

Regulatory capture in environmental legal systems – two papers and a call to action

This paper summarises two recent articles in Policy Quarterly in which we worked to create a useful framework for regulators and others to apply in addressing the controversial issue of regulatory capture in environmental legal systems (generally, law and policies intended to safeguard nature from human impacts). The purpose is not to relay all the information but rather to draw practitioners' attention to the existence of the articles and the supporting literature. In both papers we highlight why we think New Zealand is particularly vulnerable to capture, and plenty of recent media items appear to support that assertion.

Most important is how vulnerable our ailing natural environment is. Much of New Zealand's environmental data shows woeful trends (where it exists – hat tip to the excellent work of the PCE (<https://pce.parliament.nz/publications/environmental-reporting-research-and-investment/>) on the gaps in our environmental monitoring and reporting). Many of our rivers, lakes, wetlands and coastal ecosystems are in a parlous state, and only the United States has a greater proportion of threatened species than we do. Our natural environment is the core of our wellbeing and survival, and efforts to constrain the impacts of human activity have been far less effective than they needed to have been to date. I consider capture to be a major contributor to that gap.

Regulatory capture is where regulated communities exert undue influence on regulatory systems, pulling it away from serving its public interest objectives. Although well described and probably pervasive, my co-authors and I felt there was insufficient clear thinking and support for regulators and other actors in the system to usefully

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define, diagnose and mitigate capture. We felt it was such an important issue that it needed forthright and proactive management, but that it was rarely discussed (and then only in narrow circumstances).

The second motivator was that regulatory capture's management where it did occur, focused primarily on the operational front line of regulatory practice. However, it was our view that it was in fact potentially pervasive throughout the policy process. A wider boundary definition and broader conceptualisation would better equip regulators and other parties to manage its effects and ward off the short- and long-term consequences more frequently, by sharing that responsibility across various disciplines (e.g., strategy, policy). Thus, also sharing the 'blame' when regulatory failure occurs – it is tough for front line officers to overcome failures of process earlier.

Paper 1 was released in November of 2024 and canvassed existing definitions of capture, finding none to be quite

right. Most were either too simplistic in our view to convey more than an abstract notion of the idea, while others were narrowly focused on certain aspects of the policy process (e.g., frontline auditing), ignoring many places where capture is or could be present. We proposed our own definition – while lengthy it helps convey the often-

nebulous concept in a way that will help a practitioner to link concept to practice, supported by an image (fig 1) designed to help reinforce the key elements, including that capture is like dye – pervasive and difficult to extract once it takes hold.

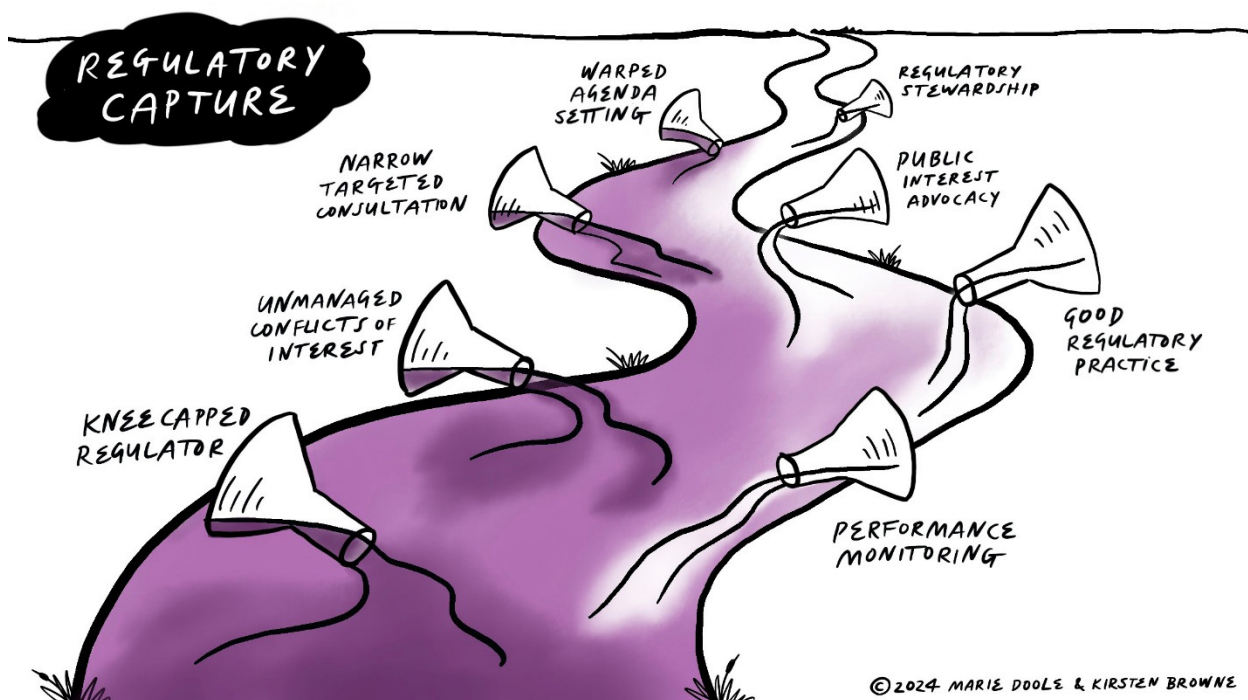


Figure 1 Image designed to convey the concept of regulatory capture as a pervasive influence that behaves like dye in a river throughout the policy process from agenda setting to evaluation

Our definition of regulatory capture is:

"...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."

We noted that capture is a serious accusation, and claims of it needed to be carefully constructed. Three key elements

of capture were set out:

- the motivation behind the behaviour is to secure personal or sector benefit, which will arise generally at the expense of the public interest;
- the conditions in the regulatory system have allowed the capture to occur (noting that capture is rarely expressly unlawful); and
- the consequence of capture is adverse for the public interest.

Unpacking the three elements helps diagnose capture and mitigate it. Where all or most of these tests were met, capture was likely at play. Although, importantly, we said one of the key challenges of capture is that it looked like ordinary things playing out and could thus be complex

to distinguish in practice. Nevertheless, more disciplined articulation of it would be of value.

We worked hard in both papers to bring capture 'to life' whilst not engaging in the same spurious accusations of capture of which we were also critical. But some indicators we included for regulators were:

- unwillingness of 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);
- tendency for regulators to consider the perspectives of civil society actors 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).

Paper 1 concluded by noting that capture requires the deliberate rebalancing of power, including by individual regulators having clear and express internal policies to manage the risk. Examples of other internal mitigations proposed included operational action plans, a robust approach to regulatory stewardship and effective leadership that establishes and maintains a culture resistant to capture in the first place. External to agencies, we proposed a suite

of potential mitigations including upholding the critical independence of the judiciary, boosting transparency requirements in public administration and supporting civil society litigation for public interest ends. But it was clear that mitigation deserved its own dedicated focus.

Paper 2 dove back into the space of regulatory capture, this time drawing on the excellent scholarship in public health, a discipline well versed in batting back against the sometimes-egregious behaviour of vested interests pursuing their own economic ends at the expense of the general population (tobacco, ultra-processed food etc.). This time, we focused on specifically recognising the many ways capture occurs and how to contest it. We did this by importing a framework developed following a review article by Ulucanlar et al 2023.

The authors reviewed a wide range of examples of capture in the field of ultra-processed food and categorised them into two main forms of strategies to gain undue influence: 'framing strategies' intended to affect the public discourse in relation to an issue, and 'direct action strategies' intended to specifically target efforts to cause objectives of the regulatory system to swerve. Both are important and targeting mitigation of both essential to safeguarding against capture. We imported this framework into environmental regulatory systems in Aotearoa.

Framing strategies can be pervasive, percolating through public discourse like dye (the metaphor is presented in figure 1 in support of the first paper). The key strategies are to:

- frame vested interests/regulated parties as the good actor (e.g., struggling under the sheer weight of unreasonable regulation);
- frame regulators and civil society as the bad actors ('misguided', 'incompetent');
- trivialise the policy problem as against other matters (usually with far less impact on the bottom line);
- push the acceptable solutions of voluntary approaches and partnerships);
- challenge and defer or delay 'unacceptable' solutions such as strict regulation or introduction of transparency obligations that will present inconvenient data.

While many claims of vested interests in regulatory systems

are legitimate, we encouraged careful consideration against these well-known strategies, to ensure that shared narratives based on falsehoods did not naturally arise.

Direct action strategies refer to all the ways vested interests can exert undue influence, most of which are legitimate on the face of it (submissions, participation in collaborative processes) in addition to more specific actions like:

- the use of the law to obstruct policies including to delay or defer proceedings is commonplace;
- manufacturing support for corporate and industry positions is a well-honed approach, often supported by shaping evidence (e.g. commissioning alternate science or material from deeply conflicted individuals);
- acting to displace and usurp initiatives to address the policy problem is canvassed as a strategy – which in the environmental space usually looks like arguing for voluntary approaches to pressing problems with limited evidence of effectiveness.

The various framing and direct-action strategies interact and intertwine, often held up by a generous investment in reputation management. The role of agencies is to moderate that influence, and that is where much more effort is needed.

The purpose of the second paper was to address the options for mitigation all the way along the policy process, in addition to wider improvements. We found much of the literature stopped short of what one could do about the issue in situ, other than the glaringly obvious things like ensuring rotation of auditors and advising against bribery. Given capture is more nuanced than just those things, more nuanced guidance may be useful (including for complex matters such as the ‘revolving door’). The aim was to target agencies where there was sufficiently skilled leadership, sufficient resources and willingness/drive to mitigate against capture, and ensure that there was some guidance on what to do. We also noted that where regulators are already captured, most of the mitigations simply would not work.

Paper 2 proposed a range of potential mitigation actions that varied from the agency-based (e.g., individual conduct controls, ensuring sufficient resourcing to support design and delivery of regulatory systems and investing in independent and evidence-based evaluation), to the broader picture (e.g., much stricter controls on lobbying

and political donations, providing generous funding for public interest advocacy where appropriate and the creation of a dedicated public institution similar to the Independent Commissions Against Corruption found throughout Australia).

Both papers are intended to be constructive and helpful and have benefited greatly from a slew of regulators and other experts providing their ideas and insights. Special thanks go to Professor Jonathan Boston who provided considerable editorial assistance and advice, in addition to Malory Weston for editing on Paper 2. Gratitude is also due to the Australasian Environmental Law Enforcement and Regulators neTwork (AELERT) for both the technical input of several members and the opportunity to present the research at the AELERT-INECE 2024 Global Summit for Implementing and Enforcing Environmental Law in Brisbane, Australia in November 2023. The Michael and Suzanne Borrin Foundation kindly supported my travel to that and a tour of Australian regulators to support analysis. Final thanks are due to my hardy co-authors who both brought significant intellectual firepower to a tough topic. Moderating the influence of vested interests is a critical precondition to the effective and enduring protection of nature – let’s get to work.

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