about much more than just retaining the low-density character of 'leafy street suburbs' and character areas. They are also more fundamental than the colour of a person's front door. Rather, design guides under the RMA are vital to guide how large-scale developments function (especially, but not solely, in high density residential areas). Amenity is important, for example, to address concerns about privacy, manage the interface between the private and public realms, to reduce crime, to encourage healthy choices (which may have flow on effects on the public health system), to address issues like reflectivity (especially safety concerns for drivers), and to enhance residents' sense of wellbeing (including access to greenery and nature). Physical features of buildings (such as the colour of materials used for a roof) can have significant implications for issues like glare and urban heating, both for residents within a building and for a city as a whole. It is not just about artistic preference.

   Often the planning system is used to design entire new neighbourhoods, the visual design of which must be future proofed to ensure they are a nice place for people to be and move around in. Without safeguards, they risk becoming slums even if more sensitive design choices may have been possible and inexpensive. Once in place, poor choices are baked into the urban fabric and are very hard to retrofit. And although some developers will no doubt choose to make sensitive design choices because people are willing to pay a premium for it, at the bottom end of the market that is much less likely to be the case.

c. It is not clear whether the Planning Bill retains jurisdiction to control views from *public* places (eg viewshafts for Auckland's volcanic cones). Clause 14 explicitly restricts the

[151] For example, councils still have responsibility for managing the infrastructure and supporting it with services (eg rubbish collection).
[152] See EDS's report on landscape protection at https://eds.org.nz/our-work/policy/projects/landscape-project/

control of private views (which is not itself inappropriate, given there are other mechanisms like covenants available to protect such views from being built out). However, it also prevents consideration of visual amenity generally (including the physical features of a building), which appears broad enough to cover controls on height and therefore the imposition of viewshaft overlays. The fact that regulatory relief does not cover such restrictions implies that they are no longer within the jurisdiction of plans (even if councils are willing to pay landowners for them).

d. Constraints on controlling (or even incentivising)[153] the external layout of buildings on a site needs reconsideration. Anecdotes about councils controlling things like where televisions go certainly sound like overreach, but the orientation and placement of structures on a site can have significant public interest implications. For example, the location of windows can minimise friction between neighbours; orientation of windows, walls and living spaces can impact on the energy efficiency of a residence (eg to maximise passive solar heating) and therefore potential pressure on the grid; north facing rooftops can provide opportunities for cheaper and more effective solar panels (and the resilience that comes with distributed generation).

e. Retail distribution effects should not be seen only as an opportunity for trade competitors to block market competition. Trade competition arguments are already prohibited elsewhere in cl 14. Rather, retail distribution effects can make a big difference to public interest outcomes, because central business districts and suburban centres have social and cultural value to communities, and are not just marketplaces for economic activity. The death of a town centre, and the removal of all commercial activity to suburban big box developments or energy hungry malls disconnected from the public realm, is a matter of substantial public interest.

f. "Well-functioning" urban and rural areas are still included in the scope of the Planning Bill, but this term is not defined in the legislation. That term needs to specifically encompass things currently included in the National Policy Statement on Urban Development, such as accessibility to green space, the reduction of greenhouse gases, and the provision of a mix of site sizes. It also needs to clarify that it allows the benefits of compact urban form to be considered.

g. Effects covered by other legislation are also excluded, creating considerable uncertainty about the respective scopes of the NEB and Planning Bill. This has particular risks when it comes to subdivision, which can only be controlled under the Planning Bill but which can have significant environmental effects that only fall within the goals of the NEB.

   This risk is heightened because the RMA's presumption against subdivision (that it cannot occur unless expressly allowed) is being reversed. In other words, the Planning

[153] A plan would not, for example, be allowed to provide for such design choices to be permitted activities in order to make them more attractive to developers, since the *consideration* of such factors is not allowed.

Bill allows subdivision as of right unless it is expressly restricted, but it can only be restricted on the basis of the goals in its cl 11 (which does not include the protection of indigenous biodiversity).[154]

There is also uncertainty as to what the respective roles of the Planning Bill and Building Act are when it comes to 'well-functioning' urban areas (and whether all urban design considerations are left to minimum standards for health and safety under the latter).

271. Overall, the narrowed scope of cl 14 presents significant risks from an environmental and urban planning perspective. These risks are exacerbated by the fact that cl 14:

a. Applies not just to the use of regulatory tools, but also to any other mechanism provided for under the legislation (eg incentives). Even though the intention is, presumably, to curtail regulation imposed on landowners, it goes much further and hamstrings the ability to take other measures.

b. Applies to *any* effects, not just the *adverse* effects of an activity. This means that a decision-maker could not take into account the *positive* effects that a proposal might have on things like community amenity or landscape and therefore cannot impose volunteered (so called *Augier*) conditions to secure those effects. If such effects cannot be taken into account, then (perversely) it may make discretionary consents (eg for urban development) more likely to be declined because there will be fewer benefits to set against possible adverse impacts.

272. The NEB is less explicit with respect to its constrained scope (there is no equivalent of cl 14 of the Planning Bill, and cl 14(c) of the NEB allows consideration of all effects as long as they are not already covered by the Planning Bill).

273. But scope constraints exist. This is because all functions, and therefore all instruments that discharge those functions, are limited by the scope of goals in cl 11. We addressed this point earlier in the context of environmental limits. Essentially, the goals dramatically reduce the scope of what Part 2 of the RMA provides for, because they heavily focus on defending environmental limits. There is a limited ability to protect, maintain or enhance the natural environment *above* those limits.

274. This essentially removes not only the RMA's obligation, but also any *ability*, for a regulatory authority to ensure the environment is in a better state than one which safeguards life-supporting capacity and prevents significant harm to human health. That is an extremely low ambition for our natural environment.

[154] Under cl 139 of the Planning Bill, planning consent authorities must have regard to adverse effects on people and the built environment (but not the natural environment), and relevant provisions of "key instruments" under cl 12 (which do not include natural environment plans).

275. The only real exception is the goal for no net loss of indigenous biodiversity in cl 11(d). However, this still leaves the level of ambition low (given that we have already lost a huge amount of biodiversity and habitat). And it is left unclear what the baseline for measuring 'net loss' actually is (and whether the Minister or councils have to undertake a process for determining this).

276. The Planning Bill is also limited in its ability to address environmental considerations because it is constrained by its goals. For example, there appears to be no ability for a territorial authority to consider the benefits of nature-based infrastructure, urban gardening and pollination, green walls, or health benefits of green space when making land use plans or deciding consents, unless such outcomes are within the scope of "well-functioning" urban areas. This could fundamentally transform the nature of 'planning' for district councils. In other jurisdictions, urban planning legislation is rife with references to environmental protection and wellbeing.[155]

277. Protection of ONFLs, significant heritage and high natural character under the Planning Bill is also more difficult than under the RMA, because the goals talk only about protection of their *identified* values and characteristics. If they are not identified (presumably in plans), they are not part of the statutory goals to be pursued and are beyond scope to consider.

278. One goal of the Planning Bill is "to maintain public access to and along the coastal marine area, lakes, and rivers". This excludes the RMA's direction to *enhance* access. It is reflected in provisions making it more difficult to create esplanade strips/reserves.[156]

Concluding remarks

279. We thank the Committee for considering our submission.

ENDS

[155] For example, the word 'environment' appears in Ireland's Planning and Development Act 801 times (on average, almost once per page).
[156] Planning Bill, cl 57.