



Planning Bill and Natural Environment Bill

Environmental limits: Ministerial discretion and the relative 'protectiveness' of ecological health limits

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How environmental limits are framed and applied has direct implications for environmental outcomes, regulatory behaviour, and system credibility. While the framework for human health limits appears reasonable, as currently drafted, it is unclear what level of environmental protection ecosystem health limits will be required to achieve.

While the NEB describes the purpose of ecosystem health limits as being to 'protect the life-supporting capacity of the natural environment',¹ the legislation provides no clear indication of what sort of protection any limits may yield. This gives the NEB the appearance of being focused on protection, but the way the Bills are drafted means that it is impossible to say whether *any* environmental protection will be forthcoming, or whether protective limits would remain so with a change of minister. This is because of the wide discretions granted to the Minister to fine tune so many critical elements of the system, without clear guidance from the primary legislation as to what must be achieved.

The limits that issue from such a system could range from delivering outcomes that promote development at the expense of the environment, to outcomes which promote protection of the environment at the expense of development. The outcome appears to depend almost entirely on the intentions of the Minister in charge.

I set out below several examples of where ministerial discretion can affect how 'protective', or otherwise, ecosystem health limits might be. The examples used are illustrative only. The sequence in which they are presented is not an indication of their relative importance nor are they necessarily the most consequential areas of ministerial discretion.

1. The Minister may **particularise the goals** set out in clause 11 of the NEB.² This could include further defining what "life-supporting capacity" means (since the statutory definition is neither particular nor objective). For example, a Minister could particularise life supporting capacity to mean:
 - a) the presence and abundance of a diverse range of indigenous invertebrate, plant and algae species; or
 - b) the presence of at least one indigenous invertebrate species and at least one indigenous plant or algae species, regardless of diversity or abundance.
2. When particularising the goals, the Minister may **prioritise the goals and set out how conflicts between goals are to be resolved**.³ For example, where there is conflict:
 - a) Environmental protection goals in the NEB could be promoted over PB development goals, such as supporting and enabling economic growth by enabling the change and use of land, and enabling competitive urban land markets; or
 - b) Development goals could be favoured over environmental protection goals.

Alarmingly, the Minister may not even need to prioritise goals or resolve conflict between them. At the extreme end of the scale, the Minister may particularise the goals of one Act in

¹ NEB cl 46(b).

² NEB cl 78(1).

³ NEB cl 69 and 81.

such a way that narrows how they are to be interpreted and applied, thereby allowing the goals of the other Act to prevail – avoiding the need to prioritise or resolve conflict across the Acts. The Minister would have no obligation to consider whether national policy direction would achieve development within environmental limits, or the current and long-term impacts of such policy direction on people and the environment. This is because there is no obligation for a Minister to do anything until NEB clause 81(1)(b) is engaged, and a Minister may particularise and draft national direction in a way which avoids engaging this clause.

3. The Minister may **determine, through national standards and regulations**, how limits may be applied, achieved or implemented.⁴ This could include anything from what domains require limits, to how those limits must be expressed. The Minister can also direct how considerations such as information and uncertainty are to be treated. For example, the Minister could direct the use of:
 - a) The most robust information that can be obtained, necessitating the gathering of new information if it does not already exist or is insufficient, and the application of the precautionary principle in all situations; or
 - b) Less robust, best obtainable information where it is the only information that is available, with restrictions on the application of the precautionary approach in the absence of better information. This is readily conceivable in the context of the procedural principles requiring those exercising powers, functions and duties under the Bills to be solutions focused and enabling.
4. The Minister can **direct methodologies** that must be applied to limit setting.⁵ For example, the Minister could direct the methodology for assessing costs and benefits that must be used by regional councils. This could include:
 - a) Use of the Treasury discount rate geared towards the long term (e.g. 2% or less) and assessment of all monetary and non-monetary costs and benefits; or
 - b) Use of the Treasury discount rate geared towards the short term (e.g. 8%) with the focus on quantifiable monetary values for costs and benefits including a requirement for environmental services and non-monetary costs and benefits to be omitted.
5. The Minister can **decide whether or not to set minimum acceptable limits and where they are to be set**.⁶ For example:
 - a) Minimum acceptable levels could be set to protect the current state of affairs where the environment is considered healthy (to avoid degradation) and to drive improvement where degradation or poor environmental health is observed; or
 - b) Minimum acceptable levels could be set which allow degradation to maximise headroom for additional activity and intensification of existing use and development.

I note that a regional council is not required to adopt a minimum acceptable level when setting ecosystem health limits. However, the additional obligations that a regional council must comply with when departing from a minimum acceptable level may disincentivise councils from determining ecosystem health limits that may be more appropriate for their regions.

How the goals are particularised, and the methodologies directed by the Minister, will constrain where and how regional councils are able to set ecosystem health limits.⁷

⁴ NEB cl 84(1) and (3), cl 59(2).

⁵ NEB cl 84, cls 52 and 54.

⁶ NEB cl 54(3).

⁷ With particular regard to the considerations and trade-offs required to be made when setting limits, in accordance with NEB cls 56 and 57.

To illustrate, ecosystem health limits set using:

- The requirements framed by ministers using the approaches set out above in the (a) paragraphs are likely to lead to fairly protective ecosystem health limits, which seek to avoid degradation, and to drive progressive improvement where degradation is observed. The regulatory plan(s) would likely promote regulatory controls over non-regulatory methods and focus on achieving an uplift in environmental performance from existing activities and/or other changes to improve environmental conditions (e.g. encourage land use change).
- The requirements framed using the approaches set out above in the (b) paragraphs are likely to see limits set at a level which allows for new activities and intensification of resource use, and permits a consequential increase in pollution and environmental degradation. The regulatory plan(s) would likely include liberal use of permitted activities, and promote the use of non-regulatory measures, over effects or activity based regulatory controls.

In total, there are at least five statutory opportunities for ministerial discretion to influence where and how ecosystem health limits might be set. Parliament is effectively being asked to delegate environmental protection to the Executive on terms that are completely open-ended. This may be legitimate, but it is, in effect, saying that Parliament can find no operative language it could place on the face of the statute that would provide assurance that a minimum level of environmental protection would be achieved. The single exception to that is NEB clause 80(2)(c), which requires the Minister to be ‘satisfied’ that any direction, which restricts how a goal may be achieved, “will not result in severe and irreversible adverse effects to people and the environment”. This comes close to saying that a Minister should only be constrained by the risk of catastrophe. Any other environmental risks are acceptable. If this is the standard the legislation is proposing it suggests a massive step backwards in New Zealand’s environmental management ambitions.

I would like to be clear that there *are* matters on which ministerial direction could be useful to limit setting. I have published a detailed report on the use of catchment scale modelling and noted the huge number of different models that have been deployed.⁸ Direction on things like models and methodologies could be very useful. But the discretions granted to the Minister by these Bills go far beyond technical matters.

Given the vastly different outcomes that may be operationalised through the proposed limits framework (and the downstream regulatory environment), the committee should decide how comfortable it is leaving such wide-ranging discretion to direct outcomes in the hands of the Minister. The committee could direct officials to provide options for more objective ways limits could be described in the statute that provides more certainty about the level of ‘protectiveness’ they would deliver, regardless of who the Minister might be.



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⁸ Parliamentary Commissioner for the Environment (PCE), Wellington, 2024. A review of freshwater models used to support the regulation and management of water in New Zealand.