



The Planning Bill and Natural Environment Bill (NEB)

Regulatory relief, environmental limits and standing

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Context

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

Regulatory relief - overview

- There is a framework in the Bills for compensating landowners. Essentially, this is where regulation affects how land is used.
- There are two slightly different frameworks: for 'specified rules' and other 'provisions' in plans.
- Both are premised on the idea that the enjoyment of property rights need to be protected more than under the RMA.
- But property rights are not (and have never been) absolute. There is a lack of evidence about the extent of regulatory impacts on landowners. And we need to think about what the actual effect of a relief framework will be for the environment.

Regulatory relief – specified rules

- First is the ‘specified rules’ framework. This applies to certain types of rules contained in the NEB and the Planning Bill.
- It’s useful to think about this in three key steps:
 - Figuring out if/when a ‘relief framework’ is required
 - What that relief framework looks like
 - Applying the relief framework on the ground

Regulatory relief – is a relief framework required?

- Before they're notified, 'plans' have to include a 'relief framework' if it is 'reasonably likely' that a 'specified rule' has a 'significant impact' on the 'reasonable use' of 'land'.
- Let's go through the key terms.

Regulatory relief – is a relief framework required?

- Before they're notified, 'plans' have to include a 'relief framework' if it is 'reasonably likely' that a 'specified rule' has a 'significant impact' on the 'reasonable use' of 'land'.
- Plans include plan changes (and include private plan changes and variations) but only if the rules are 'substantially different' from the operative plan.
- Rules, not policies?
- What about national direction?

Regulatory relief – is a relief framework required?

- Before they're notified, 'plans' have to include a 'relief framework' if it is 'reasonably likely' that a 'specified rule' has a 'significant impact' on the 'reasonable use' of 'land'.
- This only applies to *private* land, not public land or the common marine and coastal area.
- It doesn't apply to other forms of property (or quasi property like resource consents).

Regulatory relief – is a relief framework required?

- Before they're notified, 'plans' have to include a 'relief framework' if it is 'reasonably likely' that a 'specified rule' has a 'significant impact' on the 'reasonable use' of 'land'.
- There are four kinds of specified rule under the Planning Bill: ONFLs; areas of high natural character (around water bodies); significant historic heritage; and sites/areas of significance to Māori.
- There are three further kinds of specified rule under the NEB: SNAs; terrestrial indigenous biodiversity; sites/areas of significance to Māori.

Regulatory relief – is a relief framework required?

- Before they're notified, 'plans' have to include a 'relief framework' if it is 'reasonably likely' that a 'specified rule' has a 'significant impact' on the 'reasonable use' of 'land'.
- Specified rules under the NEB encompass all rules protecting terrestrial indigenous biodiversity – not just SNAs. This scope is extremely wide.
- It's unclear what is and isn't covered by 'terrestrial' indigenous biodiversity.
- And SNAs don't apply just to 'terrestrial' environments – they could encompass private marine areas and private beds of lakes/rivers.
- And what about non-indigenous biodiversity?

Regulatory relief – is a relief framework required?

- Before they're notified, 'plans' have to include a 'relief framework' if it is 'reasonably likely' that a 'specified rule' has a 'significant impact' on the 'reasonable use' of 'land'.
- It's not clear whether specified rules include those where the purpose of a rule applying to one parcel of land is to protect biodiversity on a *neighbouring* parcel (ie to stop spillover effects).
- And what about other people's property on someone's land – like wildlife, owned by the Crown?

Regulatory relief – is a relief framework required?

- Before they're notified, 'plans' have to include a 'relief framework' if it is 'reasonably likely' that a 'specified rule' has a 'significant impact' on the 'reasonable use' of 'land'.
- What's an 'impact'?
- What's 'significant'? It's left up to national regulations to decide (if Ministers want) or for councils to blaze their own trail (if they don't).
- And what happens if regulations change and shift the goalposts about the meaning of 'significant'?
- A 'reasonable use' is not defined and does not preclude uses having significant environmental impacts (eg extinctions).
- It's also very unclear what 'reasonable use' means when thinking about a landowner's expectations for *future* use.
- What does 'reasonably likely' mean?

Regulatory relief – if a relief framework is required, what does it look like?

- There are several obligations on councils once a relief framework is required. These apply *even if a relief framework is required because of national direction*.
- The council must assess how “material” the impacts of the rules actually are, in order to decide what kinds of relief to provide.
 - There are four statutory criteria for assessing how ‘material’ an impact is: restricted development potential (a big concern); obligations imposed on a landowner; constraints on reasonable use/enjoyment; and impact on land value.
 - There is also a power for regulations to add other criteria.

Regulatory relief – if a relief framework is required, what does it look like?

- The council must provide for how eligibility is to be determined.
- Relief is only available to *owners* of land (although the definition is ambiguous).
- There are some safeguards to stop the gaming of the system (eg if a landowner seeks an SNA in his/her own submission in order to obtain relief).
- You can't get relief if you bought the land after a rule was in place (since that would have been known and reflected in the price).
- But there is retrospective effect – relief is required if 'specified rules' under RMA plans are carried over into the new system.

Regulatory relief – if a relief framework is required, what does it look like?

- Relief can take different forms: cash, rates/fees relief, alternative development rights, land exchanges, and assistance (eg fencing etc).
- The mix is left largely to councils to determine. But national regulations can specify what kinds of impact will require particular types of relief.
- Appeals are available to the Environment Court for plans (and therefore relief frameworks within them).

Regulatory relief – applying it on the ground

- Councils must then notify landowners of their eligibility and entitlement for relief.
- There's a council review process if landowners consider the framework has not been *applied* properly to their property.
- A landowner then has a right of objection to the Planning Tribunal from the council's review.
- Only at this point will it become obvious what the financial implications of the relief framework are likely to be.

Regulatory relief – other planning provisions

- Both Bills (cl 122 NEB, cl 105 Planning Bill) provide for more general pathways for relief quite separate from those for specified rules. These are modified version of section 85 of the RMA.
- Here, relief is available for any plan ‘provision’.
- The Environment Court (on appeal) can direct a council to provide relief to the holder of an interest in land where a plan provision “severely impairs” the “reasonable use” of the land and “places an unfair and unreasonable burden” on him/her.

Regulatory relief – other planning provisions

- A “severe impairment” is not defined, but is a lower threshold than s 85 of the RMA, and the possibilities are concerning (eg restrictions on urban development on elite soils).
- There’s cause for concern where there are less than significant effects (eg increased traffic, loss of productive land, sedimentation).
- Unlike the specified rules pathway, relief, including cash compensation, is available *even where plans impose land use rules to protect common pool resources like freshwater*. There is no exception even where those controls are needed to defend environmental limits.

Regulatory relief – what’s the upshot?

- Both pathways for relief are likely to have a chilling effect. But despite its narrower scope, there are fewer safeguards for the ‘specified rules’ pathway, making it of greatest concern (especially for biodiversity).
- The potential cost for councils is high, dissuading legitimate regulation (or making it impossible if there’s a rates cap).
- The litigation risk is high, adding delay and churn at multiple points.
- Councils won’t know total costs until late in the piece, meaning that the framework adds high legal and fiscal risk that councils likely will try to avoid from the outset.
- There is a high risk of people gaming the system (overestimating lost development potential).
- It’s a double standard, because there’s no compensation for pollution of common pool resources (it’s even worse - compensation could be to a landowner if rules try to *stop* pollution!).
- There’s a risk it crowds out voluntary measures.

Regulatory relief – what's the solution?

- Get rid of the structured relief framework for 'specified rules' entirely.
- Keep the Bills' enhanced requirement for proportionality.
- Retain the RMA's general relief framework already in its section 85 (where land is rendered incapable of reasonable use)
- Add the ability to provide other forms of relief where that is the case (eg rates relief, not just buying out landowners).
- Add a more proactive process to 'screen' for rules that render land incapable of reasonable use.
- Specify that no relief is possible for controls seeking to protect common pool resources from land use.

Environmental limits

- The RMA has failed to draw lines in the sand – we need something new.
- There are some good building blocks in the NEB.
- But alongside the good there is the bad and the ugly. Overall, the limits framework is leaky.
- Let's explore the framework methodically in ten steps, starting from the top:
 1. What do the purpose/principles of the Bills say about limits?
 2. How is a limit conceptualised?
 3. What do limits have to cover?
 4. How are limits measured?
 5. What determines where limits are set? (very important!)
 6. Who sets limits and how is that done?
 7. How are limits translated into controls on human activity? (very important!)
 8. How else are limits defended?
 9. What happens if a limit is likely to be breached?
 10. What happens if a limit is breached?

Step 1 – purpose and principles (goals)

- The RMA's purpose and principles are effectively being replaced by the Bills' 'goals' provisions. These guide everything beneath it – they're at the top of the funnel.
- One goal under the NEB is enabling development within environmental limits. An explicit recognition of limits is positive.
- But this exists alongside several other goals (under the NEB and the Planning Bill), with no clear hierarchy.
- There is the risk that the same balancing approach is taken as has been taken under Part 2 of the RMA.
- The direction to 'seek to achieve' goals is also weak.
- Goals are also specifically subject to national direction, which is required to resolve conflicts between goals.

Step 2 – how is a limit conceptualised?

- An environmental limit is a description of a minimum biophysical state or a maximum amount of harm.
- It is not a regulatory restriction on human activity. This means setting a robust limit is not, by itself, sufficient.
- There are also two types of limit: for human health and for ecosystem health.

Step 3 – what do limits have to cover?

- Human health limits need to be set for freshwater, coastal water, land and soil, and air.
- Ecosystem limits need to be set for freshwater, coastal water, land and soil, and indigenous biodiversity.
- These are broad domains, and the Bill doesn't specify which attributes they need to cover. There are many places for decision-makers to hide.
- It's not clear whether limits *can* be set for other domains that fall within the definition of the natural environment (eg non-indigenous biodiversity or climate).

Step 4 – how are limits measured?

- It will depend on the domain and the relevant attribute. But limits have to be set within ‘management units’ – spatial areas.
- These must be appropriate to “achieve the purpose” of an environmental limit (for ecosystem limits, that’s life-supporting capacity).
- Limits can be complied with by offsetting harm within a management unit, and regulations get to determine when offsetting is ‘appropriate’.
- An offsetting approach has particular risks for indigenous biodiversity limits, because it could allow threatened or vulnerable species to be pushed towards extinction as long as the overall diversity of a much larger ecosystem is maintained.

Step 5 – what determines where limits are set?

- This is an extremely important piece of the puzzle.
- The ‘purpose’ of ecosystem health limits is to protect the life-supporting capacity of the natural environment.
- This is defined in the NEB (cl 45) as *the ability of ecosystems of the natural environment to support and sustain a diverse range of indigenous life over time and to be resilient (to withstand or recover from pressure and disturbances while retaining its essential qualities and functions).*
- One weakness is that this could allow the threat status of threatened species to get worse.

Step 5 – what determines where limits are set?

- There is greater cause for concern in other provisions.
- When councils are setting or changing limits, and when the Minister is creating methodologies for setting limits, there are a number of considerations that invite them to ‘balance’ environment against other things:
 - the needs or aspirations of communities for the economy and society
 - the extent of resources likely to be available for allocation
 - the implications ... for current and future use of natural resources and the benefits associated with that use
 - the cost of available methods for managing within the proposed limit
 - alternative ways of providing for natural resource use that are consistent with protecting or enhancing the natural environment
- The Minister/regional councils must also consider various matters when determining how urgent or important particular limits are. This could allow things seen to be less important to be put on the back burner.

Step 6 – who sets limits and how is that done?

- Human health limits are set in national standards.
- Ecosystem health limits are set by regional councils in natural environment plans using national methodologies.
- There is a big grey area in between (eg are nitrates in groundwater about human health or ecosystems?)
- This approach is treating core elements of environmental health as matters for local democracy to weigh up, as if other New Zealanders have no interest in such outcomes.
- It's also not clear whether Ministers have the power to set ecosystem health limits themselves.
- Even if they can, regional councils can (and no doubt in some places will) make them weaker if they produce a justification report.
- There is no real independent input into the limits setting process (eg a limits and targets review panel envisaged by the Natural and Built Environment Act).

Step 7 – how are limits translated into controls on human activity?

- This is one of the most crucial aspects of the limits framework. A limit itself (a description of a minimum state) is not enough.
- There are 5 places where limits can be translated into meaningful restrictions:
 - national standards
 - spatial plans
 - regulatory (NEB) plans – where the rubber really hits the road
 - private plan changes
 - consents (permits).
- Some elements of the Bills are positive, but others need shoring up.

Step 7 – how are limits translated into controls on human activity: national standards

- National standards (ie regulatory controls) prepared by the Minister must enable resource use only *within* environmental limits. That's positive.
- Yet the Minister only has to use 'reasonable endeavours' to ensure that limits are not breached.
- If there's a risk of limits being breached, the Bill requires rules/consent conditions that are more restrictive than the standard, more restrictive activity status, and monitoring/forecasting. That's also positive.
- But councils require justification reports wherever they depart from national standards, which involve a cost-benefit approach to decision-making and an extra hurdle to jump through. Even under the RMA, stringency has been tough to do (eg for strengthening forestry standards).

Step 7 – how are limits translated into controls on human activity: spatial plans

- Spatial plans must be consistent with environmental limits and map out the ‘spatial implications’ of limits. That’s positive.
- But there’s a timing issue – spatial plans are being prepared before limits are being put in place.

Step 7 – how are limits translated into controls on human activity: NEB plans

- NEB plans must ensure that limits are complied with once they are set. That's positive.
- However, this is weakened by three things.
 1. The regulatory relief framework (especially for biodiversity, where many regulatory controls may effectively have to be purchased)
 2. Constraints on the use of the effects management hierarchy (true limits will require the *avoidance* of effects, but plans are not allowed to include any effects hierarchy unless national direction specifically allows them to).
 3. Constraints on the use of regulatory tools to comply with limits. It's worth delving into this a bit deeper...

Step 7 – how are limits translated into controls on human activity: NEB plans

- Constraints on the use of regulatory tools to comply with limits
 - There are 2 tools available to councils to manage resources subject to a limit: a cap on resource use, and an action plan. This is a crucial link between aspiration (the limit) and the tools required to actually defend it.
 - A cap 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 (extent of an activity), an input (eg maximum amount of fertiliser), or an output (eg nitrate volume).
 - An action plan is an open ended suite of other interventions a regional council (and others) can take. It can include caps, but does not have to.

Step 7 – how are limits translated into controls on human activity: NEB plans

- Regional councils must give first preference to *only* using a cap. That's good.
- But they do not have to do so if it is not effective or feasible.
- 'Feasibility' is a big red flag. Whether a cap is 'feasible' depends partly on how many other causes of environmental degradation there are (and most environmental issues have multiple causes).
- An action plan is useful to create an integrated set of interventions, but by itself is not a suitable replacement for a cap. It doesn't give a clear line in the sand.
- And although an action plan *can* include caps, it's *harder* for that to happen once a decision has been made to create an action plan. That's because it specifically *cannot* include controls on inputs or land use unless non-regulatory measures are first shown to be inadequate.

Step 7 – how are limits translated into controls on human activity: NEB plans

- But let's assume a cap *is* seen as effective and feasible, so there's no need to create an action plan.
- There's no real process for creating a cap (Ministers are simply empowered to establish a process). This means they may not be robust.
- Do caps have direct regulatory effect? Are they themselves 'rules'? It doesn't sound like it ...
- Do regulatory plans have to give effect to caps? Again, that's not obviously the case ...
- In fact, translating caps into meaningful regulatory restrictions is being made *hard* to do. Any land use controls or input controls in a regulatory plan are only allowed if a council can explain why non-regulatory tools are not enough (this is a recurring theme).
- It's even harder to give teeth to indigenous biodiversity caps, because *any* of these 'specified' rules require a justification report that involves a cost-benefit analysis.

Step 7 – how are limits translated into controls on human activity: private plan changes

- Private plan changes *can* be rejected on the grounds they would be inconsistent with limits.
- However, that is not *required*.

Step 7 – how are limits translated into controls on human activity: permits

- Permits under the NEB cannot be granted if they would result in the breach of an environmental limit. That's good.
- But there is a significant exemption for infrastructure having significant public benefit, which gets to be defined through regulation.
- In doing so, the Minister has to consider the “wider implications for natural resource use” – a vague phrase that could mean anything – as well as the criteria for limit setting (which includes things like the aspirations of communities for the economy).
- It's also possible that exemptions could be quite specific (for pet projects).
- And the Fast-track Approvals Act remains as a de facto exemption to limits for projects subject to that Act.

Step 8 – how else are limits defended?

- Regional councils must avoid breaching an environmental limit.
- This general duty on regional councils (beyond just ensuring that *NEB plans* comply with limits, and consents don't breach them) is very important, because some causes of a breach may lie beyond the ability of a plan to address.

Step 9 - what happens if a limit is likely to be breached?

- If a breach of a limit is likely, a regional council must take some form of action. “Likely” is a worryingly high threshold of probability.
- A council has to either change its natural environment plan *or* prepare an action plan. This gives complete freedom for non-regulatory responses.
- And, again, even if a breach is likely, input and land use controls are not allowed unless non-regulatory measures would be inadequate.
- Other (stronger) responses are possible, but only if they are considered *necessary*. They include the creation of a cap, a change in rules, the review of consent conditions and changes in how resources are allocated.
- It’s unclear whether this includes reviewing conditions of *existing* consents, or is limited to conditions imposed on new consents (the drafting isn’t clear).

Step 10 – what if a limit is breached?

- Councils must report on any breaches of limits. That's good.
- There are also two automatic consequences of a breach:
 1. The preparation of an action plan.
 - This can rely entirely on non-regulatory measures and has no statutory process.
 - Even when a breach *has occurred* it still cannot include input or land use controls unless non-regulatory measures are explored first.
 - It only has to set an open-ended timeframe (10 years plus) by which limits need to be adhered to again. This could create a cycle of breaches and then extended periods trying to resolve them.
 - It can rely heavily on other agencies' interventions, despite councils having no powers to bind them.
 - Targets (including interim targets) in action plans must avoid unnecessary delay, but they have to be 'credible' and 'achievable'.
 2. The review of a cap on resource use.
 - But if a cap on resource use does not exist already, it is required only if considered 'necessary'.
 - A change to a natural environment plan and review of consent conditions are also required only if 'necessary'.
 - And there's no ability to review the conditions of exempted infrastructure.
 3. Is there a third response....? Changing the limit itself to reflect economic aspirations!
(see earlier discussion)

Standing - consenting

- Under the Planning Bill, public notification of consents has to occur where the effects on built environment are more than minor.
- Under the NEB, public notification will be allowed only where proposals generate “significant” adverse effects on natural resources or people. This is inappropriate, since environmental impacts are often on common pool resources in which all New Zealanders have an interest.
- Even where there *are* significant effects, submitters will have to ‘reside’ in the relevant region to submit. This includes ratepayers, infrastructure providers, corporates who operate in the region, and those who live there.
- But it cuts out many who have a legitimate interest in environmental protection, including watchdogs.

Standing - planning

- Submissions (and appeals) on the merits of plans are very limited – they're allowed only where a plan departs from standardised provisions (eg standard zoning rules) in national direction.
- Where a plan's just a bunch of standardised national rules, appeals are only allowed on points of law.
- This is inappropriate, as it may encourage councils to paint by numbers in situations where bespoke solutions are required (eg the Mackenzie Basin).
- Constraints on appeals may effectively remove judicial oversight of the system, including for the setting of environmental limits and the rules required to defend them.
- It is heavily reliant on the ability of national standards to provide a menu of rules that is suitable for every single part of the country, which may be possible in urban spaces but will be unlikely for rural and other areas.
- Submissions can be made only by residents, otherwise you have to show you have an interest greater than the general public. This is another barrier to environmental groups operating at the national level, who provide an essential check and balance.

Conclusion

- Although many changes are needed, lawmakers need to fix three key things: regulatory relief, environmental limits and standing.
- Regulatory relief should be stripped right back, with a focus on better implementing the RMA's existing protections for private property and ensuring proportionality of regulation.
- The bones of an environmental limits framework are there, but there are big holes that need to be plugged.
- Constraints on standing (to submit and appeal on merits) have gone overboard, especially for plan making, and need to be pulled back.