Blueprint for RM reform - Minority Report

Paul Melville

12 March 2025

1. Summary – quick guide to differences between EAG Report and Minority Report

	EAG Report	Minority Report
Scope	Descriptive purpose statement for each act. Scope of each act is *focused* on externalities, but some internal elements of property use are regulated. Aspects such as cultural impacts, elite soils and well-functioning urban and rural environments are regulated. Landscapes are included in the natural environment act.	Purpose statement of each act is used to manage scope explicitly to externalities. The Natural Environment Act only regulates physical environmental effects. Intangible effects such as landscapes are included in the Planning Act. The Planning Act also has scope to manage efficient provision of infrastructure.
Materiality	Material effects are those that are 'more than minor'.	Materiality in the Natural Environment Act is determined by defining quantitative materiality thresholds for each natural environment domain. Materiality in the planning act is managed by the minister defining nationally standardised zones.
Policy goals	Policy goals include creating well-functioning urban and rural environments, safeguard the life-supporting capacity of air, water, soil and ecosystems, and recognise and provide for the relationship of Māori and their culture and traditions (including kaitiakitanga) with their ancestral lands, water, sites, waahi tapu, and other taonga and protected customary rights.	Policy goals for the Planning Act should be specific in nature, such as the goal to provide 30 years of plan-enabled development capacity. Policy goals for the Natural Environment Act should empower councils to set environmental limits that balance trade-offs. Examples are given and it is suggested such goals should be the subject of specific consultation.
Decision making principles	Decision-making principles include needs of future generations, those who produce externalities (including pollution) should bear the cost of remediating or mitigating, and a potential hierarchy of obligations (avoid, minimise, remedy, offset, compensate).	Recommends that decision-making principles may not be needed. If they are included, need to be specific and based off Cabinet Paper direction.
Treaty of Waitangi	Treaty of Waitangi clause replicates that in the RMA, including all persons exercising powers and functions shall take into account the principles of the Treaty of Waitangi.	Descriptive Treaty of Waitangi clause outlining how existing Treaty settlements are to be provided for. Decisions are made by councils and aim to serve all community stakeholders.
Role of technicians	IHPs hear general submissions on plans and make recommendations to councils. Where councils do not follow IHP recommendations, plans can be appealed on merit.	Plans can only be appealed on points of law.

Regulatory takings	Landowners can apply to the Environment Court for compensation for a regulatory taking with a presumption of no regulatory taking where the overlay was identified by a national methodology.	Where a council wishes to place an overlay (ONL, SNA, SASM) on a property, they must first agree a compensation value with the property owner. Disputes should be referred to either the Planning Tribunal or existing Land Valuation Tribunal (established under the Public Works Act).
Environmental limits	Environmental limits to protect human health are set nationally. Other environmental limits are set regionally following a process to protect life-supporting capacity for key attributes of mandatory domains. NEA must require that limits are complied with, including transition pathways to reverse over-allocation.	Regulation prescribes the attributes for which regional councils must set environmental limits. Regional councils set environmental limits balancing economic, social and environmental trade-offs.
Allocation	Movement away from first-in first served. Different allocation systems are defined in national direction, including market-based, merits-based (discretionary consents), standards. Regional councils choose allocation system best suited to local circumstance.	Primary legislation is more specific on what allocation systems should be used for each environmental domain. Primary legislation requires the Minister to make regulation to enable: - Air quality to be managed by standards - Biodiversity offset system to be established - Water quantity to be managed with cost-recovery for water storage & managed aquifer recharge, and water trading where needed - Water quality to be managed primarily through national standards that are flexible for local conditions (including Freshwater Farm Plans)
Fast track regime	Fast-track regime not included in EAG Report.	Recommend a fast-track regime included in Natural Environment Act called "Environmental Impact Assessment." This allows complex projects to take a streamlined approach to environmental assessments, assessed by an expert panel but final decisions made by elected decision makers. Planning permissions are fast tracked through inclusion in spatial plans.

2. Context

2.1. The primary role of the Expert Advisory Group was to prepare a workable blueprint to replace the RMA, based on the legislative design principles agreed by Cabinet in the Cabinet Paper 'Replacing the Resource Management Act 1991' (the Cabinet Paper).

2.2. The EAG completed most of its work over a 13-week period from late September to late December 2024. I contributed to much of the material in the EAG Report and I agree with many of the recommendations.

2.3. However, in certain areas I view that alternative approaches to those set out in the EAG Report would more strongly respond to the Cabinet design principles and reduce the risk of carrying over challenges from the Resource Management Act (RMA) into the new system. This minority report details these areas.

3. Problem Definition

3.1. The 'problems' of the RMA are broad and numerous. Rather than list them all, I will touch on a few that I believe are important to consider and that are not raised in the Final EAG Report.

3.2. **Integrated Management.** The RMA integrates management of town planning and environmental management into a single statute and single set of policy instruments. This results in broad policy goals, broad scope and policy instruments (such as resource consents) that are unsuited to many of the elements the RMA manages. For example, resource consents are used to grant permission for a new motorway or harbour bridge, assess if a house can be built outside of zone rules, and assess if a farmer can change land use. This has resulted in inefficiencies as tools are not suited to need.

3.3. The broad nature of primary legislation has also meant that large volumes of policy objectives have had to be developed through secondary legislation, adding complexity and contradiction to the system.

3.4. This integrated management approach sits in contrast to the approach used in other OECD countries where separate laws govern planning and environmental management, and policy instruments are tailored for the specific issue.

3.5. **Broad purpose statement and definition of effects.** Related to the broad scope, the RMA has a broad objective of promoting the sustainable management of natural and physical resources. The RMA's definition of effects includes any effect, including effects on economic growth or internal to a property. This has allowed planners to have a say over how private land is used even when there is no material externality on a third party. This includes how houses and infrastructure is designed and what types of development can occur where. This has reduced investment flexibility and increased costs for housing and infrastructure.

3.6. **Democracy and the role of technicians.** Democratic decision-making that is responsive, accountable, peaceful in transition, inclusive and transparent is seen as the best predictor of long-term economic prosperity. However, within our democratic system we appropriately view that some decisions are best made by technicians. Some examples include central banking, decisions related to what food is safe to eat, what medicines are approved for human use, etc. In each case, technicians are appointed by elected decision-makers.

3.7. RMA processes have suffered from being unsure if it is better to allow elected decision-makers to make decisions about environmental limits and planning, or technicians. Elected councillors are superficially responsible for decision-making, but such decisions are often then reviewed by specialist hearings panels or appealed to courts for final decision. This reliance on technicians for what are inherently political decisions can lead to RMA decisions that lack responsiveness to community needs. While there is always a role for technicians in the system, the RMA has lacked a clear delineation between what decisions are political (e.g. what the environmental limit should be) and what aspects are apolitical / technical (e.g. enforcement, environmental monitoring).

Dissenting opinion on some aspects of EAG Report

4. Property Rights

4.1. The concept of property rights consists of separate and overlapping rights to possess, use and dispose of property as wished.[1] This right is tempered where the actions of one property owner can have a negative external effect that impacts the property rights of a third party (an externality).

[1] Guerin, K. (2003). *Property Rights and Environmental Policy: A New Zealand Perspective.* New Zealand Treasury.

4.2. In simple terms, a system that is based on the enjoyment of property rights is a system that is limited to only regulating material negative external effects on a third party. Property owners are free to make decisions on how to use their own property, when no negative externality arises.

4.3. In contrast, a system that isn't based on property rights is one that regulates use of private property even when there is no negative externality. An example is the way the RMA can regulate effects internal to a property such as the design of a home or how highly productive lands are used.

EAG Report on Property Rights

4.4. The EAG Report recognises that preserving property rights requires a focus on only regulating externalities and recommends that new legislation is limited to regulating only negative externalities. However, other recommendations provide for the scope of the statutes to creep beyond an externality-focused approach.

4.5. In relation to the Natural Environment Act, a focus on property rights would require that legislation only regulate negative externalities on the natural environment. However, the EAG Report recommends the Natural Environment Act regulate:

4.5.1. **Landscapes.** Landscapes are intangible human values. There is an argument that planning layers may protect some special areas from inappropriate development. However, including landscapes in an environment act risks rules and regulations that dictate to property owners how land is used even when there is no negative externality on the natural environment (air, water, biodiversity).

4.5.2. **Recognise and provide for the relationship of Māori with their culture and traditions with ancestral lands, water, sites, etc**. Protecting culture and tradition is a broad concept that go beyond the scope of protecting the natural environment. Including such concepts within the scope of the Natural Environment Act risks the ability for activities to be regulated even when there is no material negative externality on the natural environment. For example, mixing of water from one water body with another, under the RMA, has been viewed as having cultural impacts even if there are no physical environmental impacts.

4.6. In relation to the Planning Act the EAG Report recommends,

4.6.1. **Highly productive lands / elite soils.** A system based on property rights would allow landowners to determine the best use of highly productive lands. Regulating highly productive lands allows a regulator to prohibit development, not based off negative external effects on the environment, but rather on a view that land is better used for one purpose over another.

4.6.2. **A goal of well-functioning urban and rural areas.** The EAG recommends that planning needs a "more positive focus". It is recommended that planners are required to achieve well-functioning urban and rural areas.

4.6.3. This goal needs to be carefully defined in legislation to ensure that a narrow scope is maintained. The National Policy Statement on Urban Development (NPS-UD) Policy 1 defines the minimum requirements of well-functioning urban areas.

4.6.4. In the event that 'well-functioning urban and rural areas' is a term caried over to the new system, care needs to be taken to define this term in a way that avoids it being used to regulate broad matters that are not externalities or closely related to efficient infrastructure provision. For example, in a paper 'Defining a Well-Functioning Urban Environment' prepared by Auckland Council, 25 additional priorities for inclusion within the term 'well-functioning urban environment' were identified, including aspects such as active frontages, inclusive

neighbourhood designs, buildings designed to minimise resource consumption, visual interest, visual complexity, enabling regenerative food production using urban agriculture, and shortening supply chain length.

4.6.5. Such concepts quickly raise the possibility that planners could place conditions on building design or land use in the name of 'well-functioning' areas.

4.7. The Purpose section of an act is an opportunity to confirm the scope of the act and prevent such mission creep. Regulations and provisions are not able to go beyond the purpose of the act.

4.8. The EAG Report recommends a broad descriptive purpose for each act. For example, the purpose proposed for the Natural Environment Act is "To establish a framework for the use, protection and enhancement of the natural environment."

4.9. I have a concern that, while the proposed acts may have strong definitions of externality, a broad purpose statement will allow each act to increase in scope as goals and decision-making principle are defined. Particularly as the EAG Report already views the Planning Act including the regulation of land based off things such as protecting elite soils, achieving well-functioning urban and rural areas and protecting ancestral relationships. This leads to an act that has only a partial focus on protecting property rights, but also the ability to direct land use outcomes.

4.10. It may be useful to reflect that, when the RMA was first legislated, it was also characterised as a law that was focused on managing externalities and that would have fewer and more targeted interventions. It appears it was not by design that the RMA devolved into a system that allowed councils to require 40,000 resource consents per annum and control matters such as the location of doors and balconies, but rather a behaviour that was allowed to emerge over time due to the broad scope of the Act. Quotes from Hon Simon Upton at the third reading of the Resource Management Bill 1991 include,

> *"For the most part, decision makers operating under the Bill's provisions will be controlling adverse effects---especially in the use of private land… Benefits will flow from there being fewer but more targeted interventions… The current law [meaning the law prior to the RMA] allows---indeed, encourages---almost limitless intervention for a host of environmental and socio-economic reasons…. In adopting the present formulation of [the bill] the Government has moved to underscore the shift in focus from planning for activities to regulating their effects of which I have spoken. We run a much more liberal market economy these days. Economic and social outcomes are in the hands of citizens to a much greater extent than they have previously been. The Government's focus is now on externalities---the effects of those activities on the receiving environment."*[2]

4.11. The point to underscore here is that it is not enough to have *intentions* of focusing the new laws only on managing externalities: if scope is allowed for control of private property, it can be expected that it will, over time, be exploited. Care needs to be taken to maintain a tight scope in the new laws to avoid a repeat of the experience that has played out over the last 34 years with the RMA.

Recommended way forward.

4.12. A Cabinet agreed design principle is to narrow the scope of the resource management system and the effects it controls. Having open purpose statements for both acts risks this design principle not being fully achieved. Each new act should clearly define its scope in its purpose section. For the Natural Environment Act, it should be limited to only managing material adverse effects on the natural environment. The Planning Act

[2] See historical Hansard 516 here: https://www.parliament.nz/en/pb/hansard-debates/historical-hansard/#1990

needs to provide some scope for efficiently planning infrastructure, prevention of inappropriate land use, and planning of the coastal marine area. Table 1 provides a starting point for how this can be done.

Table 1: Purpose statements of Natural Environment Act and Planning Act

Core elements	Natural Environment Act	Planning Act
Purpose	The purpose of this act is to establish a framework for the management of material external effects on the natural environment. In this Act, ***External Effects on the Natural Environment*** *are the:* - Taking of freshwater, other than coastal water - Discharge of contaminants to freshwater - Consumption of geothermal resources - Damage to indigenous biodiversity areas - Discharge of contaminants to air, other than greenhouse gas emissions - And include physical environmental effects only	To establish a framework for the planning and regulation of land use so as to: (a) Manage material external neighbourhood effects (b) Allow the efficient planning of infrastructure (c) Enable the prevention of inappropriate land use on areas of high public value, such as areas of cultural significance or outstanding landscapes, subject to appropriate landowner compensation (d) Allocate and manage the use of space in the coastal marine area In this Act, ***External Neighbourhood Effects*** are: - Shade - Noise - Odour - Vibration - Human health impacts of air pollution - Land movement (earthworks, inundation, erosion)
Other considerations provided for in this definition	None	The use of planning tools to allow the efficient provision of infrastructure. The use of planning tools to support the provision of public greenspace and recreational areas. The use of planning overlays to protect areas from inappropriate use or subdivision, subject to compensation for regulatory takings. This is expected to include avoiding subdivision on historical battle sites,

		urupā, outstanding natural landscapes, outstanding natural features, and so on.

Notes on Table 1

4.13. **Well-functioning urban and rural environments.** The Planning Act will also need to allow for the planning of urban areas to allow efficient provision of infrastructure, public greenspace and recreational areas. The definition in Table 2 aims to do this carefully to avoid potential expansion of scope.

4.14. A broader reference to well-functioning urban areas risks the scope of the act becoming too broad, as "well-functioning" could reasonably mean managing various issues such as housing design principles, greenhouse gas management, traffic management, and other matters mentioned in the Cabinet Paper as expected to fall outside the scope of replacement legislation. This is evident in the EAG Report's recommendation that highly productive land rules fit within the goal of well-functioning environments.

4.15. **Coastal marine area and landscapes.** The Planning Act controls where development can occur whereas the Natural Environment Act is focused on physical adverse effects on the natural environment.

4.16. The EAG Report recommends that the Natural Environment Act be used to manage both allocation of space in the coastal marine area and protection of landscapes. This would broaden the scope of the Natural Environment Act beyond negative externalities on the environment. As both matters largely relate to control of where built development can occur, I recommend they are included within the Planning Act.

4.17. **Highly Productive Lands.** Highly productive land is protected under the RMA with the objective of keeping this land in primary production. The 'problem definition' and evidence base for why regulation is needed to keep land in primary production isn't clear. Figure 1 shows that vegetable prices have not increased beyond the rate of inflation, indicating that potential fears of a shortage of leafy greens may not be justified. Protected highly productive land covers 15% of New Zealand's land area, yet only 0.3% of New Zealand is used for vegetable growing. Of the land that is identified as highly productive, only approximately 2% of this is occupied by urban areas (lots up to 4,000m² in size).

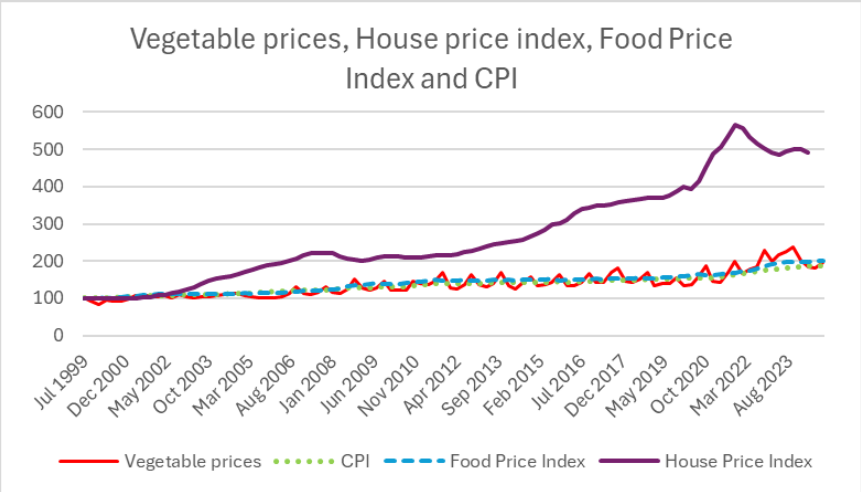

Figure 1: Vegetable prices, food prices, CPI and housing prices, since 1999

4.18. The policy rationale for favouring primary production land use over housing is also not clear. While there are obvious health benefits to eating vegetables, there are also health benefits to having affordable

housing. There may also be more of a shortage of land available for housing than land available for vegetables. Figure 1 shows that it is housing prices, rather than food prices, that have increased at a rate faster than inflation.

4.19. The Cabinet Paper states, "The resource management system should not attempt to specify or direct development outcomes that are better determined by landowners and developers themselves in response to demand." Deciding whether land should be used for housing, vegetables, other forms of primary production, solar farms, or even a use such as recreation (horses), or retired from use altogether (biodiversity covenant), is a clear example where outcomes are better determined by private individuals in response to demand.

4.20. Allowing the system to specify what land is used for to achieve goals related to economic growth or food production risks broadening the scope of the system beyond managing material adverse effects and into a space of achieving broader policy goals. Such a system could allow for many of the regulations that have occurred under the RMA and that Cabinet wants to prevent. I recommend that protecting land based on its productive capacity is beyond the scope of either act.

5. Material adverse effects

5.1. The Cabinet Paper states the replacement system must be based on the enjoyment of property rights and focus on managing material environmental effects. This is interpreted as a direction to further narrow the scope of both acts by considering how materiality thresholds can be better used.

5.2. The RMA does not regulate effects that are considered "de minimis". The EAG Report recommends increasing the threshold for materiality to a presumption that land use is enabled, unless there are minor or more than minor effects or where it is necessary to manage significant cumulative effects (paragraph 89 and 92). Note 'more than minor' is language carried over from the RMA. The meaning of more than minor has been defined in part by court decisions under the RMA.

5.3. One of the Cabinet design principles is that a new system provides "less litigious processes" and "more accessible legislation". I do not believe that stating effects that are 'no more than minor' achieves this cabinet principle as system participants would need to continue to test what is and isn't regulated in the system through court processes. Even as a member of the EAG Group, in asking for advice on what this recommendation would mean in practice, it was difficult to understand clear implications for how materiality would be different under such a definition (for example, would a developer clearing 200m^2 of regenerating forest be considered a more than minor impact on biodiversity).

5.4. A review of overseas jurisdictions shows that materiality thresholds are generally defined either in primary legislation or via regulation in quantitative, rather than qualitative, terms. For example, for water abstraction, regulations under the UK Water Resources Act state:

> *"The restriction on abstraction shall not apply to any abstraction of a quantity of water not exceeding twenty cubic metres in any period of twenty-four hours, if the abstraction does not form part of a continuous operation, or of a series of operations, by which a quantity of water which, in aggregate, is more than twenty cubic metres is abstracted during the period."*

Recommended way forward

5.5. Materiality thresholds should be quantified in either primary legislation or regulation. The following are some illustrative examples:

5.5.1. Water abstraction:

5.5.1.1. Maximum volume of water abstracted per day

5.5.1.2. Alongside permitted purposes such as domestic use, stock water, firefighting, etc.

5.5.2. Biodiversity: Maximum areas of scrubland, regenerating forest, wetland, that can be cleared without regulation.

5.5.3. Water quality:

5.5.3.1. As an example, restricting regulation to properties with any of: over 550 stock units (a stock unit being equivalent to 1 ewe), or 50 dairy cattle, or 700 swine, or 50,000 poultry, or applying 40 tonnes of synthetic nitrogen fertiliser would restrict materiality to 23,000 farms,[3] and

5.5.3.2. Any point source discharge.

5.5.4. Air quality: regulations could stipulate what form of air quality emissions are unregulated and what forms are subject to standards or regulations.

5.6. Regional councils should retain the ability to adjust materiality thresholds in circumstances where it is necessary to manage cumulative effects and where a resource cannot be managed due to a large volume of activity beneath the level of the materiality threshold.

5.7. In regard to the Planning Act, the EAG Report has recommended nationally standardised zones be developed (which I support). These zones themselves would state allowable building height, noise, vibration, odours, etc. Having these defined centrally allows the Minister to manage the regulation of non-material effects (as anything less than the threshold in the most restrictive zone is not regulated).

5.8. The EAG Report allows for a council to apply a bespoke zone. The EAG Report recommends that a justification report is used for such bespoke plan provisions. There is no requirement for ministerial approval of a bespoke zone. Requiring ministerial approval for bespoke zones would allow for ministerial control throughout the Planning Act on the materiality of effects managed (without the need to separately define materiality thresholds).

6. Policy objectives

6.1. The EAG Report recommends containing policy goals in primary legislation. I support containing key policy goals in primary legislation. Containing policy goals in primary legislation is consistent with the New Zealand Government Legislation Design and Advisory Committee (LDAC) guidelines.

6.2. Policy objectives need to provide clear direction for decision makers. Examples of such policy objectives are the Climate Change Response Act's objective of achieving net-zero long-lived emissions by 2050 and the Fisheries Act policy objective of maintaining Maximum Sustainable Yield. Both objectives serve to provide a clear direction for decision-makers.

6.3. The EAG Report includes the following proposed goals (amongst others):

6.3.1. Create well-functioning urban and rural areas (Planning Act)

6.3.2. Keep communities safe from intolerable risks and effects of natural hazards and climate change (Planning Act)

[3] This was the materiality threshold developed for greenhouse gas regulation under the He Waka Eke Noa work programme.

6.3.3. Safeguard the life-supporting capacity of air, water, soil, and ecosystems (Natural Environment Act)

6.3.4. Recognise and provide for the relationship of Māori and their culture and traditions (including kaitiakitanga) with their ancestral lands, water, sites, waahi tapu, and other taonga and protected customary rights (both acts)

6.4. The goals proposed for the Planning Act risk broadening the scope of that act beyond neighbourhood frictions and the efficient provision of infrastructure if not tightly defined in the interpretation section of the Planning Act. The challenges with the goal of well-functioning urban and rural areas are outlined above.

6.5. Annex-1 of the Cabinet Paper states regional councils should set environmental limits. My view is that, in setting an environmental limit, regional councils must be able to balance economic, social and environmental concerns. The goal of safeguarding the life-supporting capacity of air water and soil is likely to act to constrain regional councils' ability to achieve such a balance. For instance, in a situation where a regional council decided to recognise that a highly modified catchment (e.g. Lake Horowhenua) needed a relatively more lenient environmental limit for water quality, in order to preserve economic and social outcomes, they may face the risk of an Environment Court appeal due to not complying with the policy goal of safeguarding the life-supporting capacity of water. This situation also runs counter to the Cabinet Principle of providing less litigious processes.

Recommended way forward

6.6. The EAG was tasked with tasked with preparing a workable blueprint to replace the RMA, based off the legislative design principes agreed by Cabinet. Policy goals that sit within each act go somewhat beyond issues of legislative design principles provided and require their own specific policy judgement. For example, how many years of development capacity should be provided. Rather than providing a definitive view on what individual policy goals should be, I suggest that policy goals should be the result of their own detailed process and include public consultation.

6.7. The Government is planning to review a number of National Policy Statements as part of its Phase 2 RMA work later this year. The EAG has recommended this Phase 2 work is aligned with work to replace the RMA (paragraph 530).

6.8. I view that this Phase 2 public consultation should consider what policy objectives should be included in each act. Table 2 provides some examples of policy goals that are more specific in nature and could provide suitable direction under each act.

Table 2: Examples of Policy Objectives for each act

	Policy objective	Notes
Planning Act	Tier 1 and 2 councils enable 30 years of feasible development capacity in their district plans, using 'high' population growth projections. Tier 1 councils spatially plan 50 years of growth and infrastructure. Tier 1 councils deliver housing intensification along 'strategic transport corridors'	These examples are based off housing growth targets in the Government's Going for Housing Growth programme. In the first goal, the word "housing" has been replaced with "development" in the first objective so that capacity for commercial and industrial development is also provided for.

		The second two goals have been adjusted also.
Natural Environment Act	Regional councils are empowered to set environmental limits for each environmental domain in a way that allows broad community needs to be met. Freshwater objectives are set by local government in a way that balances the health of the water body, the health of the people and the prosperity of the community. Biodiversity areas of exceptional value are protected and preserved for future generations. There is no net-loss in extent of area preserved for indigenous biodiversity and where development intersects with biodiversity areas, the impacts are offset. Air quality is managed to avoid impacts on human health.	Regional councils are empowered to set environmental limits based on broad community needs. Freshwater policy is presently unclear if policy should achieve a balance between outcomes or a hierarchy of obligations where the health of the water is above the health of people and communities. This first objective aims to clarify that a balance between outcomes needs to be achieved. Areas of biodiversity that are exceptional and cannot be replicated are protected from development, however where offsetting is possible, the Act aims to achieve no net-loss. This provides for a system where the impacts on biodiversity are offset.

7. Decision making principles

7.1. The EAG Report recommends a series of decision-making principles and procedural principles be adopted under both proposed acts.

7.2. Principles-based law allows decision-makers discretion within legislated principles for decision making. This contrasts with rules-based law, which aims to create clear and unambiguous rules.

7.3. Proponents of principle-based law often argue that, while precise rules more consistently regulate simple phenomena than principle-based law, as areas become more complex, principle-based law can provide more certainty than rules-based, as it allows the law to be flexible for varied circumstances.[4]

7.4. However, others have observed that paradoxes can exist where principle-based law can quickly devolve back into precise law as principle-based law, to be enforced, requires guidance or court jurisprudence.[5] Some specific paradoxes of principle-based law are:

[4] Braithwaite, J. (2002). *Rules and Principles: A Theory of Legal Certainty.* Australian Journal of Legal Philosophy.

[5] Black, J. (2008). *Forms and Paradoxes of Principles Based Regulation*. LSE Law, Society and Economy Working Papers 13/2008 London School of Economics and Political Science Law Department.

- **The interpretive paradox:** Principles aim to create flexibility but in practice become precise as rules interpreted from the principles are later defined by regulators or courts.

- **The communication paradox:** Principles aim to create law that is more easily communicated via a short number of principles rather than lengthy code, but as principles require a proliferation of guidance documentation and jurisprudence, they can become harder to understand than detailed rules.

7.5. Note the RMA includes regulatory principles in Section 6 (Matters of National Significance), Section 7 (Other matters) and Section 8 (Treaty of Waitangi). The paradoxes above were observed as each of these principles resulted in volumes of court jurisprudence and inaccessible legislative framework.

7.6. Careful consideration needs to be given to adopting decision-making principles. I have concerns that the following principles may lead to litigation and complexity. These are noted in Table 3.

Table 3: Decision making principles in EAG Report

Decision-making principles	**Need for court clarification**
Recognise the capacity for positive benefits of development to enhance people's wellbeing and balance these against costs.	*How and when should decision makers recognise positive benefits?* *How are the positive benefits balanced against negative externalities on others?*
Have information sufficient and necessary to understand the implications of the decision, weighing the cost and feasibility of obtaining information with the scale and significance of the decision.	*How much information is sufficient for a given level of significance of decision?*
Seek to achieve positive outcomes for the natural environment.	*When and by how much?*
Ensure appropriate management of cumulative effects.	*What degree of management would see this principle satisfied? E.g. would NPS FM 2020 or NPS FM 2017 freshwater standards be appropriate?*
Recognise that those who produce negative externalities (including pollution) should bear the costs of remediating or mitigating them.	*Noting remediating means remedy or redress, what is the value of the redress provided and who should it be paid to?*
Recognise the reasonably foreseeable needs of future generations when granting permits to use resources.	*What are the needs of future generations? Note this principle could be argued to both favour new development or to favour environmental protection: future generations may need both economic growth and environmental protection.*
Consider whether adverse effects that cannot be avoided should be minimised, remedied, offset or compensated for.	*Is this a hierarchy of obligations? How does one decide when an effect cannot be avoided and when it should minimised, etc.*
Procedural principles (included in both acts)	*Comment*
Act in an enabling manner in accordance with the goals and principles.	*While few would disagree that these principles are good things to do, it is unclear what they mean in practice and how they are to be followed.*
Act proportionately to the scale and significance of the issues.	
Be succinct in all written materials and use plain language so that documents are accessible to the public.	

7.7. Further comment is provided on the following principles:

Table 4: Additional comment on decision making principles in EAG Report

Decision-making principles	Comment
Recognise that not all goals in the NEA are required to be achieved in all places or at all times. Recognise that not all goals in the Planning Act are required to be achieved in all places or at all times.	These principles raise questions as to the standing of the goals in each act. Noting the importance of some of the aspects listed in goals (enjoyment of property rights, make available sufficient land to be developed), these principles could undermine the intent of the reform.
Recognise the capacity for positive benefits of development to enhance people's wellbeing and balance these against costs.	This principle is well intentioned in that it is seeking to allow more flexibility to grant consent to projects with positive benefits. In allowing positive benefits of a project to be considered however, it risks moving the entire system away from one based on externalities and to one that can consider outcomes (similar to the Natural and Built Environment Act). I.e. would this principle allow each planning application to consider not just the negative externalities of a project but also weigh these up against broad societal benefits? This then results in a situation where two developments are proposed with equal impacts, but one is approved due to an assessment of the positive outcomes it achieves, the other is not, meaning the system has shifted away from externalities and to a focus on outcomes.

Recommended way forward

7.8. Consideration should be given to not having any decision-making principles in either act.

7.9. If decision making principles are to be included, they should speak to the principles and intent agreed by Cabinet and be as specific as possible. Table 5 provides some examples for consideration. Some of these principles have been adopted from the Regulatory Standards Bill consultation document.

Table 5: Decision making principles

Planning Act decision-making principles ***Italics are explanatory notes only***	Natural Environment Act decision-making principles ***Italics are explanatory notes only***
The system will not specify or direct outcomes that are better determined by individuals in response to demand. *For example, the system shouldn't specify that a business (e.g. supermarket) cannot be built in an area because there is already sufficient supply of that service. Individual investors are better positioned to determine if demand exists for development.*	Conflicts between different goals in this act are resolved at the lowest possible level that is consistent with their resolution. Where possible, this level should be the individual undertaking the activity. *Where conflicts can be resolved by individuals, planning should not direct outcomes. For example, a user who wishes to develop land but will impact on an area of wetlands can resolve this conflict by having access to an offset regime. If it is more economical to develop the land and offset impacts, they will do so. If not, they may choose to develop elsewhere. This is*

	the individual resolving the conflict between development and protection. This will lead to more efficient outcomes than planning processes determining how to make trade-offs.
Decision makers will not impair, or authorise the taking or impairment of property, without the consent of the owner unless: • there is good justification for the taking or impairment, and • fair compensation for the taking or impairment is provided to the owner, and • compensation is provided to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment.[6] For the avoidance of doubt, zoning an area residential, commercial, industrial, rural or mixed-use does not constitute a taking under this clause.	Regional councils are empowered to set environmental limits at a level that they view balances cultural, social, economic and environmental needs. Environmental limits are set following engagement with the local community and aim to serve all local community stakeholders. *These principles aim to empower regional councils to set environmental limits they see fit and prevent either legal challenge or ministerial direction. The second principle ensures that specific consultation requirements do not imply that limits serve specific party interests over the broader community interest.*
A buyer beware principle should be applied in the following ways: (i) Property owners are not guaranteed of a static environment and should expect existing urban areas to continue to development. (ii) Property owners in city centre zones, or living near city centre zones, should expect commercial and residential activity to increase in intensity over time. (iii) Those that move to a nuisance are not then protected from that nuisance (reverse sensitivity), or the expansion of that nuisance. *These principles seek to avoid situations where land use is unable to change over time with urban growth and address reverse sensitivity issues.*	Only externalities that have a physical and measurable impact on the natural environment may be regulated under this act. *This principle avoids metaphysical or spiritual values being regulated under a natural environment act.*
The imposition of fees must relate to the cost of efficiently providing the good or service to which it relates. *This principle anchors any fees to a cost-recovery principle. Where a council is inefficient in the way it provides a service, a user would be able to take a case that the fee charged was excessive.*	The imposition of fees must relate to the cost of efficiently providing the good or service to which it relates.

8. Te Tiriti / Treaty of Waitangi

[6] This language is taken from the draft Regulatory Standards Bill.

8.1. The RMA Section 8 requires all persons exercising functions and powers under it to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

8.2. The National Party-New Zealand First Coalition Agreement contains a provision to: *"Conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes 'The Principles of the Treaty of Waitangi" and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references."*

8.3. The Cabinet Paper requires that Treaty of Waitangi settlements and the Crown's obligations are upheld.

8.4. The EAG Report recommends that future legislation (both acts) "should retain the section 8 RMA requirement for persons exercising powers and functions under the RMA to take into account the principles of the Treaty of Waitangi" (paragraph 145).

8.5. The EAG Report also recommends that new legislation protects the ancestral relationships Māori have with natural resources in their rohe and provides opportunities for Māori to engage in relevant planning issues within their area of interest.

8.6. At present, under the RMA, many activities that impact the natural environment may also require the undertaking of cultural impact assessments. At times, issues such as the mixing of water from one water body with water from another water body are viewed as having a cultural impact (even if there is no environmental impact). This makes consenting of managed aquifer recharge and some water storage schemes particularly challenging.

8.7. It is important to distinguish between what are cultural impacts and what are spiritual values. When determining the environmental limits for water bodies, different water bodies may have different cultural values, and this will be a consideration when determining the environmental limits that are set (alongside other factors). However, environmental limits must be environmental. Placing restrictions on the ability to mix waters to preserve the life-force (or mauri) of water is a spiritual value and goes beyond the scope of what is required to achieve an environmental limit.

8.8. Cultural impacts can be assessed at the front-end, when establishing an acceptable environmental limit. Cultural impact assessments should not be required for individual resource consents as assessing the project against the ability to achieve the environmental limit will already implicitly consider cultural values (as cultural values were considered when setting the environmental limit).

8.9. Finally, the EAG Report recommends that the system seeks to involve Māori in resource management decision making (Paragraph 147).

Recommended way forward

8.10. Both acts should have descriptive Treaty clauses specifying how existing Treaty settlements are upheld through the Act.

8.11. The scope of the Natural Environment Act should be limited to physical externalities on the natural environment. Spiritual impacts, such as mauri, should not be within scope.

8.12. Cultural impacts should be assessed at the point environmental limits are set (i.e. environmental limits should be set at levels which consider cultural values). There should not be the need for cultural impact assessments on individual consent applications.

8.13. Councils should engage with a variety of community stakeholders including iwi and hapu groups. However, decisions need to be made by councils and should aim to serve all community stakeholders (rather than requirements to specifically involve Māori in decision making).

9. Independent Hearings Panels

9.1. The EAG Report recommends that the Planning Act require submissions on draft spatial plans to be heard by Independent Hearings Panels (IHPs) (paragraph 287). The IHP would then make recommendations to the joint committee of local authorities. Where the joint committee accepts the recommendations of the IHP, only appeals to the Environment Court on points of law would be possible. Where the joint committee rejects some or all of the recommendations, appeals on merits would be possible.

9.2. The EAG Report also recommends this model for district and regional plans (paragraph 327 and 329).

9.3. Paragraph 328 of the EAG Report notes Productivity Commission advice that the ability to appeal proposed policy statements and plans on merit is unique in New Zealand.

9.4. It also unique to the RMA. Where a decision is made by the government's executive, legislative or administration arms under a statutory power, individuals have the right to pursue a judicial review of that decision. A judicial review reviews the government action to test if the way the decision was made was in accordance with the law (rather than testing the merits of the decision). If a judicial review is successful, the court can cancel or reverse the decision, order the decision-maker to reconsider the issue and make a fresh decision, or make a declaration, but the court cannot generally direct the decision-maker on what a new decision should be.

9.5. A decision by a council when developing a spatial plan, district plan or environmental limit is a political decision made under empowering legislation. It will always please some in the community and be met with disapproval by others. The normal mechanism for those who disagree with political decisions is to state this disapproval publicly and build political pressure for change.

9.6. Allowing those who inevitably disagree with the political decision the right to appeal the decision on merit will simply delay processes for others and shift decision-making powers away from democratically elected political institutions to technical experts.

9.7. While some may view technical experts as being better equipped to manage complex decisions, technical experts are also likely to be less responsive to local community demands. Example: Auckland Transport was established in 2010 as a council-controlled organisation responsible for all of Auckland's transport services, including policy and planning functions. Auckland Transport lacked accountability to the people of Auckland and over time became unresponsive to community needs. In 2024 the Government reformed the policy to transfer powers back to Auckland Council.

9.8. Care should be taken to consider what decisions in the system are political and what decisions are technical and allocate clear responsibility for decision making.

9.9. Some aspects of the system will be highly technical in nature. For example, if councils are required to allow 30 years of plan-enabled development capacity, an IHP could be used to review council plans for compliance with technical requirements under the law. This advice can then be provided to the council. If the IHP recommends more development capacity is required to fulfil legal requirements, and the council ignores this, the council is then of course opening itself up to appeal on legal grounds (an appeal could be lodged on the grounds that the council did not fulfil the requirements of the primary legislation).

Recommended way forward

9.10. Independent Hearings Panels only review council plans for compliance with legal requirements, rather than hear submissions on merit and make recommendations on points of merit.

9.11. Spatial plans, district plans, and environmental limits can only be appealed on points of law.

10. Environment Court

10.1. Under the RMA, the Environment Court can hear appeals against regional policy statements, district plans and regional plans proposed by councils.

10.2. Where an appeal in the Environment Court against a proposed regional plan or policy statement is successful, the Environment Court can direct a council to make specific changes to the proposed plan or policy statement. This is in contrast to the process noted above where a judicial review can cancel a decision but cannot change it. Here, the Environment Court will investigate the policy issue at hand, reach a conclusion on what the best policy is and order the council to make such regulations.

10.3. Allowing the Environment Court to make policy has the following implications:

10.3.1. As a successful appeal on a plan change to the Environment Court can see the council forced to adopt a specific policy, disgruntled parties have a much higher incentive to make an appeal on a plan change to the Environment Court than they would in a world where the Environment Court only had the power to strike out plans.

10.3.2. As the Environment Court will make new policy, interested third parties have a much higher incentive to join Environment Court proceedings than there exists to join judicial review proceedings.

10.3.3. Appeals to the Environment Court on plan changes can run much longer than a judicial review. While the court may be able to relatively quickly decide if a decision followed the requirements and scope of empowering legislation, it is a much more complicated undertaking to reach a view on what an alternative policy should be. For example, Waikato Plan Change 1 was initially notified in 2016, had submissions and hearings from 2016 to 2019, had further decisions notified in 2020, was appealed in 2020, and Environment Court proceedings remain open at the time of writing (2025).

Recommended way forward

10.4. Provisions in the RMA that allow the Environment Court to order specific changes to plans and policy statements are not carried forward into the new system (Section 293 of the RMA).

11. Regulatory Takings

11.1. Council plans under the RMA often place overlays on private property to protect matters such as outstanding natural features (ONFs), outstanding natural landscapes (ONLs), significant natural areas (SNAs), sites of significance to Māori (SASM) and so on. Rules relating to overlays vary by council, but it is generally the case that such overlays place significant restrictions on how land under and near an overlay can be used.

11.2. These overlays can be viewed as having the effect of seizing property for public use or benefit and therefore constitute a regulatory taking.

11.3. The EAG Report recommends that where a council is operating under a national methodology, there would be a presumption of no regulatory taking, however landowners could apply to the Environment Court for a claim. Where a council puts its own overlay on land, the Environment Court would consider matters of regulatory takings.

11.4. I disagree with the way the EAG has drawn a distinction between different types of overlays based on if they were done under a national direction or not. A regulatory taking occurs when government takes property through regulations, regardless of whether it is done by central or local government.

11.5. The only distinction that should be made is who should provide compensation to landowners: if central government created a national direction that had the effect of forcing councils into a regulatory taking, it would not be appropriate for central government to ask local government to fund compensation (central government should fund this compensation).

11.6. I also disagree with the recommendation that, where a regulatory taking does occur, landowners should apply to the Environment Court for compensation:

11.6.1. It is important that compensation is negotiated with the landowner before the taking is allowed to occur. This is important for the regulator so they can make an informed decision on if the overlay is worthwhile for the community (understanding the cost of the proposed overlay to ratepayers / taxpayers before making the decision to proceed with it).

11.6.2. Requiring landowners to go through the Environment Court will create financial barriers as not all landowners will be able to risk the expense of court proceedings if they are unsuccessful.

11.7. New Zealand already operates a compensation system for government takings through the Public Works Act. The Public Works Act requires that the government notify the landowner ahead of time, offer to purchase the land, or pay an agreed valuation for the partial taking. This is all done through a process required under the Act. To challenge a Public Works Act valuation, a landowner can lodge an objection with the Land Valuation Tribunal.

11.8. Regulatory takings should occur when a regulation is applied uniquely to specific areas of land for a public benefit (e.g. ONLs, SNAs and SASMs). General environmental regulation or planning zones that apply broadly should not constitute a regulatory taking.

Recommended way forward

11.9. Regulatory takings are presumed to occur for specified overlays, including ONLs, SNAs and SASMs.

11.10. The Planning Act and Natural Environment Act should operate a similar method for takings as that occurs under the Public Works Act, i.e. councils should engage with landowners before a taking occurs to agree a purchase or compensation valuation for the partial taking. Where dispute occurs, a low-cost dispute resolution body such as the Planning Tribunal or the existing Land Valuation Tribunal should be used.

12. Environmental limits

12.1. The EAG Report states that "Environmental limits are set and used to determine the boundaries of acceptable use of natural resources (allocation quantum or cap)" (Paragraph 183).

12.2. The EAG Report also states that "An environmental limit defines the extent of nature's capacity to absorb pressure from the use and development of natural resources" (Paragraph 192). Paragraph 207 then states that the EAG recommends the NEA require environmental limits are set for the purpose of protecting values of human health and the life-supporting capacity of air, water, soil and ecosystems.

12.3. The EAG recommend that the EPA develop a process for regional councils to follow to set regional limits to protect the life-supporting capacity for key attributes of the mandatory domains (Paragraph 211). The EAG also then states that the NEA must require that limits are complied with, with provision to prescribe a transition pathway to account for the difficulty in reversing existing overallocation.

12.4. Note the Cabinet Paper Appendix states “Regional councils should set environmental limits” but does not state a preference for these limits to be based off natural capacities. The Cabinet Paper also states there should be a double-bottom line, requiring councils to provide for essential human needs such as housing, food production, drinking water and sanitation within environmental limits.

12.5. I view the EAG recommendations that environmental limits be based off life-supporting capacity (paragraph 211), and that councils must reverse existing over-allocation, as inconsistent with Cabinet’s intent that regional councils set environmental limits and that there be a double bottom line.

12.6. Requiring councils to set environmental limits in line with the life-supporting capacity of environmental domains is a legal constraint on councils’ ability to set environmental limits at levels that focus on broader priorities: in the event that a council (or Minister) set an environmental limit that was less stringent in nature, this decision could be appealed on the grounds it did not comply with the legal requirement to protect the life-supporting capacity of the environment. Court decisions will then have the effect of defining what level of protection *would* protect the life-supporting capacity. This is not consistent with the Cabinet direction that decisions for resource management instruments should be made less litigious.

12.7. Note that over the last 20 years there has been debate over if regional councils should be left to their own devises to set target attributes for freshwater or if central government should set national bottom lines. At present, under the RMA, national bottom lines are set by the Minister. The Cabinet Paper states regional councils should set environmental limits (paragraph 33 and Appendix 1). The EAG Report approach results in a third outcome where it will be the courts that determine what environmental limits are able to be set (rather than central government or regional government).

12.8. There is a risk that requiring environmental limits to be based off so-called life-supporting capacity, particularly for freshwater, may require catchments return to near-pristine water quality levels. This dynamic has already been observed through the development and implementation of the National Policy Statement for Freshwater Management 2020 (NPS FM 2020). Research done for the National Science Challenge found that in the Tukituki catchment, a catchment covering 221,000 hectares in Hawkes Bay, even if every single sheep and beef farm was converted to alternative land uses (largely forestry), environmental limits in the NPS FM 2020 were still not met. The current land use in the Tukituki catchment is 74% sheep and beef and 5% exotic forestry (left hand box Figure 2 below), the future land use under NPS FM 2020 requirements is projected to be 78% exotic forestry and 0% sheep and beef (right hand box Figure 2 below). Tukituki is not a unique in the challenges it faces in achieving current freshwater limits.

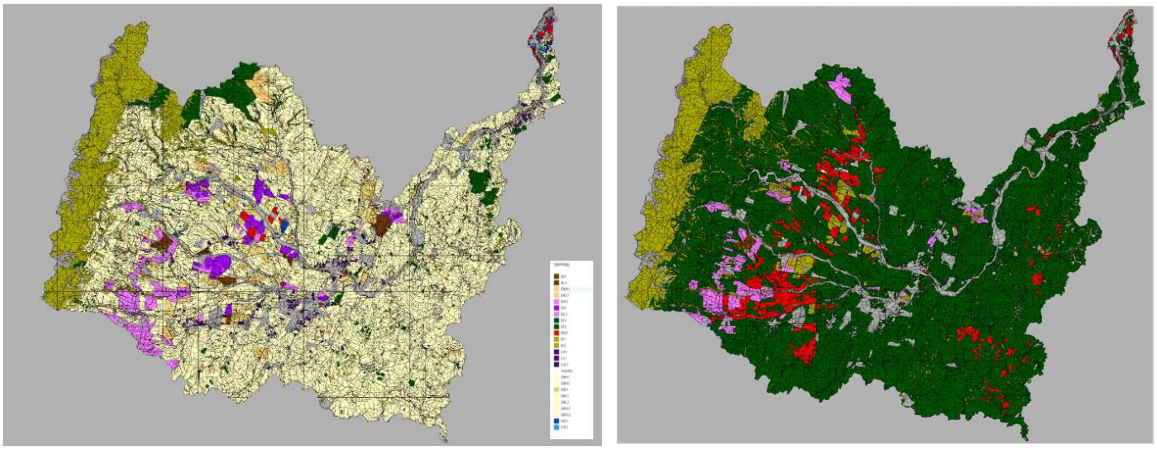

Figure 2: A sea of pine: Current land use in Tukituki catchment (left hand side) and projected land use change in the Tukituki catchment to meet current nitrogen bottom lines (right hand side). Dark green is exotic forestry, light green indigenous forestry, pink is dairy, red is fruit, brown is arable, dark blue is vegetables, light blue is viticulture, grey no data. A second scenario that allowed increased irrigation saw more sheep and beef land

move into fruit growing (resulted in more fruit land area (10% of total area), however sheep and beef remained completely gone).

12.9. Note that freshwater quality issues are not solely an agricultural land cover issue. Data from Land and Water Aotearoa shows that, on average, across a number of indicators, urban areas have the poorest water quality. Setting environmental limits based on life-supporting capacity may also create major challenges for the ability to provide housing and infrastructure in urban areas too.

12.10. The result is a system that is not able to achieve the double bottom line envisioned in the Cabinet Paper where human needs such as housing, food production, drinking water and sanitation are able to be provided for within environmental limits (as environmental limits may be set at levels that don't allow such needs to be met).

12.11. I do not agree environmental limits need to define nature's capacity to absorb pressure as stated in the EAG Report. Rather, environmental limits are legal boundaries, defined by people, and made into law. As agreed by Cabinet, they must allow human needs to also be met.

12.12. Good public policy should seek to allow decision makers to balance trade-offs across economic, social and environmental considerations and be responsive to community stakeholders. Environmental limits should be set in a way that allows the community to maximise it's wellbeing across economic, social and environmental factors.

12.13. While there is value in having flexibility for regional councils to determine the level environmental limits are set at for their region, there is also value in having consistency in the factors for which environmental limits are set, how progress is measured, and how it is reported. National direction should focus on supporting a consistent framework for the setting of environmental limits, while allowing councils flexibility to set environmental limits that balance competing local demands.

Recommended way forward

12.14. The EPA should develop a list of attributes for each environmental domain for which regional councils must set environmental limits (e.g. e-coli, dissolved oxygen, Macroinvertebrate Community Index).

12.15. Guidelines may also be developed for the processes by which councils use to assess the likely economic, social and environmental impacts of different potential environmental limits.

12.16. Environmental limits should not be required to protect the life-supporting capacity of air, water, soil and ecosystems.

12.17. Regional councils should be empowered to set environmental limits in a way where they can seek to balance competing local demands.

13. Requirement to select an allocation method

13.1. Where a resource is over-allocated, the RMA allows a regional council to use a variety of approaches to manage the resource. These include regional rules, resource consent processes and market-based mechanisms (e.g. Taupo nutrient trading).

13.2. The EAG recommends a movement away from the first-in, first-served approach generally used at present. National instruments would set out the allocation options available, with councils choosing the approach most suitable for each catchment.

13.3. The EAG Report also recommends introducing charging for natural resources. This is either a charge for administration costs or a specific charge to cover the cost of interventions needed to achieve the limit (paragraph 244).

13.4. The Cabinet Paper principles include providing for the greater use of national standards to reduce the need for resource consents and simplify council plans, such that standard-complying activities cannot be subjected to a consent requirement. The Cabinet Paper also states that the system will enable innovative methods for water and nutrient allocations to manage over-cap catchments back within environmental limits and that environmental offsets will be recognised in the new system.

13.5. The EAG report has not provided a consideration of how different allocation methods may work, or not work, across individual environmental domains. While the EAG report expresses an intent to move away from first-in first-served, and different options for allocation are listed, much of the work to test what options should be used for different domains is left up to national direction. In my view, clear conclusions can be made about what allocation methods should be applied to different environmental domains, and these can be used in primary legislation to require the Minister to develop regulations to direct the use of such methods (for example, regulations for air quality standards, biodiversity offsets).

Recommended way forward

13.6. Each environmental domain has different characteristics. A review of overseas jurisdictions quickly shows patterns emerge. For example, offset schemes have been developed for biodiversity, trading schemes for water takes, standards for air quality and permitting regimes for water quality issues. The Natural Environment Act should state the allocation methods to be used for each environmental domain.

13.7. The Cabinet Paper indicates a preference for the use of environmental trading, offsets and standards (paragraph 34). I support this direction:

13.7.1. **Market-based allocation** seeks to establish a tradable property right that can be purchased, used or sold. This is consistent with a system premised on the enjoyment of property rights as a guiding principle.

13.7.2. Market-based mechanisms allow individuals (rather than planners or regulators) to establish the most efficient use of a resource and determine what mitigations are cost effective. This improves economic efficiency where these benefits outweigh the administration cost of administering the market-based mechanism.

13.7.3. Market-based mechanisms are not simply about allocating natural levels of a resource to users but can also allow for the creation of **offsets**. This allows a market-based mechanism to increase the overall quantum of resource available for use.

13.7.4. **Standards** often have lower transaction costs than market-based mechanisms but lack the ability to allow a market to discover the most efficient use of the resource and the lowest cost abatement. They 'command and control' the methods used to mitigate impacts.

13.7.5. **Standards** are often used in environmental management and can be viewed as preferable when mitigation costs are very low, administration costs of a market-based mechanism are high (due to number of participants etc), or operation of a market-based mechanism is not feasible (due to difficulties in measuring and verification). An example of standards having clear benefits over a market-based mechanism is air quality standards for road transport vehicles.

Recommended allocation methods for each environmental domain

13.8. **Air quality** in the Natural Environment Act is likely best served by use of **national standards** for activities that impact air quality.

13.9. Councils should retain the ability to identify airsheds with poor air quality and impose stricter standards or trading mechanisms in these occasions.

Biodiversity including wetlands

13.10. Some areas of biodiversity are of high public value and cannot easily be offset. These areas should be mapped and protected (i.e. National Parks, Regional Parks, SNAs).

13.11. Where biodiversity is of high public value but is of a nature that can be offset, a common method of maintaining biodiversity outside these protected areas are requirements for **biodiversity offsetting**. Queensland, California, the United Kingdom are three examples where such systems operate.

13.12. To simplify the offset regime for users, three pathways should be available: direct offset by applicant, use of an accredited offset provider (broker), payment to council offset fund.

13.13. As biodiversity is not homogenous in nature, biodiversity offsetting and trading is more complex than other forms of environmental trading schemes (fishing quota, emissions trading). Extra protections are needed to ensure the public has confidence that biodiversity offsets result in a benefit to society. Some protections to consider applying to a biodiversity offset regime are:

13.13.1. **Net-gain buffer**: A net-gain buffer similar to the UK 10% net gain should apply to provide assurance to the community the system is allowing both development to occur and environmental gain (both developer and environment are better off).

13.13.2. **Permanence:** Offset areas should themselves be mapped as protected biodiversity to give greater protection to that which is being replaced.

13.13.3. **Proximity:** Offsets should be within a set proximity to the area being developed. This ensures local biodiversity coverage remains.

13.13.4. **Type:** Biodiversity types should be defined, and offsets should be of the same type to the area being developed. For example, lowland forest, wetland, native tussock, etc.

Water abstraction

13.14. The majority of New Zealand freshwater bodies are not short of water. **First-in first-served** is an appropriate form of allocation where water is not scarce. An application process to a regional council can have some assessment of volume needed to provide some checks and balances.

13.15. Where surface water scarcity is present, it is often the case that water is only scarce at some times of the year. Water scarcity can be overcome with water storage.

13.16. **Cost recovery** of water storage can charge users of water based off the cost of operating the water storage scheme. Generally, this can be done by the private sector rather than by council.

13.17. Ground water scarcity can be overcome by **Managed Aquifer Recharge** (MAR). MAR faces consenting challenges under the RMA, however, when it can gain resource consent, MAR can be a low-cost and effective way to manage ground water scarcity.

13.18. **Cost recovery** should be used to require water users to cover the cost of MAR schemes. MAR resource consenting challenges can be addressed through narrowing the scope of the system as proposed.

13.19. Where water is scarce, and water storage or MAR are not options, a market-based mechanism in the form of **tradable water rights** is a system for managing scarcity that is proven and operating effectively in many parts of the world including parts of the USA, Australia, United Kingdom, Spain and Chile. South Australia has operated a water trading system since 1983.

13.20. **Tradable water rights** should be used in cases where water is scarce and scarcity cannot be overcome through water storage or MAR.

13.21. Systems for managing water through market-based mechanisms such as cost-recovery and tradable water rights will need to distinguish between consumptive takes and non-consumptive takes. Non-consumptive takes refer to takes such as a hydro dam that uses water but does not consume that water from the water body. These takes may prevent a user upstream from using the water but do not prevent a user downstream from using water.

Water quality

13.22. Water quality is impacted by the discharge of contaminants into a water body. This can occur as a point source discharge, where water is directly discharged into the water (i.e. via a pipe), or a diffuse discharge, where contaminants are washed across land into a freshwater body or leach through land into a freshwater body.

13.23. Diffuse discharges are a dominant source of contaminants in many catchments in New Zealand. Farming is a major source of diffuse contaminants, including nutrients such as nitrogen and phosphorus, and contaminants such as sediment and e-coli.

13.24. New Zealand has an existing **nutrient trading scheme** applying to defuse discharges of nitrogen. The Taupo Nitrogen trading market was the first and only scheme to apply a market-based mechanism to diffuse discharges in the world. The first trades in the market occurred in 2009. The market uses OVERSEER to measure and trade nitrogen.

13.25. However, accurately measuring nutrient loss from farms and administration costs pose significant barriers to the wider use of nutrient trading throughout New Zealand:

13.25.1. **Accuracy of measurement:** In a 2018 report, the Parliamentary Commissioner for the Environment raised concerns related to the use of OVERSEER as a regulatory tool including that:

- Overseer's structure is not adequate to provide more than a coarse understanding of a farm's nutrient losses.
- Overseer cannot reliably estimate how changes in farm management would affect those losses.

13.25.2. **Administration costs:** New Zealand has thousands of different river and lake catchments. Each catchment is affected by multiple contaminants (nitrogen, phosphorus, e-coli, sediment, etc). Operating trading systems for a significant number of catchments is likely to be administratively complex and costly. Liquidity issues may arise on smaller catchments due to a shallow number of participants.

13.26. **Standards** are likely to be the best first-port-of-call for water quality issues (due to the barriers that exist for market-based mechanisms).

13.27. Standards can be applied to point-source discharges and diffuse discharges.

13.28. The Resource Management Act was amended in 2020 to include provisions for 'Freshwater Farm Plans' with the purpose of "to better control the adverse effects of farming on freshwater and freshwater

ecosystems within specified districts, regions, or parts of New Zealand through the use of certified freshwater farm plans".

13.29. Freshwater Farm Plans can be viewed as a form of national standard for farming.

13.30. Where an activity wishes to go beyond the national standard, a merits-based application (i.e. a resource consent) process should be available. For example, a farmer who wants to undertake practices not permitted within the Freshwater Farm Plan system or a new factory that cannot comply with national standards for point source discharges.

13.31. Each catchment in New Zealand has a different environmental context. The specific contaminant that drives water quality issues can vary catchment to catchment.

13.32. Under current regulation, regional councils must provide information about the "catchment context, challenges and values" for catchments in its region.

13.33. Freshwater Farm Plans can be linked to local catchment context and requirements for farmers turned up or down depending on the targets for the relevant catchment. i.e. if a catchment is overallocated for nitrogen, the requirements of the Freshwater Farm Plan can focus more on reducing nitrogen loss risk.

13.34. This allows a nationally standardised approach while also having flex to achieve spatially varied freshwater goals.

13.35. This creates a bottom-up and top-down structure: regional councils establish environmental limits and catchment contexts for freshwater management units in their region; central government establishes a national standard for managing freshwater quality impacts that flexes to the local catchment context.

13.36. The current first-in first-served system places extra requirements on land use change than existing users. This is inequitable to those who were not first-movers, but it also means New Zealand's farming sector loses land use flexibility and an ability to adapt land use to changing markets.

13.37. New entrants should have the same requirements as existing users. i.e. someone who wishes to convert to a new land use would have the same requirement to farm within the Freshwater Farm Plan standard as someone who has farmed for a lifetime. This may mean that standards need to be more stringent than they otherwise would have been to create headroom for new entrants.

Bespoke approaches where national standards cannot achieve water quality targets

13.38. There may be circumstances where environmental limits cannot be met for water quality with the use of standards alone. Bespoke approaches may be needed for such circumstances.

13.39. One scenario is that a council identifies the ability for a targeted intervention to improve water quality. An example identified in the EAG Report is a case where a community addresses over allocation of a resource by an intervention such as retiring a specific area of land (paragraph 244). This is characterised as a "specific charge in overallocated catchments".

13.40. Rather than a charge for using a resource, this is better characterised as an **offset and cost recovery** mechanism.

13.41. In other words, where a council identifies that interventions are needed, such as land retirement, wetland restoration, native planting, and so on, this remedial work could be funded by a cost-recovery charge on resource users. From the resource users' perspective, this is likely preferable to reducing farm production.

13.42. The system could also provide farmers / users with a choice: they could comply with a more stringent standard or choose an option where the standard is more lenient, but a payment is made to offset environmental impacts.

13.43. The final question is if the Natural Environment Act will continue to allow nutrient trading systems to be established, and the existing Lake Taupo nitrogen cap and trade programme to be accommodated. I am not in a position to give advice on this. Further advice may be needed to understand how such schemes have been impacted by the PCE findings in relation to the applicability of using OVERSEER for freshwater regulation.

14. Structure of Natural Environment Act

14.1. The United Kingdom 'Environment Act 2021' provides a useful example of how a Natural Environment Act could be structured. The UK Environment Act includes preliminary chapters on setting of environmental targets, the role of the Office of Environmental Protection, and then individual parts of the act that focus on different environmental domains such as air quality, water, biodiversity, etc.

14.2. Each part of the act should contain requirements that regulations are established to allow different mechanisms to be used to manage different resources. For example,

14.2.1. A requirement that regulations to support a biodiversity offset scheme are established

14.2.2. A requirement that air quality standards are established

14.2.3. A requirement that water quality standards, Freshwater Farm Plan and other freshwater mechanisms are established

14.2.4. A requirement that regulations to allow for tradable water rights are established

15. Consent categories

15.1. The EAG Report recommends that consent categories from the RMA are carried over to the new system, with removal of controlled activity, removing the non-complying activity category and with prohibited activities to be used more rarely (paragraph 351).

15.2. The EAG Report proposes the expansion of the permitted activity category to allow for registration and monitoring of permitted activities.

15.3. The EAG Report does not differentiate at all between what categories that will be used in a Natural Environment Act or a Planning Act.

Recommended way forward under a Natural Environment Act

15.4. Note that many activities listed as permitted under the current RMA will be out of scope of a new act because they will be below materiality thresholds.

15.5. Activities that are within scope but operate under a national standard or market-based mechanism, may need to have reporting obligations and cost-recovery obligations.

15.6. Therefore, I agree with the EAG recommendation that the permitted activity category is expanded to allow for registration, monitoring and cost-recovery (so long as this doesn't also apply to activities below materiality thresholds).

15.7. Where an activity is not able to operate within a materiality threshold, under a national standard, or under a market-based mechanism, it would need access to a discretionary assessment by a regional council.

15.8. This discretionary assessment should be limited to the factors for which it could not comply with national standards. For example, if an activity is applying for a consent to discharge contaminants to air, but is in compliance with national standards for discharge of contaminants to water, a discretionary assessment should be limited to the impacts on air. Of course, an assessment under the Natural Environment Act would not consider issues out of scope to a Natural Environment Act such as height to boundary or noise (this would be done under the Planning Act).

15.9. In this sense, all discretionary assessments under the Natural Environment Act are akin to **restricted discretionary consents** under the RMA.

15.10. Finally, a fourth category akin to a fast-track consent is discussed below.

15.11. This would give the following categories:

15.11.1. Non-regulated activities (under materiality thresholds)

15.11.2. Permitted activities (operating under standards or market-based mechanisms, with ability for application of some reporting and cost-recovery requirements)

15.11.3. Discretionary consent (akin to restricted discretionary)

15.11.4. Fast-track consent (can consider multiple factors together, outlined below)

16. Fast-track

16.1. The Cabinet Paper Appendix 1 states "There will be a permanent fast-track regime" (presumably for major projects).

16.2. The EAG recommends that spatial plans identify existing and planned infrastructure corridors, strategic sites and, where necessary, existing and planned uses that require separation from incompatible activities (e.g. heavy industry, quarries, ports). Infrastructure identified in a spatial plan will have access to a streamlined designation process to avoid re-litigation of the need for and broad location of the infrastructure.

16.3. These mechanisms may address the need for a fast-track regime in the Planning Act.

16.4. In regard to the Natural Environment Act, in many cases, major projects may be able to proceed by engaging with existing mechanisms in the Natural Environment Act. For example, offsetting biodiversity impacts, complying with air quality standards, and purchasing water abstraction rights.

16.5. Where a project is highly complex and impacts across multiple factors, a special instrument may be needed to allow the project to access a one-stop-shop for environmental permissions. This could be at the applicant's choice.

16.6. Jurisdictions such as the UK, European Union, Canada and USA require 'Environmental Impact Assessments' for major projects. This requirement sometimes sits alongside other environmental requirements such as offsetting biodiversity impacts and complying with environmental standards.

Recommended way forward

16.7. The National Environment Act should contain an option for projects to undertake a broad streamlined environmental impact assessment and permission process rather than individual assessments. Projects could be referred to an expert panel for assessment, similar to the current fast-track regime. However, I view that final decision making should rest with elected decision makers rather than an expert panel (for reasons outlined earlier in this report).

17. Disaggregation between the two acts

17.1. The Cabinet Paper outlines a proposed system architecture where there are "Two Acts, with clear and distinct purposes – one to manage environmental effects arising from activities, and another to enable urban development and infrastructure, resulting in shorter, less complex and more accessible legislation." In a speech to the Resource Management Law Association (20-9-2024), Minister Bishop elaborated on this saying, "Despite the best of intentions, integrated management has failed… New Zealand's 30-year experiment in integrated management will end, bringing our system into line with most other OECD countries."

17.2. The EAG Report is far from emphatic in its commentary on disaggregation of the two acts. The EAG Report notes the group has proceeded on the "basis that there would be a high bar to displace this Cabinet directive" and the principle was tested and found to be "feasible". However, the EAG Report goes on to say, "Given the interconnected nature of planning and environmental management issues, although each Act will have its own purpose, they will have similar architecture and will need to 'speak to' each other in several places."

17.3. Figure 1 from the EAG Report ("Blueprint of the new resource management system") displays a framework where two separate acts are established at the top part of the system, but the frameworks are integrated together through common planning instruments, policy instruments (consents), enforcement regimes and courts. Throughout the EAG report issues are considered once and applied to both acts uniformly (materiality thresholds, Treaty of Waitangi, consent categories, role of IHPs).

17.4. I disagree that planning and environmental management are uniquely interconnected. If we step outside the issues covered by the RMA, it is quickly apparent that many other issues are also related to planning and the environment (infrastructure planning, building code, greenhouse gas emissions, land transport, wildlife, heritage, etc). Yet integrated management is not pursued (for good reason). Just as greenhouse gases and planning permissions can be managed separately, other environmental issues can be managed separately to planning issues.

17.5. It is correct that spatial plans need to 'pull in' spatial information from other domains. This can include natural hazards (fault lines, flood risk, sea level rise), cultural and heritage protections (historical sites), national parks, and protected areas under the Natural Environment Act (SNAs). Air quality standards will need to apply differently for different planning zones also.

Recommended way forward

17.6. Figure 3 displays a schematic of how the two acts can interrelate to each other. Some information from the Natural Environment Act is included in spatial plans and then in district plans. However, users interact with each act through bespoke policy instruments.

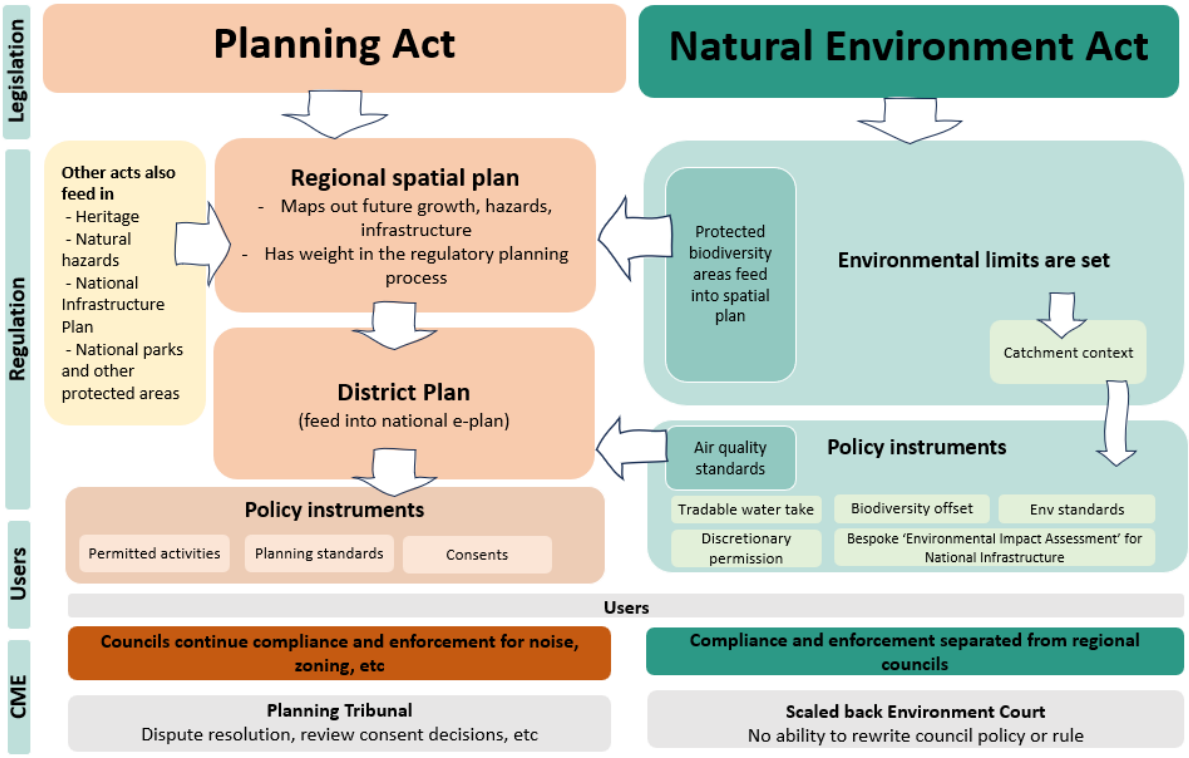

Figure 3: Schematic of new resource management system

18. Effects management hierarchy

18.1. The EAG Report recommends that decision makers under both acts "Consider whether adverse effects that cannot be avoided should be minimised, remedied, offset or compensated for."

18.2. This language implies a system where official decision makers, rather than individuals, make choices on how effects are mitigated. There is also the risk of an implied hierarchy where effects should first be avoided and, only if they cannot be avoided, they should be offset.

18.3. A Natural Environment Act should work on the principle that individuals are best placed to make judgements on if effects are mitigated or offset. For example, the Emissions Trading Scheme sets a price for greenhouse gas emissions that causes individuals, often without realising it, to make decisions on if they should avoid greenhouse gas emissions or offset them.

18.4. Biodiversity offsets, water trading and cost recovery for water storage can have the same effect. There should be no preference for effects to be avoided if they can be offset at lower cost.

18.5. A Natural Environment Act that has water trading, biodiversity offsets or water storage should be impartial to if users avoid or offset impacts.

19. One plan per region

19.1. A Cabinet Design Principle is to "realise efficiencies by requiring one regulatory plan per region jointly prepared by regional and district councils." Commentary is provided in the Cabinet Paper from paragraph 44 to 46 including the following, "plan and plan change processes should be made more efficient, with reduced

appeal rights, reducing litigation for councils. National planning standards could be used to provide standardised zones for plans, to further simplify the system."

19.2. Nationally standardised zones, as recommended by the Cabinet Paper and adopted by the EAG, will improve the efficiency and accessibility of the plan making process. The EAG proposal to disestablish Regional Policy Statements will also further simplify the plan-making process. In addition, the EAG proposal of compiling all district plans into a single national e-plan will further improve accessibility for users.

19.3. It is unclear to me, however, how asking councils to work together to develop a single region-wide plan will streamline processes. If anything, it may slow processes down as councils will have to work through a more complex process to update planning documents than if they worked alone. It also may not improve accessibility as plans will already be homogenised and located in a single e-plan.

19.4. Challenges also arise as Cabinet has asked that two separate acts are established but that there is one plan that applies for both acts. As regulatory instruments (such as a plan) need to be empowered by a single piece of primary legislation, this adds complexity on how one regulatory instrument can operate under two separate acts.

19.5. The EAG Report gets around this by proposing a model where each local authority is responsible for preparing the planning content relating to their functions under the Planning Act and NEA. "'One plan' per region will be achieved through a national e-planning portal that provides a seamless user experience" (paragraph 314).

19.6. I support this approach as a way forward for the Planning Act. Having material presented in one place online provides a useful platform to simplify planning and environmental overlays for users. Over time, further information could be added to this platform, and it may be able to largely take the place of the somewhat antiquated LIM system (Land Information Memorandum).

19.7. However, while I support the proposed way forward, I wish to note that, in my view, the proposed way forward is not fully in line with the Cabinet design principles: rather than have each region work together to provide one plan, an alternative mechanism has been developed to achieve the efficiencies without losing local autonomy (compiling district and regional plans into a single national e-plan, with common methodologies).

19.8. It would be simpler to simply allow each territorial authority to do their own plan and submit this to the national e-plan, without the one regional plan in-between.