Legal enablers for implementing ecosystem-based management (EBM) in Aotearoa New Zealand

National Science Challenges | SUSTAINABLE SEAS | Ko ngā moana whakauka

This summary provides examples of legal enablers for EBM in marine planning and policy. This document aims to support embedding an EBM approach in developing and implementing law and policy and is not legal advice.

Summary

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International legislation and policy

The **Convention on Biological Diversity**[1] requires states to "[p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings",[2] and recognises traditional knowledge and benefit sharing with Indigenous peoples (amongst other things).[3]

The **Intergovernmental Panel on Climate Change** sixth assessment found that climate governance is "most effective when it integrates across multiple policy domains, helps realize synergies and minimize trade-offs, and connects national and sub-national policy-making levels", and that, "[e]ffective and equitable climate governance builds on engagement with civil society actors, political actors, businesses, youth, labour, media, Indigenous Peoples and local communities".[7]

The **United Nations** has promoted integrated oceans management for more than 30 years.[4] There is increasing convergence in international debates around: biodiversity conservation, climate mitigation, adaptation and resilience, and Indigenous rights via an "ecosystem approach".[5]

The **United Nations Declaration on the Rights of Indigenous Peoples**[8] recognises Indigenous rights over land and resources, including the marine and coastal area.

The recent *Values Assessment* published by the **Intergovernmental Panel on Biodiversity and Ecosystem Services** recommended a new decision-making typology grounded in "living from, with, in and as nature".[9]

The **United Nations Convention on the Law of the Sea**[6] is supportive of an ecosystem-based approach, including under its general principles, through adoption of the precautionary approach and conservation and management measures.

The **Kunming-Montreal Global Biodiversity Framework**[10] expressly adopts an ecosystem approach, including Goal A 'The integrity, connectivity and resilience of all ecosystems are maintained, enhanced, or restored, substantially increasing the area of natural ecosystems by 2050' and multiple targets towards ecosystem-based management.

Domestic legislation and policy

The purpose of the **Resource Management Act 1991**[11] RMA is to "promote the sustainable management of natural and physical resources", where sustainable management refers to "safeguarding the life-supporting capacity of ....ecosystems..."

The **RMA** also includes three provisions that set overarching obligations to Māori.[12]

The **Environment Act 1986** requires that in the management of natural and physical resources, decision-makers take "full and balanced account of" "...the intrinsic values of ecosystems" and the "...values which are placed by individuals and groups on the quality of the environment" alongside Treaty rights and the rights of future generations.[13]

Under the **Marine and Coastal Area (Takutai Moana) Act 2011**[14] a number of determinations are now emanating from the courts,[15] which should provide increased recognition of Māori authority in decision-making about the territorial sea, including through the associated recognition of "permission rights" under the RMA and Conservation Acts.[16] Customary marine title holders may be able to use their status as titleholders to impose area-based protections in the marine and coastal area as wāhi tapu (sacred places), including prohibitions or restrictions on access to the area.[17]

The purpose of the **Fisheries Act 1996**[18] includes maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment; and conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.[19]

The **FA** also includes "environmental principles", which all persons exercising or performing functions, duties, or powers under it must "take into account".[20] These are that "associated or dependent species should be maintained above a level that ensures their long-term viability; biological diversity of the aquatic environment should be maintained; and habitats of particular significance for fisheries management should be protected". The Act also provides "information principles" in section 10, reflecting a "precautionary approach" in which decisions are based on the best information taking a cautious approach, and that a lack of information is not used to avoid measures to achieve the purpose of the Act.

Domestic legislation and policy

Te Ohu Kaimoana's "***Te hā o Tangaroa kia ora ai tāua***" strategy (meaning "the breath of Tangaroa sustains us") is framed around the "ongoing interdependent relationship" between Māori and living Tangaroa (the metaphysical personification of the ocean),[21] and emphasises reciprocal rights and obligations to care for the benefit of future generations.[22]

Te Mana o Te Taiao - Aotearoa New Zealand Biodiversity Strategy recognises that people are a part of nature and that natural ecosystems are living. Te Mana o Te Taiao also recognises the complexity of biodiversity conservation policy and institutions in Aotearoa NZ, which "isn't working as well as it should be, as it is failing to tackle issues at the scale needed to address the ongoing and cumulative loss of indigenous biodiversity".[25] The first 2050 outcome sought under the strategy reflects ecosystem-based thinking, in that "[e]cosystems and species are protected, restored, resilient and connected from mountain tops to ocean depths",[26] referred to as a ki uta ki tai (mountains to sea) approach.[27] The strategy includes many detailed goals relevant to the implementation of an ecosystem-based approach to managing human interactions with marine biodiversity in partnership with Māori, including to better manage policy complexity and fragmentation, cumulative effects and the impacts of climate change. These include (at 10.5.1) that "[a] framework has been established to promote ecosystem-based management, protect and enhance the health of marine and coastal ecosystems, and manage them within clear environmental limits".[28]

The draft guidelines for ***Habitats of Particular Significance for Fisheries Management*** recognise that "Fisheries New Zealand is progressing towards ecosystem-based management – an integrated approach to managing competing values and uses of marine resources, while maintaining the ecosystems that support them" and specifically refers to the oceans and fisheries work program and *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy*.[23] The guidelines will provide a definition for habitats of significance for fisheries (and a commitment to collaborate with Māori in doing so) and are intended to provide greater transparency on the fisheries management advice being given by central government.

The Department of Conservation's ***Marine and Coastal Protection and Management Principles*** adopt both the *ki uta ki tai* approach and hierarchy of obligations reflected in *Te Mana o Te Wai*.[24] The principles prioritise the health and wellbeing of the coast and oceans, and reinforce the rights of Māori and the role for *mātauranga* (knowledge), and the precautionary principle, in an expressly "ecosystem approach". The principles also suggest relational thinking, where "[t]he marine environment will be sustainably managed in an integrated way that recognizes the complex inter-relationships of land, sea, and air, and that maintains its potential for future generations, and balancing the rights and interests of customary, individual and corporate users".

The ***New Zealand Coastal Policy Statement*** includes several policies that align closely with an ecosystem-based approach, including as its first objective:[29] ... to safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by: maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature; protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

In terms of Te Tiriti o Waitangi obligations, the statement includes an objective that regional authorities "take account" of the principles of the Treaty and recognise the role of Māori as *kaitiaki* (caretakers or guardians) in management of the coastal environment, by recognising Māori relationships with lands and resources, promoting meaningful relationships and interactions between Māori and persons exercising functions and powers under the Act, and incorporating *mātauranga* into sustainable management.[30] Other objectives recognise the connection of community wellbeing to coastal management,[31] and require coastal management to reflect international law obligations.[32] The policies included in the statement continue to reflect an ecosystem-based approach, including: taking a precautionary approach where effects on the coastal environment are poorly understood;[33] providing for the integrated and collaborative management of natural and physical resources in the coastal environment (requiring coordinated management across administrative boundaries within the coastal marine area and on land), taking into account cumulative effects;[34] considering the effects of rights and management under other legislation beyond the RMA;[35] strategic planning for cumulative effects;[36] and protections of Indigenous biological diversity.[37]

Court decisions

The Court of Appeal in ***Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors*** confirmed that customary marine title under the Marine and Customary Area (Takutai Moana) Act 2011 may extend to the beds of navigable rivers.[38]

In ***Bay of Island Maritime Park Incorporated & Ors v Northland Regional Council*** the Environment Court approved the Northland Regional Plan's application to the coastal marine area, applying the precedent in the *Motiti* case to establish areas protected from fishing for biodiversity purposes as *rāhui*.[41]

The Court of Appeal in ***Attorney General v the Trustees of the Motiti Rohe Moana Trust and others (Motiti)*** confirmed the role of regional authorities to manage the effects of fishing on indigenous biodiversity in the coastal marine area under the RMA (in line with New Zealand's obligations under the Convention on Biological Diversity),[39] provided they did not do so for Fisheries Act purposes (primarily focused on allocation and sustainable use).[40] The Court accepted that the Fisheries Act and RMA were intended to complement each other, and could work alongside each other. This decision signaled major implications for regional councils, many of which have not historically had the capacity to plan for or enforce sustainable management in the coastal marine area.

The High Court in ***Environmental Law Initiative v Canterbury Regional Council*** overturned a decision to grant resource consent under the Resource Management Act 1991 to discharge nutrients onto land from farming activities because of adverse cumulative effects to aquatic life in the receiving marine and coastal environment, and on the basis that the failure of the decisionmaker to consider the New Zealand Coastal Policy Statement and Regional Coastal Environment Plan was unlawful.[42]

The High Court in ***Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated*** confirmed that the application of national freshwater standards extends beyond the land/sea interface to contemplate the impact of land use and freshwater management into estuaries and the broader coastal marine area.[43]

Court decisions

The Supreme Court in ***Environmental Defence Society Inc v New Zealand King Salmon Co Ltd (King Salmon)*** provided direction to regional authorities about the application of section 5 of the RMA and the New Zealand Coastal Policy Statement, which set "environmental bottom lines" rather than objectives that can be traded-off against development objectives as part of an "overall broad judgment".[44]

A 2024 Advisory Opinion from a unanimous **International Tribunal on the Law of the Sea** found that states (including New Zealand) have obligations under international law to reduce the impacts of climate change on marine areas, apply an ecosystem approach to marine law and policy, and reduce marine pollution and support marine restoration based on best available science.[51]

The Supreme Court in ***Trans-Tasman Resources v Taranaki-Whanganui Conservation Board (TTR)***, emphasised the need for an ecosystem-based approach to marine management that crosses assumed jurisdictional boundaries.[45] The Court noted "[t]here are good policy reasons for not ignoring the fact that if the proposed activity took place on the other side of an arbitrary line between two regimes, its proposed effects would be assessed differently".[46] The Court referred to the decision in *King Salmon*,[47] noting that policy 13(1)(a) of the New Zealand Coastal Policy Statement provided an environmental bottom line, establishing policy direction as to effects which are adverse and to be avoided or not allowed.[48] The Supreme Court's findings may set a precedent for the environmental management of other boundary areas, including the highly contentious land/sea interface.

In terms of worldview, Williams J said:[49] 'I would merely add that this question must not only be viewed through a Pākehā lens.... As the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place. As with all interests, they reflect the relevant values of the interest-holder. Those values—mana, whanaungatanga and kaitiakitanga—are relational'.

The Supreme Court in ***Trans-Tasman Resources v Taranaki-Whanganui Conservation Board; Takamore v Clarke*** **and** ***Ngāti Whātua Ōrākei Trust v Attorney-General, and Peter Hugh McGregor Ellis v R*** have acknowledged tikanga Māori as a source of law in New Zealand.[50]

The Supreme Court in ***New Zealand Recreational Fishing Council Inc v Sanford Ltd*** noted that "utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured".[52]

In ***Environmental Law initiative and Minister of Oceans and Fisheries*** the High Court emphasised the need to take an ecosystem approach and precautionary approach to the setting of catch limits for rock lobster under the Fisheries Act, specifically related to impacts on kina (and flow on impacts for kelp forests).[53]

References

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3. Ibid, Art 8(J).
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6. United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.
7. Working Group III Intergovernmental Panel on Climate Change. Intergovernmental Panel on Climate Change, AR6 Climate Change 2022: Mitigation of Climate Change (2022) 64 available at [IPCC Report](https://www.ipcc.ch/report/sixth-assessment-report-working-group-3/) (accessed 4 June 2023).
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11. Resource Management Act 1991 (NZ), section 5.
12. Resource Management Act 1991 (NZ), sections 6, 7 and 8.
13. Environment Act 1986 (NZ) preamble.
14. Marine and Coastal Area (Takutai Moana) Act 2011; Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020 (NZ).
15. *Whakatohea Kotahitanga Waka v Te Kahui Takutai Moana O Nga Whanui Me Nga Hapū* [2022] NZCA 7; *Re Edwards (No 2)* [2021] NZHC 1025; *Re Ngāti Pāhauwera* [2021] NZHC 3599; *Re Reeder & Ors* (Ngā Pōtiki Stage 1–Te Tāhuna o Rangataua) [2021] NZHC 2726.
16. Marine and Coastal Area (Takutai Moana) Act 2011, section 62(1)(b) and (c).
17. Ibid, sections 78–81.
18. Fisheries Act 1996 (NZ). In *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54 the Supreme Court at [39] noted that "utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured".
19. Fisheries Act 1996 (NZ), section 8.
20. Fisheries Act 1996 (NZ), section 9.
21. Tangaroa is generally understood to be the son of Ranginui (the sky father) and Papatūānuku (the earth mother). See, Paul Meredith, "Ti he ika – Māori Fishing - Tangaroa, God of the Sea" Te Ara The Encyclopedia of New Zealand at [Te Ara] (https://teara.govt.nz/en/te-hi-ika-maori-fishing/page-1) (accessed 1 September 2022).
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25. Te Mana o Te Taiao: Aotearoa New Zealand Biodiversity Strategy (Department of Conservation, 2020).
26. Ibid, 43.
27. Ibid.
28. Ibid, 53.
29. New Zealand Coastal Policy Statement 2010 (Department of Conservation, 2010), objective 1.
30. Ibid, objective 3.
31. Ibid, objective 6.
32. Ibid, objective 7.
33. Ibid, policy 3.
34. Ibid, policy 4.
35. Ibid, policy 5.
36. Ibid, policy 7.
37. Ibid, policy 11.
38. *Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 504.
39. *AG v Motiti Rohe Moana Trust & Ors* [2019] NZCA 532.
40. Section 30(1)(ga) of the Resource Management Act 1991 ("RMA") states that regional councils have the function of establishing, implementing and reviewing objectives, policies, and methods for maintaining indigenous biological diversity in their regions. Section 30(2) expressly prevents the regional council from controlling the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.
41. *Bay of Island Maritime Park Incorporated & Ors v Northland Regional Council* [2022] NZEnvC 228.
42. *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612.
43. *Minister of Conservation v Mangawhai Harbour Restoration Society incorporated* [2021] NZHC 3113 (High Court, 6 September 2021).
44. *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38.
45. *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.
46. *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, note 45, at [178].
47. *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, note 44.
48. *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, note 45, at [185].
49. *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, note 45, at [297].
50. *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, note 45; *Takamore v Clarke* [2012] NZSC 116; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, Supreme Court of New Zealand [2019] 1 NZLR 11; *Peter Hugh McGregor Ellis v R* [2022] NZSC 114.
51. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2014 (International Tribunal for the Law of the Sea, Case No. 31).
52. *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54.
53. *Environmental Law initiative and Minister of Oceans and Fisheries* [2022] NZHC 2969 (*Rock lobster case*).