

Climate Karanga Marlborough Submission on the Natural and Built Environment Bill and Spatial Planning Bill

5 February 2023

Introduction

1. We thank the Environment Select Committee for the opportunity to make a submission on the Natural and Built Environment Bill (NBEB) and Spatial Planning Bill (SPB).
2. Climate Karanga Marlborough is a citizen's organisation of about 120 members with the purpose of educating the public and our decision-makers as to the dangers of climate breakdown, and to support local and national decision-makers to take action.

We are submitting on these bills because we are concerned about the health about New Zealand's natural environment and want to be assured that it will be appropriately protected and remedied in the future. We would also like to see greenhouse gas emissions mitigation become central to development planning, so that New Zealand can do its part in minimising and remedying the unfolding world climate crisis.

3. We support the need for reform and consider there is a clear case for change. The Resource Management Act 1991 (RMA) is not fit-for-purpose from an environmental standpoint and has allowed the natural environment to be degraded over the past 30 years. It needs to be replaced.
4. With targeted (although, in some cases, substantively significant) amendments, the Bills would represent an improvement on the RMA. However, we do not support the Bills in their current form.
5. Our overriding concern is that the Bills need to ensure good outcomes for the natural environment. Ultimately, a thriving natural environment benefits people, given that we depend on it not just for wellbeing but for our very survival.
6. We support the submission of the Environmental Defence Society, which goes into more detail on the matters outlined in my submission.
7. Environmental protection is vital to the health and wellbeing of people as well as wildlife. With more and more water ways and beaches now unsafe to swim in, forests under stress from drought and heatwaves, fisheries and the shoreline wildlife that depend upon them for sustenance now under threat from more frequent algal blooms and marine heatwaves, our natural world is now essentially under attack. Due to the interconnectedness of our natural world, each vanishing species and ecosystem thrown out of balance risk unforeseen and potentially serious repercussions. It is critical that, with the

changes all around us due to climate breakdown, pollution and poorly conceived past and present resource exploitation, we do all we can to protect our natural world and soften the impact of the changes ahead. We are a part of the natural world and our health and wellbeing depend upon a healthy natural environment.

The purpose of the NBEB is inadequate

8. The purpose clause of the NBEB is vital, as it will directly influence decision-making by Ministers and planning committees. However, its wording is currently unclear, and introduces many conflicting and overlapping concepts. Also, its various components are connected by different conjunctions, making relationships between them overly complex particularly when compared to the RMA (which used the single conjunction “while”). Overall, the wording of the purpose clause will cause confusion, litigation and argument.
9. The NBEB actually has two purposes, separated by the conjunction “and”. The first, which seeks to enable use and development in a way that protects the environment, falls short on two fronts: the phrase “in a way that” is not sufficiently protective, and it fails to recognise that proactively improving (not just enabling protection of) the environment needs to be a core element of the purpose clause. The second purpose, to recognise and uphold te Oranga o te Taiao, sees the introduction of several general concepts without a clear sense of what they mean or how they relate to each other.
10. We would prefer to see a single, tightly defined purpose statement that is expressed as a hierarchy, conceptually similar to Te Mana o te Wai in the National Policy Statement (NPS) for Freshwater Management. Its unambiguous first priority should be to uphold the life-supporting capacity of the natural environment and its intrinsic value, with use for various human wellbeings subject to those things.
11. Climate breakdown is a reality and will have serious consequences for the environment. Forests, wildlife and ecosystems will struggle to adapt to increasing temperature and weather extremes. The purpose statement for the NBEB needs to acknowledge the threat of climate breakdown and acknowledge the importance of not just protecting and preserving our natural environment, but also “future proofing” it, where we can.

Although climate considerations are mentioned in the objectives of the bill, they need to be front and centre in the purpose, as well.

The approach to outcomes in clause 5 of the NBEB needs attention

12. One core part of the purpose of the NBEB is to enable use, development and protection that “promotes outcomes”. Our primary concern is that the list of these outcomes in clause 5 of the NBEB has no internal weighting or hierarchy.
13. Many potentially conflicting outcomes must all be “provided for”, with conflicts to be resolved with a high degree of political discretion by the Minister or through plans. Examples of conflicting matters in clause 5 include the protection and restoration of the ecological integrity of the natural environment, on the one hand, and well-functioning rural areas that are

responsive to people's diverse and changing needs "in a way that promotes ... the use of land ... for primary production" on the other. There is a real risk that this will resurrect a form of "overall broad judgement" that defined the RMA for 20 years, where short term economic opportunities frequently outweighed the long-term imperative to protect the natural environment. There needs to be a clearer hierarchy where the ecological integrity and intrinsic value of the natural world receives more weight than other things.

14. There also needs to be a stronger recognition that *synergies* between different outcomes are to be pursued or preferred where practicable. At present, the Minister is invited to simply prioritise outcomes using his or her own discretion. This could, for example, see the perpetuation of traditional modes of environmentally damaging infrastructure (eg concrete pipes and stormwater outfalls) rather than encouraging nature-based solutions (eg wetland planting and reduction of pollution at source) that can provide the same services while improving environmental outcomes.
15. The list of outcomes in the NBEB also does not adequately recognise the importance of urban outcomes (eg principles of good urban design) or issues that were previously captured by the now abandoned concept of "amenity", such as noise and odour.
16. We feel that the outcomes sought by the NBEB should be first and foremost for the long term benefit of the environment. For example, here in Marlborough there is the constant threat of floods in the Wairau Plain. With bigger storms predicted for the future, it is only a matter of time before the stop banks along the river and its tributaries are overtopped creating widespread damage to communities and infrastructure. Building higher stop banks only puts us into an "arms race" with nature and climate change, which we can't win.

Our solution to this issue needs to be long term and sustainable, focussed more on natural processes and less on just containing the river. In a purely natural setting, flood waters have a chance to spread out, lose energy and slow. This is the direction we'd like to the NBEB go; toward nature-based solutions. We believe that choosing nature-based solutions will be more robust in our flood-prone future.

Additional decision-making principles are needed

17. New decision-making principles should be included in clause 6 of the NBEB. One of these should be a general polluter pays principle. All polluters should, in principle, be responsible for pollution generated by them, but the NBEB only recognises this where sites have become contaminated. The principle needs to be applied where environmental impacts have tangible and chronic impacts on health (such as air pollution), when it comes to determining who pays for cleaning up waterways (eg from nutrients), and where the coastal environment and communities are impacted by the sediment and other detritus from things like forestry operations.
18. The NBEB should also have a clear principle of non-regression, so that once higher environmental standards and targets have been achieved, they cannot subsequently be undone. As currently drafted, the NBEB provides no safeguards against reverting to lower environmental standards over time.

19. We further believe that, where there is the possibility that pollution will be released to the environment by a project, mechanisms should be imposed that require the polluter to stop the pollution and pay for damages. These issues should not be left to the courts. They can be imposed as part of the consent decision-making process.

The NBEB's system of limit and target setting is deeply flawed

20. We strongly support the inclusion of clear environmental limits in the NBEB. The RMA lacked a proper framework for establishing environmental bottom lines, beyond which no further harm would be allowed to the ecological integrity of the natural world.

21. It is also a good thing that environmental limits *must* be set for particular domains under clause 38(1) of the NBEB. This prevents the politically difficult things - for example, indigenous biodiversity - from being ignored or put on the slow track. However, the aspects of the natural environment for which environmental limits must be set are overlapping and very general. There should be more specific things for which limits must be set, including known stresses like sediment and nutrients, and minimum states relating to indigenous vegetation cover.

22. A strong and directive framework for *target* setting is also necessary. In many contexts, the natural environment is already degraded and needs to be restored and improved as a matter of urgency. It is positive that targets must be set for aspects of the environment subject to limits.

23. However, we think that the NBEB's current framework for limit and target setting is deeply flawed. First and foremost, the terminology used in the NBEB is confusing and does not reflect what people would intuitively think "limits" should be doing, which is setting a minimum *acceptable* state of the environment. Instead, the NBEB treats environmental limits as *measurements of the current* state irrespective of how degraded that is. In addition, unless an aspect of the environment can be shown to be necessary to protect human health, a "limit" will be a line permanently drawn in the sand as at 2023. This is deeply problematic.

24. The approach to ecological wellbeing contrasts with limits set for human health, which must be set at levels that actually "protect" health and not just prevent it from getting worse than current levels. Environmental limits need to follow this approach.

25. It would be more appropriate to rename what the NBEB currently terms "limits" as "baselines". This would reflect the intention that they measure where we are now. The term environmental "limit" could then be repurposed as a measure of the *minimum acceptable state of the natural environment*. It may be that the current definition of "ecological integrity" in the NBEB could serve as the basis for measuring what that minimum state should be.

26. Given that limits are defined as the current state of the environment, it is also unclear to us why they would be set by the Minister as a political actor and not by an independent, expert group. After all, the current state is an

objective matter, best determined through scientifically robust biophysical measurement rather than through a political process.

27. Concerningly, the NBEB creates a variety of ways in which environmental limits and targets can be undermined. For example, the concept of “interim” limits, which allow the current state to decline further, provides room for existing pressures to continue to harm the environment for unspecified amounts of time. This will allow things to get worse.
28. There is also excessive discretion to grant exemptions to limits. These are far too broad and rely on what the Minister thinks, not what the law states. For example, clause 45(2) of the NBEB allows the Minister to determine whether “public benefits” would justify the loss of ecological integrity, reintroducing by stealth the idea of an overall broad judgement approach to undermine environmental limits.
29. There is also no clear role for the independent Limits and Targets Review Panel when it comes to granting exemptions. At a minimum, the Minister should be required to have particular regard to the views of the Panel before granting an exemption, and appeal rights to the Environment Court should be available where the Minister does not follow the Panel’s recommendation.
30. Limits are also further undermined by the ability for the Minister to set very large “management units” across which limits will apply. These could allow extensive harm in one place to be offset by improvements elsewhere without “infringing” the overall limit, creating significant issues of environmental and ecological justice by concentrating harm in particular places. It could also mean that a large area is considered to be in good “overall” health, even though pockets within it are heavily degraded, with the consequence that minimum level targets for improvement do not have to be set at all.
31. There is a curious lack of reference to compliance with environmental limits when it comes to decision-making criteria for designations. Resource consents cannot be granted contrary to environmental limits, but that is not mirrored in the provisions for designations. This requires correction.
32. The Minister must set a “minimum level target” for improving the environment only if he or she is “satisfied” that current state represents “unacceptable degradation”. There is no definition of “unacceptable” degradation. Even if the Minister is satisfied there is unacceptable degradation, there is no clear guide as to *where* the targets are to be set or what *timeframes* must be set to meet them. This provides excessive political discretion.
33. There is also no mechanism by which mandatory targets for environmental improvement can *become* an updated set of environmental limits. This is a big failing, because in many cases strong protection is conferred by the NBEB only if something is legally a “limit” (eg when an activity must be a prohibited activity, or when an exemption is required). Those things do not apply when something is simply a “target”, even if it is mandatory.
34. The NBEB lacks a robust accountability mechanism or legal consequences for failing to meet targets, especially where the current state of the environment is degraded.

35. There is also an excessively broad ability for the Minister to allow large infrastructure projects to go through fast-track consenting processes. While this is not an *exemption* from the need to comply with limits and targets, it is still concerning because the process lacks some of the safeguards that were present in the Covid-19 response legislation on which it has been modelled (eg the ability for specified groups to comment on a project's environmental risk).
36. In considering Limits and Targets, the NBEB needs to be clear, concise and firm. The baseline needs to be scientifically sound and consider the preferred state of the local ecology and not be based upon some arbitrary date. Exceptions to the Limits and Targets need to be few and contestable and not subject to political whim. Stronger judgement powers for the Limits and Targets Review Panel need to be established. In summary, the concept of limits and targets in the NBEB is welcome, but needs more effective "teeth" to protect the environment.

Improvements are needed to how places of national importance are protected

37. It is crucial that the NBEB takes a strong approach to protecting particular places of national importance, such as significant biodiversity areas and outstanding natural landscapes. However, the NBEB's approach to protecting places of national importance has significant issues.
38. For example, although it is positive that there is a legal obligation to identify significant biodiversity areas and outstanding natural landscapes generally, there are significant weak points. For example, places in the coastal marine area (e.g., below mean high water springs) do not have to be identified, the Minister can issue exemptions to the requirement to identify areas with no real safeguards, and effects on outstanding natural landscapes do not need to be taken into account if they are not mapped in a plan. These need to be tightened up.
39. It is also extremely unclear how the NBEB's "effects management framework" is intended to operate when it comes to managing effects on areas of significant biodiversity. Although one part of the Bill seems to specify that more than "trivial" effects on such places cannot be allowed (a strong starting point), another suggests that the effects management hierarchy "applies". This hierarchy can allow harmful effects if they are counteracted through offsets elsewhere, or even if some financial compensation is provided where stronger measures are not "practicable". It needs to be clarified that the effects management framework cannot undermine the stronger direction to avoid more than trivial impacts on significant biodiversity areas.
40. As elsewhere in the NBEB, there are also extensive exemptions which allow activities to cause impacts on significant biodiversity areas, including those which "will provide nationally significant benefits that outweigh any adverse effects of the activity". This is yet another opportunity for environmental wellbeing to be undermined by economic considerations. The ability to provide exemptions needs to be constrained significantly.
41. The NBEB even suggests that it is possible to obtain an exemption from the requirement to apply the effects management framework entirely, meaning

that one could jump straight to financial compensation without even considering avoidance or remediation. National direction is also expressly authorised to require approaches that are less stringent than the effects management hierarchy. Both of these things need to be removed.

42. These issues are important to us because there are many areas of significant biodiversity and outstanding natural landscapes in the Marlborough Sounds, to which our community is closely tied. We have already seen significant degradation to the Sounds due to sedimentation from logging and marine environment damage due to dredging and salmon farming. It is of utmost importance that these areas be protected to their full extent.

Climate change is not recognised strongly enough in the NBEB

43. The NBEB provides an ineffective framework for addressing climate change (both mitigation and adaptation), and only weak links with the Climate Change Response Act. Specifically, planning instruments are not required to give effect to emissions reduction plans (they must only be consistent with them), and although existing use rights can be altered or extinguished where needed to adapt to climate change, this may be constrained by the inability to render land incapable of reasonable use or compulsorily acquire land.

44. Climate breakdown is a reality that needs to be considered in the approval of all projects and plans. At the very least, planning instruments should be required to give effect to current updated emissions reduction plans.

We also feel that the Bill should include provisions to facilitate managed retreat from areas that are no longer safe from flood and storm surge. Weather extremes are already claiming the lives of New Zealanders due to short-sighted residential development. People need to be helped to move out of harm's way.

Urban trees are not adequately protected

45. We have concerns about provisions relating to urban trees (for example, clause 125 of the NBEB), which constrains the ability of plans to protect groups or classes of trees. This is carried over from ill-advised amendments to the RMA and should be removed, given that it is inconsistent with the protective ethos of the NBEB. The clear imperative in the face of climate change and biodiversity loss is to preserve urban tree cover to maintain liveable cities, and tree cover is not incompatible with good urban design and intensification.

46. Towns in Marlborough and cities and towns around the country are facing increasingly hot summers as climate breakdown progresses and urban trees are known to provide cooling, shade and a certain degree of flood protection. It is important that our local council have the prerogative to protect existing trees, where appropriate.

Regional spatial strategies under the SPB have the potential to undermine environmental protections

47. The order in which planning instruments are created under the NBEB and the SPB is wrong. Much of the information needed to inform regional spatial

strategies (for example, identification of protected areas like significant biodiversity areas and outstanding natural landscapes) will only be generated through the more detailed NBE plan process, yet the latter are expected to be consistent with regional spatial strategies. We see a significant risk that spatial strategies will be focused on identifying development corridors, without the environmental information necessary to know if the right projects are being planned for the right places. Once identified and planned under the SPB, it will be hard for large infrastructure projects to be changed.

48. It is crucial that spatial strategies be required to comply with environmental limits and targets, as well as give effect to the National Planning Framework. This is because many limits and targets will only crystallise through the planning process, and will not be in the National Planning Framework itself.
49. The Department of Conservation should have a clear role in planning committees tasked with developing spatial plans, to ensure that these have a focus on the natural environment and not just development.
50. The development strategy in the SPB needs to be closely aligned with the NBEB, and be flexible enough to align with the current National Adaptation Plan, otherwise we risk development that conflicts with protections afforded to the natural environment by the NBEB and NAPs, as they are updated.

Of particular concern is the planning of new roads, which we know to be extremely vulnerable to slips and flooding during extreme weather events. Considering our climate changed future, we should alternatively be planning for expanded rail for goods transport. Rail is much more efficient than road transport, can be easily electrified, which is not true of road transport. In considering the possibility of low energy availability in the future, rail provides the best solution for long haul transport of goods with the least amount of infrastructure to maintain.

The NBEB is too complex, poorly structured, and hard to understand

51. The NBEB is structured in a confusing way, requiring cross-references between provisions that are far apart and do not talk well to (and sometimes directly contradict) each other. Some elements, such as allocation principles, limits and targets, and information principles, are found in surprising places.
52. The general drafting style is opaque and ineffective, and the NBEB is riddled with errors that in many cases affect the meaning of provisions. We refer to the submission of the Environmental Defence Society, which identifies a number of these.
53. The NBEB appears to be more complex than necessary, some of which comes down to poor structural choices (for example, related provisions being separated by hundreds of clauses) repetitious provisions and unnecessarily complicated (and often inconsistent) drafting styles. For example, the NBEB provides for “exemptions to limits” and “limits to exemptions”, and defines “offsetting” with reference to “redress” even though they are meant to be entirely different concepts.

54. It is important that the NBEB be readable and understandable by ordinary people. A more straightforward and less complex document will be welcomed by many citizens in the future and should provide better compliance through minimal confusion.

Positive aspects that should be retained

55. Despite significant shortcomings, the NBEB contains many features that are an improvement on the RMA and should be retained through the parliamentary process. It is positive that:

- Plans (including land use provisions) will be required to give effect to water conservation orders;
- Consenting decisions must not be granted contrary to an environmental limit or target (assuming that issues with limits and targets identified earlier are fixed);
- Plans will provide more certainty on when consent applications should be notified, and there is the ability to appeal notification decisions to the Environment Court;
- The NBEB should result in more clarity as to what is and is not allowed in plans, and less reliance on consents (which has caused cumulative impacts);
- There will be fewer, more integrated plans and a single, more coherent set of national direction (in the National Planning Framework);
- There will be clearer liability with respect to contaminated sites;
- There will be a stronger ability to alter or extinguish existing use rights and consents, notably where environmental limits are threatened or exceeded (although as noted above there are outstanding issues on this front when it comes to adapting to climate change); and
- Express allocation principles are included based on equity, efficiency and sustainability, although significant uncertainty remains as to how this relates to strong Te Tiriti o Waitangi obligations to *give effect* to the principles of te Tiriti.

56. Overall, we are happy to see this reform of the Resource Management Act. The Act served the country well for many years and was ground-breaking when first introduced, but it has not prevented wholesale degradation of the natural environment in this country. With the changes we recommend here, the RBEB and SPB can serve the country, and the future generations that will enjoy this country's natural beauty, even better.

57. We thank the Select Committee for considering our submission.

58. We **do not** wish to be heard in relation to our submission.

Sincerely,

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