Marie Doole and Theo Stephens

Drain the Swamp to Save the Swamp

mitigating capture in environmental regulatory systems

Abstract

Regulatory capture undermines the integrity and effectiveness of environmental regulatory systems by allowing the power of vested interests to undermine the public interest in nature (i.e., humanity's collective interest in a healthy and sustainable biosphere). Mitigating the capture of environmental regulatory systems necessitates a deliberate rebalancing of the power of different actors within a democratic context to reduce the typical dominance of vested interests. This rebalancing must address both the narrative framing and direct capture actions of vested interests (Ulucanlar et al., 2023). Cumulatively, the mitigation strategies we propose (promoting evidence-based policy, rigorous analysis, transparency and supporting public interest advocacy) will support that rebalancing.

Keywords regulatory capture, environmental regulatory systems, the public interest, mitigation strategies

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Regulatory capture is a harmful and pervasive check on the effectiveness of environmental regulatory systems' ability to serve and protect the public interest[1] in a healthy and sustainable environment at all spatial scales. The often-subtle nature of capture makes it challenging to detect and thus address, but address it we must. There is an urgent need to better safeguard the integrity of environmental regulatory systems,[2] to mitigate the legacy of harm arising from undue influence, and to avoid more damage in the future.

The focus of this article is on the impact of regulatory capture in the environmental arena because this is where our expertise lies, but regulatory capture is harmful wherever it occurs. Our analysis and proposals have a wider application across other regulatory systems and domains. Vested interests, in whatever sphere, generally have the resources and motivations to exert influence on public narratives in their favour and to participate in democratic processes. It is understandable and predictable that such vested interests take opportunities to frame issues for their benefit. Their success and the degree of erosion of public interest

depends on actions to moderate that influence – by system actors and the wider community.

Regulatory capture is globally pervasive. Prominent examples of regulatory capture include outcomes associated with the failure of Australia's Civil Aviation Safety Authority (Ilyk, 2008), the Deepwater Horizon oil spill, the global financial crisis of 2007–8 (Baker, 2010) and Australia's banking royal commission (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019). These outcomes preserved and protected the interests of the regulated entities, sometimes at great public expense. Given the considerable negative impact of capture on regulatory systems, regulatory capture must be addressed and mitigated wherever possible.

The undesirable impacts of capture on protecting the public interest in nature (which we interpret broadly to include all aspects of ecological health and integrity) include harms such as pollution, habitat loss for development purposes, and unsustainable extraction. We argue that addressing capture is a necessary precondition to protect the public interest in nature (i.e., humanity's collective interest in a healthy and sustainable biosphere) – and, in particular, to prevent serious harm to the biophysical world caused by: a) the misalignment of commercial interests and the public interest; and b) the asymmetry of political power resulting from concentrated private capabilities versus a dispersed and uncoordinated public. A failure to address regulatory capture can also result in reputational harm for regulators, undermining of societal and political trust, delegitimisation of regulation (see Yackee, 2022) and worsening severity of effects of capture overall if unaddressed (Saltelli et al., 2022).

The essential impact of capture is a shift in the balance of power away from the regulatory system's public interest goals and towards those of the regulated community. This leads to trade-offs and decisions becoming increasingly favourable to (vested) regulated parties'[3] interests at the expense of the public interest. Examples include more liberal legal frameworks for politically powerful industries (even where adverse impacts of their activities are similar to, or more serious than, those of others subject to regulatory control); a propensity for project approval even where existential risks are evident (e.g., allowing development in areas highly prone to flooding, fire or land instability); and a reluctance to take compliance and enforcement action. These outcomes combine and compound, allowing vested interests to externalise their costs, inevitably diminishing public wellbeing.

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Capture is but one of many factors that can lead to adverse environmental outcomes. The deprioritisation of environmental values in favour of other interests is not necessarily indicative of capture, since it is normal in a democracy to have multiple interests with competing objectives, and policy trade-offs are to be expected. Deep uncertainty, lack of information, poor policy and institutional design, cognitive biases (as well as values and preferences) of key actors, weak participatory mechanisms, capability deficits, and limited technical oversight have impacts resembling capture. They can occur because of capture, but also without capture. As noted by Rex (2018), it is critical to delineate capture from the legitimate exercise of democratic rights.

The purpose of this article

Deliberate strategies to mitigate capture may limit some of its adverse consequences and avert future capture. Addressing capture requires a deliberate rebalancing of power in favour of the public interest in a healthy and sustainable environment. This article supports strategies to effect that rebalancing.

More specifically, the aim of this article is to:

- build on our first publication by considering how capture can be managed and mitigated;
- explain why capture matters and promote closer and more urgent attention in New Zealand;
- identify the settings in which different mitigation approaches are likely to succeed or fail;
- outline a framework for identifying where capture is occurring, with a focus on environmental regulation; and
- suggest mitigation options for inclusion in a regulatory system to safeguard against capture.

Due to underlying power asymmetries, there are few simple policy interventions to address capture. Indeed, disrupting the asymmetries is vexed and unlikely at least in the short term – for example, they continue to constrain the success of liberal democracies in addressing existential threats such as climate change (see Boston and Lempp, 2011).

Revisiting murky waters

Doole, Stephens and Bertram traversed several definitions of capture, concluding that capture can best be considered as:

> the processes and conventions by which vested interests excessively influence a regulatory system, becoming particularly problematic if the public interest is undermined for the benefit of regulated parties. Capture may range from subtle to blatant and have impacts from individual transactions to constitutional settings. It can occur at

all stages of the political and policy cycle and at agency and individual levels. Its impacts are typically cumulative in increasing the likelihood that the public interest outcome(s) of the regulatory system will be compromised. (Doole, Stephens and Bertram, 2024, p.47)

Furthermore, capture is a risk that pervades a regulatory system, not just the operational front line, with the article providing examples of the various forms that capture can take. A simple methodology described a nuanced and evidence-based diagnosis and assessment of capture:

- the *motivation* behind the behaviour is to secure personal or sector benefit, generally at the expense of the public interest;
- *condition*s in the regulatory system allow capture to occur (noting that capture is rarely explicitly unlawful);
- the *consequence* of capture is averse to the public interest.

Meeting these three tests provides greater confidence that capture is occurring, which helps differentiate undue influence from non-capture issues. The purpose of a structured approach to diagnosis is to help avoid both spurious identification of capture[4] and its (we would suggest) more common spurious dismissal.

Why New Zealand must pay closer heed to the risk of capture

Regulatory capture, whether in the environmental domain or more generally, has received little discussion or scholarship in New Zealand and limited formalised response. New Zealand has enjoyed an enviable international reputation for negligible corruption, resulting in complacency and lack of vigilance, thereby enabling the current prevalence of capture. Also, the sensitivity of the topic likely has a chilling effect on open analysis and discussion by regulatory agency leaders.

However, for many reasons, New Zealand's political context – particularly at the time of writing – is objectively vulnerable to capture. The reasons include:

- challenges to implementation of the separation of powers, aggravated by changes in the operation of the public service over past decades (e.g., the attrition of 'free and frank' advice);[5]
- a focus on criminal fraud and corruption (which may be an extreme form of capture or simply criminal behaviour), with less attention to activity that is probably not criminal, but is capture;
- a keen embrace of neoliberalism favouring small government and enhanced corporate power, with a narrow conception of the public interest that ignores elements valued by some (e.g., environmental sustainability, health, wellbeing and social cohesion);
- a small economy and at times an overt political focus on economic outcomes over environmental outcomes, which emboldens vested interests to exert their influence;
- a small, unicameral Parliament that also lacks some of the checks and balances commonplace in other jurisdictions;
- a unitary state with weak sub-national government;
- limited constraints on campaign/political finance.

New Zealand historically ranks low for perception of corruption, as highlighted by the Corruption Perceptions Index administered since 1995 by Transparency International. The Corruption Perceptions Index is not a measure of corruption, but a measure of the perception of corruption in public services, based on a suite of data sets. In 2015, New Zealand scored 91 on the scale of 0–100 (100 is 'very clean'), and in 2023 was 6 points lower at 85, reflecting a downward trend in perception which likely lags actual practice by a year or more.

Recent analyses support the case for attention here:

- Chapple (2024) highlights the declining trust in the public system and failures to progress key recommendations, such as a beneficial ownership register (recently paused) and the development of a national anti-corruption strategy.
- The OECD (2024) refers to New Zealand's vulnerability to undue influence.
- The Helen Clark Foundation's report by Yasbek (2024) highlights a suite of issues related to access money and official information.
- Death and Joy (2024) highlight changes in university systems, suggesting that funding challenges and alignment with vested interests are undermining the ability of our tertiary institutions to act as 'critic and conscience' of society.
- Rashbrooke and Marriott (2023) analyse the role of political funding and the need for law reform.

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These examples suggest that existing checks, balances and watchdogs are not sufficiently guarding against capture and corruption in New Zealand. The next section briefly reviews what these are.

Existing watchdogs

Various mitigation measures are 'baked into' our system of government and provide accountability and transparency that would not otherwise occur. Checks and balances of note in the environmental domain are outlined in Table 1, with these existing alongside monitoring and oversight roles exercised by the parliamentary commissioner for the environment, and government ministries and departments (e.g., the oversight role of councils and the Environmental Protection Authority by the Ministry for the Environment). Other agencies and

Table 1: Monitoring roles that may assist in highlighting capture in environmental regulatory systems

Agency	Summary of role
Office of the Controller and Auditor-General (OAG)	The controller and auditor-general is an independent officer of Parliament with a suite of functions under the Public Audit Act 2001. Most of the work (88%) is focused on how public organisations (of which there are about 3,400) operate. The primary function of the OAG is reporting, providing valuable transparency for important environment issues – e.g., councillor involvement in enforcement decision making, and the reorientation of the Department of Conservation.
Office of the Ombudsman	The ombudsman plays a key role in ensuring fairness and transparency in the public service, receiving and investigating complaints relating to any of the nearly 4,000 public entities in the ombudsman's remit. The ombudsman's work focuses particularly on one aspect, official information management, but also involves protection of people making disclosures about serious wrongdoing, and providing advice to the public sector and submissions on laws, policies and good practice guidelines. The ombudsman's workload has grown significantly in recent years, with 2023–24 seeing the highest number of complaints and protected disclosures ever lodged (Office of the Ombudsman, 2024).
Serious Fraud Office (SFO)	The SFO's focus is financial crime, with a specific mandate to address fraud, bribery and corruption. The very high test of 'serious fraud' means much of the subtle impact of capture falls largely outside the SFO's remit, with SFO initiatives having limited if any reach into environmental regulatory systems.

organisations that address matters related to capture include the Public Service Commission,[6] the Electoral Commission, the judiciary and the Human Rights Commission (see further analysis in Chapple, 2024).

Oversight and accountability fall unevenly across all levels of government (e.g., many accountability measures relevant to central government do not apply to local government). Together, these factors create fertile ground for capture risk. Two examples are:

- Local body politicians are subject to a code of conduct under the Local Government Act 2002, the enforcement of which is devolved to the elected representatives in that same jurisdiction. No process for addressing complaints against the code is included in the Act and no sanctions exist for its breach (Local Government Commission, 2021).
- The solicitor-general's prosecution guidelines, which are mandatorily observed by central government agencies, do not formally apply to local government. The guidelines (recently updated) contain advice for public agencies, including the management of conflicts of interest, matters to consider when contemplating prosecution, and matters related to open justice and the media (Solicitor-General, 2025). While many councils attest to observing them, the opaque status of council prosecutions for the purpose of the Criminal Procedure Act 2011 (prosecutions by councils do not meet the definition of a public prosecution) allows them to fall from view.

Yasbek (2024) suggested local government as an important area for future research and analysis of corruption risks. It seems likely that the existing suite of checks and balances is not placing sufficient focus on regulatory capture.

We argue that more proactive and effective capture mitigation is a necessary precondition for protecting the public interest in a healthy and sustainable biosphere, which faces considerable threat from: a) the misalignment of commercial interests and the public interest; and b) the asymmetry of political power resulting from concentrated private capabilities versus a dispersed and uncoordinated public. Taking a proactive approach aligns with recommendations in Chapple (2024) for New Zealand to adopt a 'positive prevention' strategy in respect of corruption, which has significant overlap with capture. To address capture effectively, it is important to weed it out wherever it prospers. To that end, New Zealand must broaden its perception of what capture looks like. We turn now to the Ulucanlar framework, which supports that broadening.

The Ulucanlar framework

Ulucanlar et al. (2023) carried out a systematic review of the literature on the undue influence of 'corporate political activity' – which we interpret as a synonym for capture by vested interests, at least in broad terms.[7] These authors divided strategies to influence the operation of regulatory systems into 'framing strategies' and 'action strategies'. We find considerable parallels between how environmental regulatory systems operate and this dual influence of vested interests. Research demonstrates that corporate political activity can be a successful non-market strategy to ward off requirements related to human rights, health, the environment and labour (Hadani, Doh and Schneider, 2018). Therefore, we apply the framework proposed by Ulucaniar et al. to New Zealand's environmental context.

Framing strategies influence public discourse in a variety of ways, including how policy actors are perceived (e.g., proponents of public health measures are characterised as 'misguided' or bringing about a 'nanny state', while corporate actors are victims, struggling with conducting ordinary business in the context of excessive and costly regulation). In other examples, framing influences perceptions of the significance of the problem (usually it is trivialised compared with other issues framed as being more pressing). Finally, framing strategies also seek to influence what solutions are 'acceptable' (favouring voluntary approaches) or undesirable (statutory interventions – often presented as being 'incoherent', 'unworkable' or otherwise imposing unnecessary burdens).

Action strategies move from the public discourse to focusing on how vested interests influence the policy process. Ulucanlar et al. (2023) identified six primary strategies, most of which overlap in practice. A key strategy is to seek access to decision makers and influence the policy process at all levels to 'shape, delay or stop' policies. Other strategies include:

- manufacturing support for industry-aligned policy through media influence;

- conjuring doubt where it does not really exist (e.g., Oreskes and Conway, 2010); and
- developing parallel interventions to displace the need for regulation.

All action strategies involve a proactive programme of reputation management to facilitate success.

This binary categorisation serves as a useful conceptual guide to recognise and mitigate capture in its multiple forms. Ulucanlar et al. (2023) call for more effort to address the strategies of regulated entities, including noting that these predictable strategies should not be seen as ordinary and legitimate phenomena in a participatory democracy, but rather as a corruption of democracy (p.18). Thus, moderating influence to within appropriate limits is the key challenge. In part, the success of these interventions depends on appropriate structural settings, which we turn to next.

We note that vested interests may also make objectively fair assertions, or otherwise genuinely have an interest in the public interest outcomes intended by the regulatory system (e.g., an aligned interest such as safety). Indeed, vested interests may engage in positive community participation and philanthropy, and may marshal effective voluntary approaches to some issues. Further, unintended issues may arise due to poor policy design rather than being the result of capture. For example, policy staff may have limited understanding of implementation issues and so design a regime that is difficult to implement and imposes unfair costs. Applying critical analysis to claims is an important underlying element of contesting them where claims are found to be valid (e.g., there is an issue with the clarity or reasonableness of the law), then it is in the public interest for regulatory stewardship processes to effectively address these matters.

Table 2: Potential mitigations against 'framing strategies'

Framing strategy and description	Possible mitigations for regulatory systems
Vested interests as the 'good' actor	· transparency obligations (i.e., applied to and implemented by vested interests) to ensure the 'full picture' of responsibility is presented · autonomy in the system is earned through good behaviour – generating trust, rather than assertion of power · where strategic alignment is pursued (e.g., collaboration and partnership), interactions with policy and regulatory functions must be clearly set out and transparent, with explicit calling-out of the regulatory capture risk alongside mechanisms to avoid it · additional scrutiny for monopoly providers to disrupt information asymmetry (see Rex, 2018, p.277)
Policy agencies and civil society as the 'bad actors'	· robust instruments (e.g., regulatory impact statements) to accurately and comprehensively justify interventions · coherent work programmes published that nest interventions in an overall strategy · use of regulatory system experts and associated researchers to communicate the problem definition via public webinars and other accessible events and publications · provide support for participation in processes of civil society, including indigenous communities and public interest advocates · distinguish vested interest from public interest advocates · demonstrate effectiveness and efficiency in achieving the outcomes of the regulatory system via transparency about performance of the regulatory system and its actors
Trivialisation of the problem	· public sharing of policy development documents and associated evidence comprising the justification for action · demonstrate the impacts of the proposed activities with robust and verified science · robust exploration of alternatives and a clear value proposition to the public for the interventions proposed · provide robust compliance data, including the nature of the non-compliances encountered, dominant issues, representation of industries, and resulting environmental harms and penalties imposed
The acceptable or 'good' solution	· economic narratives that demonstrate the socialisation of harm to the community and where the benefits lie · robust reporting obligations and transparency checks, particularly where voluntary initiatives as alternatives to regulation are publicly funded (as many are)
The unacceptable or 'bad' solution	· rigorous policy processes and good regulatory practice, demonstrable through transparent audit and sharing of key documents · ensuring policies are thoroughly and empirically costed and public benefit is demonstrable · leadership bravery to provide publicly available advice that is free and frank and clearly sets out the reasons why action is required

Contesting framing strategies

According to Ulucanlar et al. (2023), there are five framing strategies commonly used by vested interests:

- painting themselves as the 'good actor';
- casting policy agencies and civil society advocates as 'bad actors' and undermining them;
- trivialising the scale of the problem;
- promoting targeted, non-regulatory interventions of a minor scale;
- denouncing broad statutory solutions as unacceptable.

We describe these strategies below and identify some regulatory system responses. Table 2 contains a summary of mitigation measures suitable for particular circumstances.

Good actors

Emphasising their legitimacy, vested interests make claims to influence public policy, including touting their interests as reflecting the public interest, and maintaining that they are socially responsible and open to partnerships. Claims used to quell the impetus for regulatory restrictions include the economic importance of the industry, their legitimate existence as companies and generators of GDP (as opposed to sustainable wellbeing), and their importance nationally or locally. 'Backbone of the country', 'core regional

money earner', 'essential employer/job creator' are well-worn tropes. This strategy can see the industry claiming to be unfairly demonised despite its status as a responsible actor and champion of the public interest. Regulatory systems must contest these narratives, not through ad hominem attacks but through instituting appropriate system 'guard rails' on vested interests' influence and ensuring a robust evidence base for policy and regulatory measures.

Regulatory system actors = bad actors

Painting regulatory system actors and civil society groups as bad actors is a more aggressive version of the previous strategy. Vested interests seek to undermine the credibility or question the motives or competence of regulatory agencies, with accusations of 'revenue gathering', 'nanny state' and 'slippery slopes' towards hidden agendas. Regulatory agencies can contest these criticisms of incompetence and hidden agendas by ensuring operational transparency (publication of strategies and policies, demonstrating staff competence and reporting activity and outcomes). Undermining civil society groups typically involves casting them as 'vested interests' with agendas at odds with the public interest. With such groups, regulators need to be clear about the distinction between the genuine public interest and vested interests and engage with them accordingly.

Trivialisation

Vested interests aim to decouple industry action from perceived harm or shift blame onto other sectors of society in a context that undermines the need for broad governmental intervention. For example, vested interests distract by emphasising the severity of more narrow impacts to trivialise the extent and impact of much broader drivers of harm. Providing counter evidence to highlight the problem and its relative importance is required to combat trivialisation, including the rationale for how regulatory work is prioritised. The trivialisation narrative can be quelled through professional communication of a sound evidence base and the appropriate design of policy and regulatory interventions.

Acceptable solutions

Vested interests aim to paint voluntary, harm reduction or highly targeted interventions as acceptable, thus limiting the impact on their business models. Persistent advocacy in favour of soft or voluntary interventions at the expense of the public interest in a healthy environment must be contested through political bravery and robust evidence of policy effectiveness and the need for intervention.

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Unacceptable solutions

Vested interests undermine the need for existing and future interventions by the state with a suite of criticisms. These include that: the intervention is disproportionate; consultation has been inadequate; international competitiveness will be harmed; and perverse consequences will occur. A good policy process – including ample consultation and engagement, canvassing the experiences of comparable jurisdictions and robust analysis of the underlying proposals – will support regulatory systems' resilience to these capture strategies.

Contesting action strategies

Ulucalnar et al. (2023) identify six action strategies used by vested interests to achieve capture:

- accessing and influencing policy spaces;
- using the law to obstruct policies;
- manufacturing public support for industry positions;
- shaping evidence to manufacture doubt;
- displacing and usurping initiatives;
- managing reputation to corporate/industry advantage.

We describe these strategies and identify some appropriate regulatory system responses. Table 3 contains a summary of mitigations suitable for particular circumstances.

Accessing and influencing policymaking

Vested interests access 'policymakers and policy spaces' through financial resource provision, threats (usually public), revolving door employment opportunities, and direct appointment to governance positions while being active industry participants. Once a new policy is introduced, undermining by vested interests may continue with non-compliance or by constructing administrative barriers to detection (e.g., refusal to share data). Responses to questionable (but lawful) action strategies rely on clear guard rails in which reasonable opportunity for participation is provided in a proportional and fair manner, having regard to the extent to which vested interests, and others, should be able to participate.

Using the law to obstruct

Vested interests may take legal action against state intervention (e.g., questioning the legality of regulatory tools) or otherwise chill regulatory systems by threats of legal action. Regulatory systems as a matter of culture must be prepared to stand by their decisions and rigorously defend their policy frameworks. Obviously, a strong evidence base, rigorous analysis and robust processes make successful defence much easier, which signals the importance of evidence-based policy, cleverly designed to identify and address capture, and well-considered and evidenced regulatory interventions that demonstrably address public interest requirements in accordance with the solicitor-general's prosecution guidelines discussed above.

Manufacturing public support

Vested interests establish alliances, third-party activities and media influence (which may soon include the use of artificial intelligence and deep fakes as the technology evolves) to advance their agendas. Regulatory systems must be able to contest dishonest narratives in the media, as a primary means by which the population receives information. This requires a robust alignment between policy and regulatory teams and their communications and engagement functions.

Shaping evidence

Vested interests produce opposing science or otherwise raise fears and cast doubt regarding the basis of agency policy and actions, and over-emphasise complexity and impracticality. Fear, uncertainty and doubt usually enable activities to proceed at the expense of the public interest, because these typically favour vested interests. Manufacturing doubt by suggesting the 'jury is out' on key underlying reasons for policy interventions has the potential to delay, defer or stop interventions on behalf of the public interest.

Displace and usurp initiatives

Actions to displace and usurp regulations undermine the rationale for public action. Examples include advocating for harm reduction in preference to regulation, normalising ineffective interventions, and seeking to substitute existing or proposed regulations with voluntary codes.

Reputation management

Vested interests put considerable energy into highlighting corporate social responsibility actions, seeking high-status individuals and organisations with which to publicly align. Equally, they defame researchers, advocates and organisations that question their impacts or business models. This reputation management by regulated parties is harmful where it undermines the integrity of a regulatory system, helping to maintain the efficacy of the other strategies. Regulatory systems must ensure that they clearly communicate their activities and that their activities are being monitored and measured in ways that demonstrate the public value

Table 3: Potential mitigations against 'action strategies'

Action strategy and description	Possible mitigations for regulatory systems
Access and influence policymaking	· policy staff must be sufficiently skilled to formulate policy and understand the problem to be solved · ensure consultation is fair and considers all views (e.g., rushed and targeted consultation of industry invites capture and tells it to 'pull up a chair') · operational staff must have the capability, policies and work tools to make sound regulatory decisions, and ensure standards are met and regulated parties are held to account · proactive risk and issue management throughout the policy and operational process (e.g., training courses for staff and proactive monitoring of risks and incidence of capture from leadership to operational front line) · insulation of staff from direct lobbying approaches by elected representatives and others (interface controls) · revolving door management strategies for employees recruited from a regulated community; targeted, special training and oversight to build confidence that these employees are working for the regulator and the public interest by applying their industry subject matter knowledge in a regulatory context; autonomy in regulatory decision making to be earned through good performance and reliable decision making aligned with agency objectives · codes of conduct and conflict-of-interest policies must cover all staff, including governance, executive management staff, policy staff, operational staff, contractors and consultants; these administrative policies must be fully enforced and regularly updated to reflect current circumstances · operational systems to ensure good regulatory decision making that follows established standards (SG guidelines, *The Judge Over Your Shoulder*, agency regulatory strategies and policies) – this can include separation of decision making regarding the nature of compliance and enforcement actions from operational staff who engage with regulated parties; decision-making processes and panels that explicitly include policy, legal and subject matter experts while retaining the independence of the delegated decision maker to make the decision · ensuring effective design of operational compliance regimes using appropriate expertise (e.g., ensure that sufficient powers, unfettered flow of data and appropriate sanctions are in place)
Use the law to obstruct policies	· sufficient legal resourcing to defend against obstructive action · careful construction of regulatory interventions to minimise opportunity for obstruction · rigorous defence of the public interest in accordance with statutory objectives (beware the apologist regulator) · clear signalling by regulators of areas of focus based on areas of known risk and concern · publication of regulatory actions and the basis for them – taking account of relevant privacy and legal constraints
Manufacture public support for corporate/industry positions	· a coherent communications strategy highlighting reasons for policies and areas of focus, the problems they are trying to address and the evidence upon which they are based · having communications and engagement staff with regulatory experience who understand how to deftly frame problems and solutions to the public to minimise opportunity for misinformation · use diverse media to deliver the message, including those most appropriate for the regulated community · provide FAQs or other channels for people to enquire as to the implications of the policy for them and to seek clarification on areas of ambiguity
Shape evidence to manufacture doubt	· rigorous proposals that have already been subject to expert vetting · adequate science and technological expertise within policy agencies to avoid knowledge asymmetry (i.e., regulated communities have more expertise than agencies) · disclosure obligations for research and advocacy funding · tax the regulated parties to fund independent research
Displace and usurp initiatives	· regulatory backstops to 'soft' approaches, such as a trigger for strong intervention after a short period if effectiveness is not demonstrated · policies that make it clear that the 'right regulatory tools will be used at the right time', based on assessment of actual negative impact, or risk of negative impact of non-compliance, history of compliance and attitude of regulated parties to future compliance
Manage reputations to corporate advantage	· regular reporting on the regulatory system, including case outcomes and trends in public values that regulators are tasked with protecting · normalise open and transparent sharing of regulatory data · active communications, particularly to counter false claims

being delivered by the system (e.g., robust regulatory stewardship and open and transparent communication of activities help contest rival claims).

The above strategies often interact and overlap. Normalising less-effective interventions is a key strategy that may co-exist with trivialisation and is bolstered by reputation management and doubt manufacture. Each strand reinforces the others. Holistic approaches to mitigation of capture can consider the interplay of the strategies and address them in a more sophisticated way than if they are considered in isolation.

Many mitigations are not just technical fixes but instead rely on the influence of culture within the regulatory system. Sound leadership, a culture of respect for evidence, clear internal strategy and buy-in by staff, and robust monitoring and reporting are all critical to resisting capture.

Summary of key themes of mitigation approaches

Mitigating regulatory capture implemented via framing and action strategies requires nuanced and purposeful planning and execution. Regulatory system integrity must be upheld and the urge to align with vested interests and weaken rules in the face of pressure must be resisted to avoid the erosion of public support. Many mitigations are not just technical fixes but instead rely on the influence of culture within the regulatory system. Sound leadership, a culture of respect for evidence, clear internal strategy and buy-in by staff, and robust monitoring and reporting are all critical to resisting capture.

Other key themes that arise in Tables 2 and 3 include:

- proactive communication strategies to use the power of the fourth estate to communicate about the regulatory regime (e.g., publishing prosecution results to effect general deterrence and highlight patterns of non-compliance);
- providing guidance and support for what constitutes acceptable participation and how normal activities (engagement) can be undertaken, rather than focusing solely on prohibitions;[8]
- having a culture which recognises the statutory role of regulatory systems and the 'problems' they are fixing; all staff must be able to clearly articulate the purpose and strategy of the system, with leadership reinforcing and safeguarding that purpose;
- ensuring adequate capacity and capability in the regulatory system to inform both policy development and effective delivery;
- ensuring robust policy processes, a focus on quality regulation, evidence-based problem definition and impact assessment;
- having individual conduct controls within regulatory systems, including standards, codes of conduct and disclosure obligations with meaningful consequences/sanctions for breach and organisational systems ensuring appropriate implementation;
- recognising the importance of independent oversight and audit (with a specific mandate to address capture);
- ensuring transparency mechanisms to promote openness and assist in detection of capture;
- having monitoring and performance reporting to demonstrate the specific strategies to address capture and provide evidence of their effectiveness or otherwise;
- supporting the full suite of the regulatory role, including punitive action where needed to effect behaviour change;
- operationalising robust regulatory stewardship (see Treasury, 2022; Ministry for Regulation, 2024b), identifying system inconsistencies and expediting advice to recommend changes to regulatory systems where they are proving ineffective at achieving public interest outcomes.

Further considerations in formulating anti-capture strategies

Mitigation strategies will be more effective where they:

- are cognisant of existing/baseline capture, as this influences the likely success of interventions;
- adopt nuanced approaches to complex matters (e.g., the revolving door); and
- recognise how structural elements like funding arrangements influence capture.

The capture baseline

There is much emphasis in the literature on prevention or avoidance of capture as if regulatory systems responding to the risk do so from a 'clean slate' position (i.e., no extant capture; rather, it is only a potential risk). But regulatory systems exist in varying states of compromise and the need to address capture can arise within a compromised state (e.g., through a change in leadership or a regulatory crisis). The practical consequence of an already-captured regime is that many of the mitigations we propose are unlikely to be seriously contemplated, and even less likely to be effective where it is highly compromised, so approaches need to be cognisant of this.

For many regulatory systems locally and globally, there are strong indications that capture is already present and providing material benefits to its proponents. When capture is effective at the political level (via campaign funding, for example), it can be more challenging for the regulator to avoid being undermined by the controlling minister/board. The duties of the minister or board to uphold

the public interest may get lost where there is determination or incentive to run with the regulated community's narrative, and the regulator is often poorly placed to contest the consequences of this. Thus, operational approaches to managing capture risk will only be partially effective in this context.

Indications of capture include:

- unwillingness by senior leadership to present advice that could be considered contrary to the views of, or politically inconvenient to, those responsible for the regulatory system in question (e.g., the minister);
- a tendency for regulators to consider the perspectives of civil society actors[9] in the same way as those of the regulated industry without appreciating the distinction that arises from the regulator's responsibility to serve the public interest;
- a strong preference for light-handed regulation, partnership and voluntary methods instead of firmer approaches (e.g., punitive enforcement) where the public interest would be better served by the latter;
- internal and external policies that favour vested interests over the public interest (e.g., councils requiring that officers give notice for compliance inspections when non-notice or random inspections are provided for in the law and more likely to detect non-compliance);
- subject-matter experts (including experts in the matter under regulation and experts in the design and application of appropriate outcome-based regulatory systems) struggle to influence the advisory system, leading to proposals that do not reflect the best available information, expertise or likelihood of delivering beneficial outcomes, but rather appeal to vested interests' objectives;
- reluctance to undertake compliance and enforcement action generally, or specifically against politically powerful entities or industries (sometimes detectable via a sharp reduction in enforcement).

It is also important to consider that different political ideologies lend themselves to different solutions. Some solutions may be feasible in the context of a centre-left government but be unsupported by a centre-right government. In developing mitigation strategies, therefore, proponents should consider the political context in which they operate. Strategies more likely to be effective in a left-leaning government may include those that emphasise the public interest role of regulation and the wider, long-term social, environmental and economic impact of externalising costs. Right-leaning governments tend to have a narrow view of what comprises the public interest, greater appetite for short-term gain at greater long-term cost, less concern for non-market values and little regard for sustainability. The challenge for actors in the regulatory system is to maintain a focus on outcomes that are consistent with the public interest in a way that responds to changing political or ideological drivers, without compromising the integrity of legal and regulatory frameworks (while acknowledging that Parliament may change the frameworks as a result of prevailing political or ideological perspectives).

Strategies finding favour with right-leaning governments are likely to be few in number and limited in scope, probably focusing on the near-term competition, productivity and innovation-sapping consequences of externalised costs. Perversely, strategies that give strength to narrow 'NIMBY' interests may also find favour because privileged communities are a core electoral base for right-leaning governments. Strategies that interfere with mutually beneficial financial arrangements between vested interests and political parties are also unlikely to be supported by the mainstream political parties.

Strategies to combat capture must take account of the baseline level of capture in a regulatory system. Contesting extant versus potential capture likely requires different approaches. Addressing extreme levels of capture may require seismic interventions, such as dismantling political party funding systems, wholesale replacement of agencies, or restructuring to remove senior staff likely to perpetuate capture-related risks.

> … to effectively manage the risks posed by those coming through the revolving door, training and support to ensure they apply their knowledge as regulators … rather than in accordance with industry culture and practice is essential.

Understanding the nuance of the revolving door

The issue of revolving doors between industry and regulators is complex, deserving specific attention in approaches to mitigating capture. Some scholars consider the theory of revolving doors enabling capture to be largely unproven (Rex, 2018), and that it can in fact have benefits. While acknowledging that exchanging staff does not automatically result in capture and can disrupt knowledge asymmetries in ways that are valuable for the public interest, it does not follow that it is a spurious concern. Arguably, the particular risk posed by a 'revolving door' is highly contextual and thus encourages a nuanced analysis in each regulatory system.

Limiting the risk posed by revolving doors depends partly on purposeful hiring strategies to ensure diversity, and the tracking of movements between the two 'sides' coupled with triggers or additional checks put in place at strategic and

operational levels. A study in Quebec, Canada found that the problem of cultural capture and 'lobbying from within' because of a weakly managed flow of staff to the regulator was evident, but the impetus to tighten restrictions was very limited (Yates and Cardin-Trudeau, 2021). Transparency without action misses opportunities to protect the public interest.

The value of industry expertise in a regulatory system is undeniable, particularly in novel or emerging regulatory areas or those that otherwise rely on rare and highly specialised knowledge. However, to effectively manage the risks posed by those coming through the revolving door, training and support to ensure they apply their knowledge as regulators (an area of expertise in and of itself) rather than in accordance with industry culture and practice is essential. Autonomy can be earned over time as confidence in conduct grows.

The rising incidence of capture and corruption in New Zealand underscores the need for environmental regulatory systems to energetically mitigate capture and its effects.

The influence of structural settings (e.g., funding, mandate)

The structural and institutional settings in New Zealand's environmental regulatory systems are diverse and where they invite capture, they are difficult for actors within the system to overcome. As highlighted in Doole, Stephens and Bertram (2024), capture can be cumulative, meaning the adverse impact of capture early in a process is compounded through the system. Accordingly, capture mitigation strategies that prioritise efforts to limit upstream influences may be more effective than those focused on more minor drivers later in the process. Examples include the funding model for the regulatory system, the institutional arrangements and the nature of the regulated community.

The funding model for a regulatory system is likely to have significant impacts on its resilience to capture. For example, where a regulatory system is funded through direct levies on industry, there is an ongoing opportunity to undermine the regulatory system by influencing decisions about the resources available to actors in the regulatory system. This opportunity comes after influence on the setting and design of the levy itself. Funding models can be instruments of capture (e.g., limiting funding to politically challenging functions), while adequate funding supports capture mitigation in a variety of ways.

The influence of institutional arrangements on capture requires contextual consideration. The risk of capture may be different where:

- regulators have overlapping roles, such as allocation of public funding for the regulated sector or orchestration of partnerships and other collaborative approaches; regulatory functions may be chilled by the influence of dual and duelling mandates or on the losing side of competing agendas where the regulatory function is seen to undermine other objectives;
- the regulatory role is exercised by a dedicated agency versus one with a mix of roles (for example, a comparative analysis of Ireland and the United States indicated that stand-alone agencies are more susceptible to regulatory capture than functions embedded in larger government departments (Turner, Hughes and Maher, 2016)).
- Whether the regulatory function/s are centralised (e.g., the Environmental Protection Authority) or deployed through a distributed delivery system (e.g., councils under the RMA) will also likely affect the types of capture encountered.

Developing a strategy to mitigate capture necessitates understanding the nature of the regulated community/ies. Regulated parties, as noted by Rex (2018), vary in their levels of coordination and sophistication with respect to capture. This differs considerably across domains, regulatory systems and industries wielding influence, but is a critical factor to consider in what elements of capture a mitigation approach should target and in what priority sequence. For example, in small jurisdictions, a very close relationship with regulated parties can arise and the limited diversity in interactions can mean poor decision-making patterns can be overlooked that might have been noticed in a regime that is more diverse, including comprising a variety of different functions (e.g., policy, funding, regulatory etc.).[10]

Limited guidance exists on the design of regulatory systems and agencies to avert the risk of capture (e.g., the Legislation Design Advisory Council's 2021 guidelines do not mention it). Ensuring that design processes account for capture risks is critical to achieving the public interest purposes of regulation. We suggest that architects of public agencies carefully analyse how institutional settings may invite or limit capture and identify where these settings may need adjustment in response to legislative amendments or agency reorganisations.

The need for disruptive strategies

The mitigations outlined in Tables 2 and 3 will only rebalance rather than disrupt asymmetric power structures. Mitigations to address governance capture are needed to achieve disruption. While seemingly radical, many such mitigations are common in other jurisdictions, but have not been instigated in New Zealand due to the feeble vigilance mentioned earlier. Examples of disruptive mitigations include:

- requiring that political donations from vested interests cannot be accepted

unless matched by donations from registered public interest groups (or such donations are banned altogether);
- elected officials at all levels of government must declare connections to and alignments with industry groups;
- where alignments above exist, the members cannot participate in decision making concerning allocation of rights, responsibilities and resources to these groups;
- significant sanctions and penalties administered independently for false or misleading declarations of the nature discussed above, breaches of codes of conduct (such as in local government) and scurrilous behaviour in policy processes by vested interests;
- giving registered public interest groups special status for advocacy (such as immunity from security requirements or cost decisions);
- generous public funding to challenge regulatory decisions and other participatory processes (e.g., plan development);
- creating a dedicated institution to detect and expose capture and corruption (e.g., a similar institution to the Independent Commission Against Corruption (NSW) or the Independent Broad-based Anti-Corruption Commission (Victoria) in Australia).

Conclusion

Regulatory capture must be better addressed as a precondition for protecting nature from the impacts of development and extraction. The rising incidence of capture and corruption in New Zealand underscores the need for environmental regulatory systems to energetically mitigate capture and its effects. We argue that mitigating capture in environmental regulatory systems necessitates a deliberate rebalancing of power among different actors to reduce the typical dominance of vested interests.

Capture occurs both as direct actions and as more insidious intrusions designed to set agendas and frame or reframe public debate (including perceptions of the severity of issues). The rebalancing must contest both the narrative framing and direct capture actions of vested interests. Strategies to address capture should thus encompass interventions that recognise these characteristics and provide the skills and resources to effectively implement them.

1 Note our discussion in Doole et al. (2024) on what constitutes the 'public interest'. The definition of the public interest from New Zealand Ministry for Regulation (2024a) is: 'Public interest means making decisions or taking actions that benefit society in general, rather than serving the needs of an individual or a group'.

2 For the purposes of this article a regulatory system is defined as 'a set of formal and informal rules, norms and sanctions, given effect through the actions and practices of designated actors, that work together to shape people's behaviour or interactions in pursuit of a broad goal or outcome' (Ministry for Regulation, 2024a).

3 A regulated party is a person or organisation that must comply with the laws and societal expectations of behaviour. This may be in their personal, social, recreational or work lives. Usually, people want to comply and act in the best interests of others, so regulation needs to give clear guidance on how to do so (Ministry for Regulation, 2024a).

4 See discussion in Rex, 2018 about the tendency for capture to be alleged with scant evidence. We note, however, that the absence of clear evidence in any instance should not be assumed to mean that capture has not occurred, as it is by nature readily concealed. A balanced approach is necessary.

5 We note the findings of the IPANZ survey that cast aspersions on the resilience of the concept of 'free and frank' advice in the current public service.

6 Transparency International's recent report (Chapple, 2024) recommended that the Public Service Commission further strengthen public service integrity leadership in response to declining standards identified in the study.

7 Ulucanlar et al. (2023) applied their own findings to a narrow depiction of regulatory capture. Because we have defined capture as an impact on the regulatory system, their conceptualisation is very much more relevant.

8 A robust regulatory system requires engagement between regulated parties and regulators (including policy agencies). Effective problem definition, communications programmes, policy development and implementation rely on this engagement.

9 This does not suggest that civil society advocates should be above scrutiny; they can, in fact, be agents of capture when they are set up to advocate for outcomes aligned with vested interests under the guise of the public interest.

10 For instance, an analysis of US Forest Service field officers demonstrated patterns of such affinity with local interests in some instances that the individuals no longer acted in the interests of the regulator or the public (see Kaufman, 1960).

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