Environmental Law Initiative Submission:

Natural and Built Environment Bill

ABOUT ELI

The Environmental Law Initiative (ELI) thanks the Environment Committee for the opportunity to submit on the Natural and Built Environment Bill (NBEB).

ELI is a registered charitable trust, whose objective is to support the effective protection of Aotearoa New Zealand's natural environment. We are advised by a small team of experts in environmental law, policy, science, ecology and management.

Though operating independently, we partner with a range of other groups and individuals —including iwi, hapū, government agencies, charities, and organisations—to achieve positive outcomes for the environment.

In ELI's view, the law is our best tool for effectively protecting the environment. Our research and advocacy are centred around improving legislation and policy to better protect and restore marine, freshwater, and terrestrial environments and the biodiversity of Aotearoa.

For more information, see www.eli.org.nz

SUMMARY

1. The NBEB is a very significant reform that affects the lives of every person living in Aotearoa New Zealand and every facet of the environment on which we depend. Many aspects of everyday life are affected by the new legislation, from clean water and air to renewable energy, housing and other infrastructure. A long time in development, the NBEB is substantial and long. As a small NGO, ELI has largely focussed on the parts of the Bill that are likely to have the most significant influence on the first of the five legislative objectives to 'protect and, where necessary, restore the natural environment, including its capacity to provide for the well-being of present and future generations.'
2. ELI's submission therefore covers the following topics:

   (a) Purpose

   (b) Outcomes

   (c) Precaution

   (d) Environmental limits and targets

   (e) Provisions relating to Māori

   (f) Integrated management

(g) Compliance, monitoring and enforcement

(h) Consents and offsetting

(i) Transitional provisions

(j) General drafting

3. Although ELI has focussed on a subset of the clauses in the NBEB, it is clear from our recommendations that it needs significant further work in order to ensure that the legislative objective of protecting and restoring the natural environment is achieved. We have made a number of recommendations to aid the development and improvement of the legislation. These are set out in the submissions below.

PURPOSE

4. Clause 3 sets out the purpose of the NBEB. The statement of the legislative purpose is fundamental as it will be used to interpret the Act and will guide the creation of the national planning framework (NPF) and regional plans, the setting of environmental limits and targets and the determination of resource consent applications under cl 223. All powers and functions that exist under the new Act must also be exercised in accordance with the statutory purpose.[1]

5. The purpose as set out in cl 3 essentially maintains the approach of the Resource Management Act (RMA), in setting out a binary use/protection purpose, the parts of which exist in unresolved tension.

6. ELI strongly agrees with the submission of the Parliamentary Commissioner for the Environment (PCE) on the NBEB Exposure Draft which recommended that the purpose 'expressly prioritise the protection and restoration of the natural environment.'[2]

7. Without this express prioritisation of environmental protection and restoration, the new legislation will likely perpetuate the trade-offs that have undermined the implementation of the RMA.

8. **ELI strongly recommends that the Bill be amended to prioritise the protection and restoration of the environment and to safeguard environmental health and integrity prior to facilitating use and development.** ELI also notes that while use

[1] *Unison Networks v Commerce Commission* [2008] 1 NZLR 42 (SC) at [53].
[2] Parliamentary Commissioner for the Environment (2021) *Submission on the Natural and Built Environments Bill Exposure Draft* at p 2. Available at https://pce.parliament.nz/publications/submission-on-the-natural-and-built-environments-bill-exposure-draft/

and development of the environment are specifically enabled, restoration or improvement of the natural environment from current state is not. While the system outcomes in cl 5 include an environmental restoration component, restoration occurs on a continuum and the necessary interpretation and application of this provision will be informed by the purpose of the Act.

9. Amending the purpose to incorporate restoration and enhancement would also ensure consistency with key provisions in the Spatial Planning Bill (SPB). **As the purpose of the SPB is to achieve the purpose of the NBEB via Regional Spatial Strategies (RSS), and the scope of RSS (cl 15) includes setting direction for the *restoration* and *enhancement* of the environment, ELI recommends that cl 3 of the NBEB be amended to also refer to the restoration and enhancement of the environment.** In addition to ensuring that the Bills, once enacted, work well together, this change would be in keeping with the policy intent of achieving positive outcomes, as opposed to focussing only on managing adverse effects. Similarly, cl 5(a) should refer to 'enhancement' and cl 6(1)(c) should refer to recognition of the positive effects of 'restoring and enhancing' the environment to achieve the outcomes.

10. **ELI also recommends that wherever duties, powers, responsibilities and functions are exercised, the drafting of the Bill provide a line of sight to connect these to the achievement of the purpose of the legislation.**

11. ELI has also noted some watering down in the current drafting from the previous Exposure Draft. The Exposure Draft stipulated 'must comply with' environmental limits whereas the current cl 3(a)(iii) stipulates simply 'complies with'. **Where the purpose references environmental limits, ELI recommends reverting to the original, more directive drafting.**

OUTCOMES

12. Clause 5 sets out the system outcomes which the NPF and all plans must provide for to assist in achieving the purpose of the Act.

13. In general ELI supports the inclusion of system outcomes, but there are a number of significant deficiencies in the current drafting.

14. Fundamentally, the current system outcomes are not prioritised and many are in conflict. Instead, cl 33 sets out that the NPF (rather than the primary legislation) is to resolve conflict between outcomes – which is directly contrary to what the PCE recommended in his submission on the NBEB exposure draft.

15. **ELI recommends that the outcomes are prioritised in the legislation, in light of a refined purpose which prioritises environmental protection.**

16. **ELI also recommends that the language in cl 5 is strengthened by replacing 'must provide for' with 'must achieve' or similar.** Similarly, the language in cl 6(1)(b) should be strengthened by replacing 'actively promote' with 'achieve'. There is simply no value in aspirational system outcomes that are not met, and the primary legislation should therefore mandate that they are.

17. Without such clarity in the legislation, this will be a source of intense litigation, for as the PCE succinctly stated in his 2020 Salmon lecture[3]:

> 'If primary legislation can provide no guidance on the priority to be accorded to these many outcomes, officials, politicians – and ultimately the courts – will be left weighing the natural environment in the balance alongside the many other outcomes and wellbeings that are in play.'

18. In addition, the current drafting has abandoned the marker of environmental 'quality' in key system outcomes. For example, where the exposure draft included the outcomes, '(a) the quality of air, freshwater, coastal waters, estuaries, and soils is protected, restored, or improved' the current drafting relies on the concepts of 'ecological integrity, mana and mauri' to define environmental quality. Unfortunately, however, it is also evident that the concept of ecological integrity itself (while comprising qualities relevant to measuring ecosystem health) lacks an indicator of environmental 'quality' or 'health' and so cannot provide this yardstick for a key system outcome unless significantly amended. We set out detailed concerns with regards to the definition of ecological integrity below**. In light of the above, ELI recommends that the Committee amend this drafting to reinstate a marker of environmental quality.**

19. Lastly, in the face of the existential threat of climate breakdown, the outcome related to greenhouse gas removal should be significantly strengthened to explicitly include the scale and rate of removal required. **Direct reference to New Zealand's commitment to action commensurate with 1.5 C of warming would also ensure that the legislation helps achieve the rapid societal transformation that the UNEP Emissions Gap Report 2022 states is necessary to prevent catastrophic levels of warming.**[4] Failure to properly address climate change in the new

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[3] Parliamentary Commissioner for the Environment, RMLA Salmon Lecture 2020, p11. Available at https://pce.parliament.nz/media/hxjhxecy/salmon-lecture-rma-reform-coming-full-circle.pdf

[4] UNEP Emissions Gap Report 2022. Available at https://www.unep.org/resources/emissions-gap-report-2022

legislation will represent a significant missed opportunity to undertake the large-scale rapid transformation required.

PRECAUTION

20. Clause 6(2) provides that where information is uncertain or inadequate, persons exercising functions, duties and powers must favour caution and an appropriate level of environmental protection. **ELI strongly recommends that the Committee clarify that this formulation refers to protection of the 'natural environment' to remove any scope for an argument that caution should be exercised in favour of allowing, for example, continued use of a resource.** This would be in keeping with the general understanding of the precautionary principle in an international and domestic context. These issues have been known to plague a similar formulation in the Fisheries Act context.[5]

21. **ELI also recommends that a cautionary approach be taken by the Limits and Targets review panel, the Board of Inquiry, and the Minister in preparing the NPF under Schedule 6.** The preparation of reports by the panel and the board may not be captured under the current wording, which focusses on decision making. However, a precautionary approach is of particular importance when setting limits and targets given their central role in achieving the purposes of the Bill, and as there will likely be uncertainty when modelling and predicting impacts and effects over a period of 9 years.

22. In addition, it is unclear how cl 6(2) relates to cl 805, in particular cl 805(4). Please clarify that cl 805 is subject to cl 6(2) and the requirement to make a decision does not override the need to exercise caution and an appropriate level of environmental protection. The Committee may also want to consider moving cl 805 into Part 1 so that these key parts of the legislation are more clearly connected.

23. Finally, cl 805 relates to requirements 'under this Act to use the best information available' where it appears that there are no specific requirements to use best information available anywhere in the Bill. Perhaps the idea is that the NPF will set out situations where the best information available must be used. Either way, the intended relevance of cl 805 is unclear.

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[5] See section 10 of the Fisheries Act 1996, *Antons Trawling Company Ltd v Minister of Fisheries* HC Wellington CIV-2007-485-2199, 22 February 2008, where precaution was used in favour of utilisation.

LIMITS AND TARGETS

Limits

24. ELI's previous submission on the Exposure Draft focussed almost exclusively on the concept of environmental limits.

25. In that submission we recommended, among other things, that:

    (a) The safeguarding of environmental limits be made more central to the purpose of the NBEB;

    (b) Environmental limits be set at truly ecologically sustainable levels;

    (c) Environmental limits be informed by independent science bodies.

26. We reiterate those submissions and provide further submissions on the NBEB as currently drafted.

27. We welcome the introduction of the concept of environmental limits, however contrary to the prior advice of the PCE, the substance of environmental limit setting is being left to regulations, and the discretionary powers of Ministers. Such discretion does not provide any certainty of environmental protection. We note that the Minister has full discretion in the process provided, as the advice of the limits and targets review panel is defined by the Minister's terms of reference, and the advice is not required to be used other than being 'considered' by the Minister prior to public notification. The Evaluation Report is not required to explain any divergence from the Panel's advice, or limitations in the Minister's TOR. We are also concerned that the requisite inclusion of 'environmental and natural resource management expertise' on this panel in addition to science/mātauranga expertise risks industry/user input into advice which should be purely based in science/mātauranga.

28. To mitigate the obvious risks from the issues raised above, **ELI strongly recommends that environmental limits and targets are set by an independent body with the requisite scientific and mātauranga Māori expertise.** A limit setting body would be greatly aided by further improvements to the design of the limits and targets regime as set out in the NBEB.

29. On current drafting, the aspects of the natural environment for which environmental limits must be set in cl 38 are poorly defined and are set out at the wrong categorical level. For example, cl 38 requires limits to be set in relation to 'air'. Limits therefore could be set for one area of the country and not another, or for concentrations of one particular contaminant and not others. It also appears, from the wording of cl 34, that the entire NPF could apply only to a portion of Aotearoa. There is a risk that these

categories frustrate spatially integrated management to a greater extent than the RMA's specific provisions for the CMA. To address this, ELI recommends that:

(a) Clause 38 be refined so that mandatory limit setting is more clearly specified, for example, limits are set for all known air contaminants rather than for just 'air'.

(b) Clause 32 or 34 be clarified so that limits must be set across the entire country.

(c) A process be inserted into cl 39 to allow people and groups to request that the Minister consider setting limits where there are gaps, and to mandate the Minister to give due consideration to such requests.

30. **ELI also submits that the NBEB should clearly set out a process for amending limits and targets in the NPF, in response to developing concerns or changes in the environment.** Schedule 6 provides for the NPF to be reviewed at least every 9 years, and in limited specific circumstances.[6] However, environmental changes can occur quickly, and there needs to be a mechanism to respond appropriately. New concerns or changes could be picked up in the national level aggregated data collected under cl 53, or via the system performance provisions in Part 12. Changes could also be brought to the attention of the limit setting body by the public or by expert groups. **ELI recommends that the Committee clarify that limits and targets can be amended under Schedule 6, Part 2 and 3, as needed in response to developing concerns or changes in the environment.**

31. Furthermore, in stipulating that the Minister 'may' set environmental limits in the NPF, cl 39 does not wholly align with the mandatory nature of limit setting set out in cl 38. This is contrary to the language of 'must' as used in 7(2) of the Exposure Draft and introduces further uncertainty. While ELI supports the apparent intent to ensure non-regression of the natural environment by preventing further degradation, the term 'degradation' is open to definition by the Minister setting the limit. Definitions of 'degradation' used in national policy and consent conditions have enabled further loss of natural capital. **ELI recommends careful consideration is made to ensuring that limits will actually secure non-regression.**

32. Clause 40 (1) also introduces a potential loophole in the setting of environmental limits. The clause reads that 'An environmental limit must be expressed as relating to the ecological integrity of the natural environment or to human health.' The use of *or*

[6] Natural and Built Environment Bill, Schedule 6, clauses 27 and 28.

in this subclause opens up the possibility environmental limits being set that only relate to human health, but not to the protection of the natural environment for its own sake. **ELI recommends altering the drafting here to clearly stipulate that environmental limits must be expressed in terms of human health and environmental protection, thereby mirroring the purpose of environmental limits set out in cl 37.**

33. The proposed exemptions from environmental limits in clauses 43-46 also represent a clear loophole in the legislative regime through which large scale development will likely be channelled. Under current drafting, the essential feature of an exemption in cl 45(2) is that 'The activity must provide public benefits that justify the loss of ecological integrity'. This description is exceptionally wide and could unintentionally capture *any* activity that provides *any* public benefit.

34. **As ecological integrity is the foundation of a functioning economy and society, ELI does not support exemptions to environmental limits.** Continuing to allow the loss of ecological integrity is both short sighted and contrary to the stated purposes of the Act - as it compromises the well-being of future generations. ELI recommends removing this loophole to ensure that environmental limits fulfil their stated purpose.

35. However, should environmental limits exemptions be retained, ELI recommends changes to the current drafting in cl 45 to better align it with both the purpose and the provisions in cl 46, specifically:

    (a) Clause 45(2) – The activity must provide national or regional benefits that outweigh the loss, or, if this is uncertain, the possible loss, of ecological integrity

    (b) Clause 45(3) – The exemption must:

        i. be time limited

        ii. enable the recovery of ecological integrity, within the shortest available timeframe.

36. **We also recommend that cl 46(a) cover situations where ecological integrity in the area would or could become unacceptably degraded *if* the exemption were granted.** This would appear to align with the purpose of the NBEB.

37. Clause 46(b) should refer to irreversible loss or 'significant harm' to ecological integrity. This would make more sense when read along with the required considerations in cl 50(2)(c)(ii). Furthermore, to align with the requirement to favour caution in cl 6, ELI recommends that cl 46(b) refer to situations where an exemption 'could' (as opposed to 'would') lead to irreversible loss of ecological integrity.

38. Lastly, ELI welcomes the clear stipulation in cl 102(c) that environmental limits (and associated targets) must be achieved by regional level plans. **ELI recommends that the Bill also include a mechanism to hold regional planning committees accountable should environmental limits and targets not be met.**

Limits in plans

39. Clause 39 provides that limits can also be set in plans. Clauses 96 and 97 provide that the purpose of a plan is to provide for integrated management of the natural and built environment in the region, and that it must give effect to the NPF. Clause 102(2)(c) provides that the plan must achieve limits and targets.

40. **ELI recommends amending these clauses to make it clearer that the purpose, and content, of the plan are to contain appropriate rules to ensure that limits set in the NPF are complied with in the region** (this would make more sense than requiring it to 'achieve limits' which is unclear). Plans should also be required to include limits where allowed under the NPF. This would reduce the risk of gaps for which no limits are set.

Targets

41. ELI welcomes the introduction of mandatory targets in cl 49.

42. However, as currently drafted, the purpose of the NPF (cl 33) does not include targets. ELI recommends that explicit reference is made to targets, on account of their importance to environmental limit setting.

43. Targets are for the purpose of 'improving the state of the natural and built environment' (cl 47). This language is more general than that for limits,[7] and lacks a specified standard of environmental protection for either targets (cl 49) or minimum level targets (cl 50). Given the importance of restoration and improvement of the natural environment as a driver of reform, clear norms and goals for improvement should be provided for.[8]

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[7] It is not clear whether the inclusion of the built environment is intentional; the *Overview* and *Explanatory note* both refer to 'natural environment' only.

[8] Unclear norms and goals are one of the most significant sources of delay in environmental interventions which has led to overallocation of groundwater from 2005 until at least 2030 in Canterbury, and the associated loss of natural capital during this time and possibly a permanently compromised ability to implement comprehensive environmental interventions. Jenkins, B. (2022) *Science and policy delay leading to loss of natural capital: case study of Te Waihora/Lake Ellesmere* Australasian Journal of Water Resources at 8-11.

44. The introduction of the concept of minimum level targets in cl 50 appears to be a safeguard mechanism in the eventuality that environmental limits are set at levels that continue environmental degradation, or where environmental degradation has already reached unacceptable levels. Although it is difficult to reconcile the purpose of environmental limits in cl 37 with the settling of limit levels that enable or entrench degradation, it seems prudent to include a safeguard mechanism. However, there are some significant issues with the current drafting, including:

    a. the minimum level target is discretionary and can be set at the behest of future Ministers. This delegation of key legislative provisions into regulations is again contrary to the explicit recommendations of the PCE, and

    b. the use of the term 'unacceptable degradation' in cl 50(1) is also ambiguous and highly subjective.

45. **To avoid these issues, we reiterate our recommendation that environmental limits and targets be set by an independent body with the requisite scientific and mātauranga Māori expertise.**

46. If Ministerial discretion is retained, the primary legislation should include a requirement that, in considering the matters in cl 50(2), the Minister receives appropriate scientific advice, or makes their assessment with reference to scientific knowledge and mātauranga Māori. These assessments will involve a level of scientific judgement and the Minister making these decisions is unlikely to have the required expertise.

47. In making these decisions, the Minister will need to apply the decision-making principles in cl 6, which includes favouring caution. It is not clear how this aligns with the strong requirement in cl 50 to be 'satisfied' and there is potential for litigation on the meaning to result. We suggest considering alternative wording such as 'the Minister, following consideration of scientific advice and mātauranga Māori , *considers*.' The question of how to weigh up a requirement to be 'satisfied' against taking a cautious approach also arises in other clauses for example 232(5), 233(4), and 293(5)(b). These could also be amended to 'considers.'

48. Lastly, ELI welcomes the mandatory monitoring of limits and targets in cl 53, (but note that this provision should clarify what is to be monitored, i.e., the state and change of the actual environment compared to limits and targets). **We recommend that cl 53 is expanded to include a statutorily defined review mechanism**

following this monitoring, including a mechanism for holding regional planning committees responsible for meeting limits and targets.

PROVISIONS RELATING TO MĀORI

49. ELI welcomes the introduction of the Tiriti o Waitangi clause which requires all persons exercising powers and functions under the Act to give effect to the principles of te Tiriti o Waitangi. However, ELI is concerned that without an appropriate understanding of te ao Māori which forms part of the context behind the principles of Te Tiriti, there remains a risk of unlawful decision making. This happened in *Kawhia v Otorohanga District Council,* a case in which a district council summarily dismissed tangata whenua concerns where a proposed activity would adversely affect the relationship of Māori with their ancestral lands, water sites, wāhi tapu and other taonga.[9]
50. **In order to substantively improve recognition of te ao Māori and Te Tiriti, ELI recommends introducing a requirement for decision-makers to attend mandatory education which incorporates both an introduction to tikanga and te ao Māori.** Education and understanding are important to forming meaningful relationships and will improve the capacity of government and its agencies to act as honourable Tiriti partners.
51. ELI welcomes those elements of the NBEB which provide for effective roles for Māori in the new resource management system at the national, regional and local levels. In particular, ELI acknowledges the increase in focus on hapū Māori within the Bill, which seeks to give greater recognition to the way that kaitiakitanga is exercised at a localised level.
52. Notwithstanding these elements, ELI is concerned that certain clauses in the Bill do not adequately provide for effective roles for Māori at the local level and indeed, work contrary to hapū Māori interests.
53. Clause 819 subsection (1) states that local authorities must keep and maintain records of those things listed under paragraphs (a)-(d) for iwi, hapū and any groups that represent hapū with interests in their region or district. On current drafting, local authorities are directed to keep:
    (a) The contact details of each iwi authority and any groups that represent hapū for the purposes of this Act; and

[9] *Kawhia Harbour Protection Society Inc v Otorohanga District Council* (2007) 13 ELRNZ

(b) The planning documents that are recognised by each of those iwi authorities or other groups and lodged with the local authority; and

(c) Any area of the region or district over which 1 or more iwi or hapū exercise kaitiakitanga; and

(d) Any Mana Whakahono ā Rohe applying within the region or district entered into under subpart 6 of Part 10.

57. Clause 819 (3) goes on to state that the requirements of subsection (1) do not apply to hapū unless a hapū (through the group representing it for the purposes of the Bill) requests the Crown or the relevant local authority to include information on the hapū in the record.

58. The effect of subsection (3) appears to be that the matters listed under paragraphs (a)-(d) of subsection (1) do not need to be kept and maintained to the extent that those matters apply to hapū.

59. It is unclear what the rationale behind subsection (3) is, but its implications are hugely damaging to hapū Māori. For example, does subsection (3) properly interpreted mean:

(a) That the contact details of hapū are not retained by local authorities? Does this mean that local authorities will no longer contact hapū concerning matters that directly affect their rohe?

(b) That Hapū Management Plans (whether they represent the hapū in its entirety or a marae of the hapū) are not 'carried over' into the regime, and will not be referred to when resource consents are being considered, affecting taonga?

60. While we note that subsection (3) allows hapū to request the Crown or the local authority to include information on the hapū in the record, this represents an onus shift that places the burden of responsibility squarely with hapū. Such an onus shift places an unnecessary burden upon often under-resourced hapū, or groups representing hapū, whose primary objective may not always be taiao related, and indeed may not be up to speed as to reforms taking place in the law.

61. Failing to transfer Hapū Management Plans into the new regime may amount to a breach of the treaty principle of Active Protection which seeks to uphold the Crown's obligation to preserve and maintain taonga under Article 2 to the fullest extent

practicable.[10] The Crown cannot be said to be actively protecting hapū Māori if it allows hapū environmental planning documents to be rendered inoperable.

62. Previous efforts by hapū to encapsulate their environmental goals and objectives in Hapū Management Plans must be protected and automatically maintained for future records. Relationships between hapū and local authorities that have taken some time to develop, risk taking a significant step backward.

63. **ELI recommends that all existing hapū management plans (those being plans which have been lodged or have been recognised by local authorities in resource consent matters) are imported into the new regime, along with the contact details of the hapū, or group who represents hapū for the purposes of those plans.**

INTEGRATED MANAGEMENT

64. Integrated management is a well-established and critical policy goal.[11] Integrated management includes interdependent spatial/physical (horizontal) and administrative (vertical) aspects. Both are critical for ensuring the environment is managed in a holistic way.

65. ELI acknowledges and supports the intent of including ‘integrated management’ as an overarching decision-making principle (cl 6), and as a core purpose of the NPF (cl 33), Plans (cl 96) and RSS (cl 15 SPB).

66. However, these core integrated management provisions lack both a definition of what integrated management means and any explicit prescriptions for operationalising integrated management. They appear intended to create vertical integration through the use of Planning Committees and RSS without explicit regard for horizontal integration.

67. ‘Integrated management’ as a term appears in high-level provisions in the RMA, NBEB and SPB, all without definition. Due to its scope, a single legislative definition may be undesirable. However, without a clear definition, the complexity of the concept lends itself to mixed and inconsistent application when used. ELI recommends that the Committee seek further guidance on defining ‘integrated management’ in the NBEB.

[10] *New Zealand Māori Council v Attorney-General (Lands)* [1987] 1 NZLR 641 per Cooke P at [37].
[11] Report of the Resource Management Review Panel (2020) at p 32

68. **To achieve the intended spatial integration across landscapes, ELI also recommends that mechanisms and actions for achieving integrated management are clearly prescribed in the legislation.**

Integrated management as proposed is open to interpretation (all things to all people)

69. As drafted, implementing integrated management (required by the high-level provisions noted above) is left completely open to decision makers to determine as they see fit, more so than in the RMA, which sets out a requirement for spatial integration specifically. In the RMA 'Integrated management' applies to the environment in a physical sense, i.e. to the 'natural and physical resources' of the region,[12] the 'effects' of activities,[13] and a coastal marine area and any related part of the coastal environment.[14]

70. **ELI supports specific provision for estuaries at a high level (and all areas where coastal and freshwater systems mix) but considers that without limits set for the appropriate specific parameters (see our submission on limits), it is open to decision makers to decide how to provide for estuaries within the NPF, plans and the RSS, and this may be done so as not to include inland land uses.** This leaves the system open to repeating past failures to manage the cumulative effects of activities on land in the coastal environment.

Lack of provisions operationalising integrated management of legislative categories

71. The new system will replicate some of the categories used in the RMA, e.g.: separating activities into different permit types and separate responsibilities for regional and territorial authorities. It will increase categorisation through separate matters for limit-setting, and the setting of management units according to these separate categorisations. These types of categorisations have frustrated integrated management in the past.[15] There is no clear mechanism in the SPB or the planning provisions of the NBEB to ensure linkages across categories are appropriately factored into decisions at all levels.

72. Without clear direction, management categories specified in in the RMA (e.g.: for consent types, council functions, and the CME) can frustrate environmental

[12] Sections 30(1)(a) and 59 RMA.
[13] Section 31(1)(a) RMA
[14] Section 64(2) RMA.
[15] Parliamentary Commissioner for the Environment, *Managing our Estuaries* (2020), p 25; Denyer, K. and Peters, M. (2021) *Root Causes of wetland loss* National Wetland Trust at p 14,

protection. For example, new wetland protections in the National Environmental Standards for Freshwater were found in the High Court to apply to coastal wetland as intended, but despite this, these were repealed pending the development of specific regulations for wetlands in the CME, partly due to the need to amend coastal plans to align with the new protections. **While management categories are inevitable, to prevent categorisation frustrating integrated management, ELI recommends that the requirements of 'integrated management', and the agencies responsible, must be explicitly woven into decision making requirements.** One example of this would be to ensure the Minister of Conservation's input where matters 'affect' the coastal marine area, rather than constrained to where provisions 'apply to' (cl 94 and cl 338 NBEB, and cl 61 SPB).

COMPLIANCE, MONITORING AND ENFORCEMENT

73. ELI strongly supports comments made by Hon Eugenie Sage MP during the first reading debate regarding cost-recovery from monitoring permitted activities, the addition of applicants' compliance history when assessing consent applications, the increase in financial penalties, and the barring of insurance in these areas.

74. Ms Sage also highlighted the work of the Environmental Defence Society and Marie Brown in their report *Last Line of Defence.* This report pointed to a lack of staff resources, a lack of funding, and a lack of serious intent in councils to enforce plan rules. Similar themes – although arguably 'upstream' – were highlighted by the Parliamentary Commissioner for the Environment in his October 2022 *Environmental reporting, research and investment.* His essential case was that councils do not have the information base to enforce plan rules.

CME Implementation

75. The Minister for the Environment has recognised that poor implementation of the RMA 'almost guaranteed its failure.' [16] RMA plans could never 'achieve sustainable management' on their own. Only together with proper implementation could any planning objective be achieved.

76. The NBEB contemplates a range of new plans. Improved national direction and rationalisation in these plans is welcome. But regardless of the final details or

[16] https://www.beehive.govt.nz/speech/speech-rm-reform-thomson-reuters-environmental-law-and-policy-conference-24-may-2022

arrangement of these plans, they will remain mere documents without effective and properly funded implementation.

77. In the Ministry's work on the NBEB, ELI has not sighted a detailed policy analysis of the depth of monitoring system needed to support the real-world achievement of the new statutory purpose or planning objectives. Similarly, we have seen no analysis that evaluates the necessary funding arrangements for such a monitoring system, nor the downstream compliance and enforcement systems. **We strongly recommend that the Committee carefully review available analyses and pay close attention to these implementation issues.**

Monitoring

78. Monitoring is fundamental to implementation. An expanded information (i.e.. monitoring) base, will be necessary to ensure that new compliance, monitoring and enforcement (CME) powers in the Bill can actually be implemented as envisioned, including:

    (a) the power to consider applicants' compliance history (cl 223)

    (b) the power to review consents (cl 75 and cl 277)

79. The exercise of these powers will inevitably be challenged as invalid in the absence of fair, adequate and accurate information to underpin such reviews. In short, without better monitoring information, 'clawbacks' will remain a theoretical possibility unavailable in the real world. As such, 'targets' will remain just that.

80. Similarly, if meaningful environmental limits are to be set, many will have been overshot – such that they ought to be targets in many cases. An expanded monitoring effort will be required in order to claw back to those targets – with or without buyouts.

81. Monitoring also provides the information required to assess the performance of the system as a whole and to make changes where necessary. ELI supports the new provisions for system performance evaluation and oversight, but considers that prior to reporting and oversight, improvements to the legislation could better ensure system performance is successful in the first place. **As a starting point, ELI recommends including a strong link to the outputs of the Environmental**

Reporting Act, along with enduring outcomes set by that legislation (as recommended by the PCE)[17].

82. To ensure a responsive evidence-based system, monitoring should generate information to diagnose: [18]

    a. the state of the environment and the progress in relation to environmental outcomes sought:

    b. the adequacy of provisions which set out to achieve those outcomes; and

    c. the adequacy of monitoring and enforcement of those provisions.

83. Under the RMA, the Minister's function to monitor the implementation of this Act (and of any secondary legislation made under it) and its effectiveness in achieving the purpose of the Act has not led to comprehensive monitoring of environmental standards. Similarly, councils have not been proactive in monitoring the efficiency and effectiveness of either their plans, nor the exercise of processes despite these requirements of the RMA. National Monitoring System data make it clear that few councils have reported on efficiency and effectiveness of plan provisions. This lack of core information gathering has perpetuated RMA implementation failings while fostering an unbalanced focus on further planning. Similar generic provisions in the NBEB cannot be relied on to generate the monitoring information base required.

84. ELI supports provisions requiring monitoring of implementation, however, the NBEB lacks mandatory direction on the level on monitoring required (which was similarly missing from the RMA).

85. ELI notes that the NBEB retains a high degree of discretion for Councils to determine and take 'appropriate action' in response to monitoring (cl 783(4) and cl 784). Due to this, councils can limit the scope of action they may take by limiting the monitoring information they gather. Fuller information gathering should enable a reliable determination of 'appropriate action'.

86. **ELI therefore recommends that mandatory direction on the level of monitoring is included in the Bill.**

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[17] Parliamentary Commissioner for the Environment (2022) *Environmental reporting, research and investment Do we know if we're making a difference?*

[18] A recent example of the utility of his kind of information is the Parliamentary Commissioner for the Environment's request for information in relation to the degradation of Otago's deep-water lakes which sought Council monitoring information on the condition of the lakes, the adequacy of rules protecting the lakes, and the adequacy of the rules' implementation. Parliamentary Commissioner for the Environment, 1 December 2022 *Letter Re: Heal of Otago's deep-water alpine Lakes to Chief Executive Otago Regional Council.* Available at: https://pce.parliament.nz/publications/letter-to-otago-regional-council-regarding-deepwater-mountain-lakes/

Fragmented CME responsibilities

87. ELI supports an increased focus on systemic oversight but is concerned that with more responsibilities split across the relevant agencies, information and responses might be siloed, and therefore incomplete. For example, the separation of planning committees from local authorities risks a lacuna as to who is responsible for identifying where inadequacies lie and which body must take action under cl 784.

88. Potential silos of information and response will be exacerbated by the 'scatter' of interconnected CME responsibilities throughout the Bill, creating uncertainty as to the agency responsible in the case of inaction or failed implementation.

89. For example, Schedule 7 directs reporting of certain monitoring information about plans to the planning committee (cl 53, Schedule 7), while cl 783 provides for more comprehensive monitoring by local authorities. In addition to this, regional planning committees are to monitor how effectively its plan and RSS are being implemented (cl 642(c)). The requirement to respond and take appropriate action in response to monitoring is shared by both local authorities and planning committees.

90. In cl 783(1)(b) the monitoring of the 'efficiency and effectiveness of policies rules, or other methods' has been qualified (when compared with the previous section 35(2)(b) of the RMA) to relate to: any limits that apply in the region; promotion of system outcomes; and addressing other matters of significance identified in the plan. ELI is concerned that with this narrower focus there is a risk that monitoring does not link to environmental outcomes, as represented by the actual state of the environment.

91. **ELI recommends that the Bill be revised to include more transparent lines of accountability for monitoring and for taking action when implementation problems occur. ELI also recommends careful review of how environmental indicators and outcomes (in alignment with the Environmental Reporting Act) can be used to measure the success of plan provisions in terms of environmental outcomes.**

Clarity and consistency of CME provisions

92. There are also issues with clarity and consistency in the current drafting of CME provisions that ELI recommends the Committee pay particular attention to.

93. The heading of cl 783 states that monitoring is for local authorities to effectively carry out their functions and duties under the Act. However, the content of the clause does

not make this link and uses inconsistent language - of ‘functions and responsibilities’ and ‘functions, powers duties’ in cl 783(b) and (d)). **ELI recommends that this be made consistent, and where possible, cross-reference what these include (e.g, the matters in Subpart 4, and the duty of local authorities to enforce compliance with plans in cl 146). We also recommend amending cl 783(4) so that action must be taken in response to monitoring information.**

94. In cl 783(1)(b) the monitoring of the ‘efficiency and effectiveness of policies rules, or other methods’ has been qualified (when compared with the RMA) to relate to: any limits that apply in the region; promotion of system outcomes; and addressing other matters of significance identified in the plan. ELI is concerned that with this narrower focus, fine grain information needed to locate inadequacies may not be gathered.

95. ELI does not support inclusion of ‘significant’ in cl 784, which already gives local authorities and planning committees broad discretion as to how to respond to risks which are core to the objective of the legislation.

96. The definition of ‘risk’ currently relates to that set out in the Civil Defence and Emergency Management Act 2002, which pertains to ‘hazards’. This does not sit well with the ‘environmental limits’ subject matter of the NBEB provision.

Cost recovery

97. The cost recovery provisions in cl 781 appear to be based on the idea of monitoring for compliance or non-compliance with statutory authorisations or compliance directions. This focus is misplaced. Cost recovery should be closely linked with whatever parameters will constitute environmental limits and targets, at the very least through a cost-recovery principles provision. If cost recovery is part of a council’s ‘authority to enforce observance with its plan’, as it must be, ELI recommends that the relationship with cl 146 be clarified.

98. In ELI’s view, however, cost recovery for monitoring should go much further than that. To provide local authorities with the funding base for proper monitoring, **ELI recommends that it be made mandatory to recover upon consents, including existing consents, that will have reasonably foreseeable effects, either alone or in combination with other consents, on the parameters chosen for limits and targets.**

99. **ELI recommends that cl 781 be redrafted to align with the ‘polluter pays’ principle found in cl 417. If the ‘principle that those who produce pollution**

should bear the costs of managing it to prevent damage to human health and the environment' is appropriate for contaminated land, it is also logical to apply a similar principle to any activity with externalised effects. If this way of cost recovery is deemed to be too complicated, ELI suggests that the Committee refer this aspect back to officials to design a levy regime.

100. ELI supports the uplift in maximum penalties, as contained in cl 765. However, we consider that further analysis is necessary. Penalties need to be sufficiently high to have meaningful deterrent value for the most serious offences, such that the present low probability of detection diminishes in relevance. For the most 'serious' offences we recommend that the Committee review the penalties to ensure that they provide the required level of deterrence.[19] This is because in the absence of any commitments to better resource monitoring and enforcement, the likelihood of detection for breaches or offences will remain very low. In that circumstance, the only way to generate a signal of a spectrum of 'seriousness' for breaches and offences is to revisit penalties – i.e., the consequences upon detection of breaches or offences. Greater use of consent forfeiture penalties should also be considered.

Pecuniary penalties

101. ELI supports the introduction of the pecuniary penalty regime. Clause 778(1) sets out the matters, which the Court must have regard to when setting the penalty amount. We have two recommendations here:

(a) **ELI recommends including 'any financial gain made, or loss avoided, from the breach' in cl 778(1).** We see that sub-clauses (4) to (7) set out maximum limits based on different situations. However, the Court should still *consider* financial gains when determining penalty levels within these limits. Further, ELI recommends that you take advice from the Parliamentary Counsel Office (PCO) to ensure that the wording also captures losses avoided in addition to gains made.

(b) Clause 778(1)(b) provides that the Court can consider the nature and extent of loss or damage caused to a 'natural and physical resource' as a result of the contravention. **ELI recommends that this be amended to refer to the 'natural environment.'** As the definitions currently stand, this change would

[19] We note, for example, that the maximum term of imprisonment in cl 765 is 18 months, compared with a 5 year maximum imprisonment term in s 252 of the Fisheries Act 1996.

capture impacts on habitats and ecosystems in addition to natural and physical resources. These are also surely relevant to identifying the appropriate penalty level. The Committee may also consider referring to impacts on te Oranga o te Taiao, which could align with the purpose of the Bill.

(c) Similarly, cl 779 provides that the Court can order a person to take steps to minimise and remedy adverse effects on natural and physical resources**. ELI recommends that this be amended to refer to the natural environment.** The Committee could also take advice on whether it would be appropriate to refer to adverse effects on te Oranga o te Taiao here.

CONSENTS AND OFFSETTING

Consideration of resource consents

102. Clause 223 sets out what a consent authority must have regard to (and what they must not have regard to) when considering a resource consent application.

103. Subclauses (2)(c) and (d) initially direct the consent authority to consider the NPF, but subclause 10(a) then directs that the consent authority may only have regard to the NPF if satisfied that the plan does not adequately deal with the matter. The inclusion then subsequent exclusion of the NPF is unnecessarily confusing. If the intent of subclause 10 is to legislate a response to RMA case law on recourse to national direction and Part 2, **ELI recommends that the Committee closely examine cl 223 to ensure that it provides a clearer set of directions for local authorities and for resource consent applicants.**

104. Clause 223 (c) also includes the line 'whether, and the extent to which, the activity contributes to any relevant outcomes, limits, targets, and policies in…' The language 'contributes to' is also likely to be confusing here. For example, it is difficult to imagine how a development activity will contribute to an environmental limit or target. The language of consistency used in subclause (d) appears to be more appropriate language for limits and targets**. ELI recommends that the Committee seek advice from the PCO on redrafting subclause (2)(c).**

Offsetting

105. Schedules 3-5 set out the principles for biodiversity and cultural offsetting. ELI supports the additional clarity provided regarding these principles but wishes to highlight some areas for improvement in terms of how they are incorporated into the NBEB.

106. We expect that offsetting and redress were intended to provide additional avenues for environmental protection. We are concerned that, if incorporated in this way, they would instead provide additional avenues for consents to be obtained, or exemptions from limits sought. This is largely because, despite the hierarchy in the effects management framework, offsetting and redress are included as options for addressing negative effects as opposed to being treated separately as options for adding positive effects. Our concern is that an applicant could skip down the list of avoid, mitigate, and remedy, and land with offsetting or redress. Please ensure that offsetting and redress do not effectively end up providing alternatives for activities which should be prohibited and would have been prohibited under the existing framework.

107. Clause 62 provides that the effects management framework applies only to adverse effects on significant biodiversity areas, specified cultural heritage and to other resources where directed in the NPF. The effects of including offsetting and redress in clause 14 are therefore unclear. If the general duty in cl 14 does not link into hierarchy in the effects management framework, do using offsets and redress just become part of a set of options available to meet the duty? The concern also arises in relation to cl 717.

108. It is also unclear how the provisions in clause 61 will work. For example, cl 559 provides that a rule, consent, or designation must not allow an activity that would have an adverse effect on a place of national importance unless there is an exemption. Is an activity prohibited if it has adverse effects in general, or only if it has remaining adverse effects after applying the framework? We suggest clarifying it is the former.

109. A similar problem arises in cl 223: a consent authority must have regard to measures proposed to avoid, remedy, mitigate, offset, or take steps to provide redress for effects. If the effects management framework specifically does not apply, it is not clear whether this list must be applied in any particular order. It is concerning that, where the effects management framework expressly doesn’t apply, offsetting and redress could be said to be available as new alternatives to avoiding adverse effects.

110. **Furthermore, in our submission on the SPB we recommend that cl 17 of that Bill include provision for RSS to include specific planning for biodiversity and cultural offsetting, to ensure that positive environmental outcomes are achieved.**

111. Similarly, the contents of natural and built environment plans specified in cl 102 should include specific planning for biodiversity and cultural offsetting to ensure that the objectives of environmental protection and restoration and giving effect to Te Tiriti are not undermined by ad-hoc and reactive responses to offsetting applications.

112. To ensure that offsets are properly planned in a fashion that delivers positive environmental outcomes, **ELI also recommends that the monitoring provisions in cl 783 specifically prescribe monitoring of environmental offsets, including under cl 783(e) and the monitoring of resource consents.** Only with sufficient information about the scale, number and success of offsets within a region can offsets be planned in such a way as to lead to environmental and cultural benefits.

TRANSITIONAL PROVISIONS

113. The transitional provisions included in Schedules 1, 2, 6 and 15 are key to ensuring that one of the key objectives of the new Bill -- to 'protect and, where necessary, restore the natural environment, including its capacity to provide for the well-being of present and future generations' -- is not undermined.

114. Schedule 6, cl 31 (b) sets out that the first NPF does not need to include input from a limits and targets review panel. Schedule 6, cl 31(1)(e) also currently provides that the first NPF must be prepared on the basis of the RMA national direction and that the Board and Minister must have regard to maintaining consistency with the policy intent of the RMA national direction to the extent it is compatible with the NBEA.

115. It is therefore currently not clear whether the first NPF will include new limits and targets, and how the Minister will receive scientific advice on those limits and targets. It is also not clear which parts of the national direction instruments that currently include 'limits' will be transferred across to the NPF.

116. The current drafting of the provisions relating to environmental limits adds to the state of uncertainty in the transitional period. Clauses 40 to 42 of the Bill provide that environmental limits must be set to reflect the state of the environment existing at commencement. The wording 'reflect' in cl 40(3) can be interpreted in multiple ways, including to incorporate the current state as a 'baseline' or to simply factor the current

state into the limit setting process. To ensure that the state of the natural environment is not further degraded in the transition, and to improve certainty, this key limit setting provision must be clarified in such a way as to prevent regression.

117. **ELI recommends that the transitional provisions outlined above are clarified in order to ensure 'non-regression'.** Indeed, the Committee may consider inserting a clear commitment to 'non-regression' into Schedule 1 and/or Schedule 6 to ensure that the legislative objective to protect and restore the natural environment is not undermined during transition.

GENERAL DRAFTING

Definitions

118. ELI also has a number of recommendations in relation to definitions contained in cl 7.

119. Our principal concern is with the definition of 'ecological integrity', which is a cornerstone definition in the Bill. We accept that the current drafting does cover the recognised aspects of an ecosystem, but we question whether it describes a *natural* or *healthy* ecosystem. The current definition refers to representation, composition etc, but it does not specify that these should be at a healthy level. On comparison with Appendix 1A of the National Policy Statement for Freshwater Management which clearly focusses on a level of ecosystem health which would have been 'expected in the absence of human disturbance or alteration', the current drafting could be seen as a regression.

120. **ELI recommends taking advice from the PCO on drafting options to remove this unintentional regression.** One option would be to amend cl 5, and Schedule 6, cl 3, to refer to protecting ecological integrity at natural levels that would be expected in the absence of human disturbance. Another option would be to amend the definition to refer to the absence of human disturbance, or to include 'natural' in (a), (c) and (d) instead of just (b), and then to assess whether amendments were required to cl 37 and elsewhere.

121. Adverse effects is defined as excluding 'trivial effects.' ELI recommends that 'trivial effects' should instead be excluded from the definition of 'effects'. Making this amendment would avoid a situation where decisions makers can consider 'trivial' positive effects but not 'trivial' adverse effects. It may then be possible to remove duplicated references to 'trivial effects' in cls 64, 559 and 563.

122. The definition of ‘natural environment’ refers to ‘plants, animals and other living organisms’ where most other definitions and clauses in the Bill (cls 19, 20 and 50, for example) refer only to plants and animals. Technically, ‘other living organisms’ could include fungi, protozoans, algae and bacteria. ELI recommends checking with the PCO as to drafting which consistently captures these.

123. We assume that ‘indigenous’ species would include cosmopolitan species and cryptogenic species. The Committee may also wish to check that with the PCO.

124. *Kaitiakitanga* is defined as meaning the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to ‘natural and physical resources.’ We wonder whether the definition should instead refer to the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to the ‘natural environment’. This would also capture ecosystems. However, we are not in a position to advise on whether this would be appropriate, and only recommend that the Committee takes appropriate advice.

125. ELI recommends the following changes to definitions which would assist integrated management, to ensure ecosystems are managed as a whole, including their dynamics over time and in response to climate change.

(a) *Bed*: amend to ensure this includes the entirety of a functional river system, accounting for its dynamics over time, and not exclude the full bed of braided river systems;

(b) *River*: Amend to ensure that (b) including *modified water courses* includes drainage canals which have replaced historic water bodies. This would make the approach for rivers consistent with that already in place for lakes, which includes lakes controlled by artificial means.

Other drafting

126. ELI also has noticed drafting issues with the following:

(a) Should the first sentence of Schedule 3 refer to biodiversity redress?

(b) Schedule 3, clause 1 refers to mitigating more than minor adverse effects, when much of the act refers to ‘trivial’ effects. This should instead refer to ‘trivial’ effects to align with cl 559.

(c) The NBEB makes repeated references to people on ‘low incomes’, but what constitutes a ‘low income’ is not defined. ELI acknowledges the intent of these provisions but submits that there may well be unintended consequences to, for example, disregarding adverse effects on the environment caused by the use

of land by people on low incomes (cl 223(8)(e)(i)). Many extremely wealthy individuals may in fact have low incomes. Disregarding the adverse effects of land use based on income may not generate the desired outcomes and should be carefully considered by the Committee.

(d) Clause 104 appears to be duplicated by cl 109.

127. We have also spotted possible typos in relation to definitions contained in cl 7:

(a) The definition of effects management framework appears to refer to the wrong clause.

(b) The definition of 'environmental limit' appears to contain a typo. Should it say 'or' instead of 'of'?

Efficiency

128. Efficiency is one of three core allocation principles (cl 36) which are relevant to the Minister's decisions on the NPF, planning committee decisions on rules, and consent processes. ELI understands that the incorporation of these principles has been to ensure allocation fosters uses which offer the greatest environmental, social, cultural or economic value.[20]

129. This intent matches international discourse recognising the need to shift in policy to allocation systems within environmental limits that build long term social and ecological resilience.[21] The intent of the reform, and the allocation principles, is commendable and consistent with this shift in policy, but the proposed language of the allocation principles does not carry this intent through to decision makers.

130. In isolation of this background, it is not clear what kind of efficiency is referred to in cl 36, or the rationale supporting its inclusion. In the absence of closer definition, this term is open to be used in at least several different ways which may not align with each other or the legislative intention.

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[20] Ministry for the Environment, 'Our Future Resource Management System Overview' at p 38 states in relation to allocation that '*The new framework implements the Randerson Panel's allocation recommendations and enables a range of allocation methods*'. The Report of the Resource Management Review Panel (2020) at 321 and 159, recommends an allocation system which contributes to the overall wellbeing of people and communities and is consistent with the propose, outcomes, targets and limits of the legislation.

[21] Andersen et al., '*A Safe Operating Space for New Zealand/Aotearoa Translating the Planetary Boundaries Framework*' (2020) Ministry for the Environment available at https://environment.govt.nz/publications/a-safe-operating-space-for-new-zealandaotearoa-translating-the-planetary-boundaries-framework/ ; European Environment Agency. and Federal Office for the Environment FOEN., *Is Europe Living within the Limits of Our Planet?* (2020) at 22 available at https://www.eea.europa.eu/publications/is-europe-living-within-the-planets-limits ; Stockholm Resilience Centre, '*Applying Resilience Thinking Seven Principles for Building Resilience in Social-Ecological Systems*' (2018) available at https://www.stockholmresilience.org/download/18.10119fc11455d3c557d6928/1459560241272/SRC+Applying+Resilience+final.pdf

(a) Administrative efficiency: The overview document suggests that 'efficiency' has been used in an administrative sense, citing the favour given to existing users as inefficient, by frustrating councils in developing fundamentally different allocation methods.[22] While this intent is supported, we suggest that amendment is needed to ensure those applying the allocation principles align with this intent.

(b) Economic efficiency: A focus on economic efficiency may create an unintended bias in favour of the status quo, because immediate costs and benefits can be quantified, whereas those occurring over a longer term, during which change arises, are not so easily quantifiable.

(c) Efficiency of resource use: Prioritising efficiency of resource use should also be avoided as this can drive unintended consequences of environmental decline within a limit.[23]

131. Efficient allocation in the short term does not cope with ecological or market shocks and reduces resilience. Recent severe flooding and landslips in Nelson and Auckland demonstrate how important resilience is to the economy and environment of Aotearoa New Zealand. As the climate continues to change, resilience will only grow in importance.

132. While the concept could be clarified, **ELI recommends that to align with the intent of the allocation principles, the focus of the provision should move away from 'efficiency' in favour of an up-to-date basis for allocation which focuses on how to build capacity to deal with unexpected change.[24]**

133. **ELI recommends that the resource allocation principles in clause 36 must include (and prioritise) environmental resilience. Similarly, ELI recommends that environmental resilience should be added to the list of considerations relevant to the determination of resource consent applications, as found in cl 270(4).** The inclusion of an environmental resilience criterion in resource consent applications would assist local authorities with directing development away from flood prone and erosion prone areas, for example, or to allocate in a way that matches the use to the diverse characteristics of the environment.

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[22] Ministry for the Environment, 'Our Future Resource Management System Overview' at p 37.
[23] An example can be found in Dench and Morgan, 'Unintended Consequences to Groundwater from Improved Irrigation Efficiency' Agricultural Water Management 245 (2021) 106530
[24] We acknowledge that 'equity and efficiency' were cited by the Randerson Review panel as one component of an appropriate basis for an allocation system. However, this was the last of three recommended provisos. Firstly, the panel recommended that allocation contributes to the overall wellbeing of people and communities, and secondly that it is consistent with the purpose, outcomes limits and targets of the system (Report of the Resource Management Review Panel at p 321).

134. Efficiency also appears elsewhere in the NBEB and SPB without definition; ELI recommends that the committee review how this term is intended to be used. **If the intent is to provide for administrative efficiency, ELI recommends characterising this to ensure that it does not support a bias in favour of continued use or further development.**

CONCLUDING REMARKS

135. ELI recognises the importance of these once in a generation reforms but submits that a number of significant revisions are required to meet the stated objectives. We hope that our recommendations above will aid the Committee to improve the legislation.
136. **ELI requests to be heard in support of our submission. To effectively present the submission we would ideally require a 30 min slot.**