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Impact Assessment in the Marine Environment

Edited by Nick Taylor

How do we assess impacts in the marine environment?

- an introduction

Nick Taylor

This issue looks at issues around impact assessment and the marine environment. Popular media have, in recent times, highlighted negative human impacts on the marine environment, from plastic found in dead turtles, to coral bleaching in Australia and the Pacific, to overfishing, deep-sea exploration and resource extraction. We are reminded frequently of sea-level rise impacting on coastal settlements and increasing intensity of ocean storms and coastal disasters.

Impact assessment seems to have a weak connection into resource policy, decision making and management for the ocean environment. We ask as an Association, how can this connection be improved? What are we learning to help locate impact assessment as a key part of planning and decision making processes relating to the marine environment? How can we be more effective in our contribution?

We look first at issues around iwi, impact assessment and the marine environment with an article by **Dyanna Jolly**.

An article follows by **Christine Cheyne**, reviewing the influence of impact assessment on decisions around deep-sea mining by Trans Tasman Resources.

Hamish Rennie provides a further case study, of the impact assessment undertaken for consent to leave the remnants of the wreck of the Rena on the reef off the port of Tauranga, with discussion of the consequent Environment Court decision.

Jurisdictions in the marine and coastal environment are not always clear, an issue addressed by **Dan Minhinnik and Rachel Robilliard**, resource management lawyers at Russell McVeagh (with our thanks for their agreeing on us making a link to their previous piece on this topic).

Finally on the marine theme, **Nick Taylor** summarises initiatives on impact assessment and the marine environment in the Pacific Islands, drawing on the guidelines for EIA prepared by our colleagues at SPREP.

This issue ends with an article on SEA in New Zealand by **Chantal Whitby**. She draws on our Lincoln (2016) conference on this topic to provide an overview of SEA here. This commentary provides a useful link to current discussions about SEA in Australia and New Zealand during and following up from the recent EIANZ conference in Wellington, where

NZAIA collaborated with our Australian colleagues in a round table discussion to consider joint initiatives around SEA. Members of NZAIA are working on these initiative with the EIANZ Special Interest Section on Impact Assessment.

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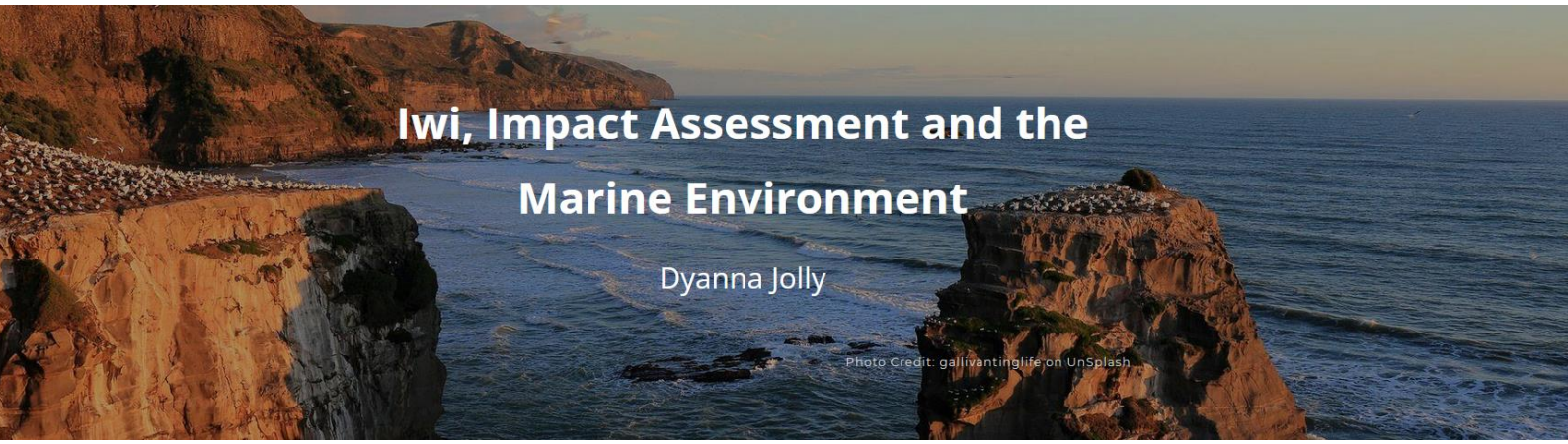

Iwi, Impact Assessment and the Marine Environment

Dyanna Jolly

The marine environment is an integral part of the history, culture and identity of the tāngata whenua of Aotearoa/New Zealand. Iwi interests in the marine environment reflect the value of customary mahinga kai traditions, the role of iwi as kaitiaki (environmental stewards), and the importance of commercial fisheries assets.

As kaitiaki, iwi are a strong voice in planning and consenting processes involving use of the marine environment. Seabed mining, marina developments, aquaculture, shipping channel dredging, land reclamation, and the use of the coastal waters as a receiving environment for wastewater and stormwater discharges are activities that may negatively impact on areas and resources of importance to iwi. These activities can be at odds with iwi use, environmental policy and future aspirations.

Assessing the impacts of activities on iwi therefore is a key consideration for proposed projects in the marine environment. What is the best way for this assessment to happen?

Cultural impact assessment (CIA) is a planning tool used to support the involvement of iwi/hapū in impact assessment, and manage the cultural impacts of development. A CIA identifies iwi values and interests in an area, the potential effects on these as a result of a proposed activity, and how adverse effects can be avoided or mitigated.

CIA has potential to enable iwi/hapū to influence a project at the front-end of the resource consent process, rather than submitting on a completed project design and assessment of effects that has not considered iwi/hapū values and interests adequately.

Photo credit: Don Shearman

Lyttelton Port is a good case study. The port is located in Whakaraupō/ Lyttelton Harbour, in the takiwā (traditional territory) of Ngāti Wheke, a Ngāi Tahu hapū. A series of earthquake recovery and development projects are now at consenting stage, under a planning framework amended by a Lyttelton Port Recovery Plan (LPRP).

CIA is being used by Ngāi Tahu and Lyttelton Port Company (LPC) to manage the effects of port recovery and development projects on iwi/hapū customary rights, values, and interests. Ngāi Tahu are working to restore harbour water quality and kaimoana habitat, and assessing where and how proposed activities occur is integral to achieving this.

At a strategic plan-making level, a CIA informed the development of the LPRP by setting iwi/hapū priorities and providing guidance on how to enable port recovery in a manner that reflects the value of the Whakaraupō/Lyttelton Harbour as both a mahinga kai and a port. At a project level, CIA were used to assess the potential cultural impacts of a proposed Channel Deepening Project and a proposed 24 ha Te Awaparahi Bay Reclamation Project.

There is good evidence that the use of CIA resulted in a recovery plan and consent applications that recognise the importance of the coastal marine environment to Ngāi Tahu, and the potential effects of port development on key values such as mahinga kai. The LPRP contains provisions for a catchment management plan and policy supporting net gain to mahinga kai. Capital dredging is proposed to be managed using a monitoring and adaptive management regime that responds directly to iwi/hapū concerns about sediment-induced effects on water quality and mahinga kai, and LPC has agreed to a net gain to mahinga kai. LPC is also required to mitigate the loss of kaimoana as a result of a 24 ha reclamation, and investigate the potential for designing the reclamation seawalls as new kaimoana habitat.

In this case study, the use of CIA had a positive impact on the relationship between LPC and Ngāi Tahu, providing a basis for the parties to work together to address issues at the pre-application stage.

This is not to say that all cultural impacts were resolved through the use of CIA. Ngāi Tahu have lodged an appeal against the consents granted for the CDP Project in July 2017. Ngāi Tahu and LPC would agree that much hinges on the kōrero (discussion) to come, and the ability of these to provide confidence that Ngāi Tahu values and interests in the marine environment will be protected.

In March 2017, the Indigenous Peoples Section of the International Association for Impact Assessment (IAIA) issued the Aashukan Declaration, recognising that development has affected the lives of Indigenous Peoples in profound and lasting ways, and that Impact Assessment has yet to realise the potential of fully participatory processes.

Can CIA help iwi/hapū, project proponents and government meet future challenges associated with the use of the marine environment?

CIA can result in environmental impact assessments that recognise iwi/hapū rights, values and interests in the marine environment, and decision-making that provides for all of these. Used well, CIA can empower iwi/hapū to participate in environmental impact assessment in their traditional territories, and contribute to a more Treaty-compliant resource management regime.

But to be effective, the tool needs to be supported and valued by all involved. Iwi/hapū need to have ownership over the CIA process, and be resourced to do so. Project proponents and decision-makers must give appropriate weight to the matters raised in CIA, and the kaitiakitanga and mātauranga (knowledge) that supports the assessment. One of the biggest risks to CIA is that it becomes a 'tick the box' exercise for consultation with iwi/hapū, or that the 'cultural' component of CIA is narrowly defined.

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The August 2017 decision on Trans-Tasman Resources application for sea-bed mining in the South Taranaki Bight

Christine Cheyne

In August 2017, approval was given to an application from Trans-Tasman Resources Ltd (TTRL) for sea-bed mining off the South Taranaki coast. This was a second application following an unsuccessful application in November 2013.

The application submitted to the EPA in August 2016 was for marine consents and marine discharge consents to extract and process for export up to 5 million tonnes of iron sand per year for up to 35 years in the South Taranaki Bight.

The marine consent authority, the Decision Making Committee (DMC), appointed by the Board of the EPA to hear the second application, gave consent with conditions and operating constraints to limit the scale, intensity and duration of the discharge effects of residual material to the seabed, known as the sediment plume, as well as impacts on marine mammals.

Significantly, the 4-member DMC had a split vote with Committee Chairman Alick Shaw and Dr Kevin Thompson voting to grant consent and Deputy Chair, Sharon McGarry and Gerry Te Kapa Coates, voting to refuse consent. McGarry and Coates cited concerns over localised adverse environmental effects and tangata whenua existing interests. According to procedures established prior to the hearing, the chair's casting vote was used to determine the outcome of voting.

The 368 page decision report is in two parts – the first part comprises 8 chapters dealing with the background to the application, the legislation and regulations, the project and context, environmental impacts, social and cultural impacts, existing interests, the committee's integrated assessment, and finally conditions and monitoring. The second part comprises the alternative view of Coates and McGarry who acknowledged that the DMC had worked collaboratively on the agreed factual narrative in the decision report, but had some major differences in interpretation of the evidence. They felt that overall the localised adverse environmental effects on the Patea Shoals and tangata whenua existing interests are unacceptable and not avoided, remedied or mitigated by the conditions imposed. They also had concerns regarding uncertainty, and the adequacy of environmental protection within the coastal marine area (CMA that they consider tangata whenua have statutory acknowledgement over. They were concerned that a large area would be affected by the sediment plume for the duration of the mining, which would significantly impact on the ability of tangata whenua to exercise kaitiakitanga over their rohe and marine resources, and, in the view of tangata whenua, would adversely affect the mauri of the marine environment. They considered the lack of engagement between TTRL and tangata whenua as a serious deficiency.

Critical issues for impact assessment: quality of information and key impacts

Impact assessment necessarily informed the decision to grant consent but the quality of information about the impacts of the activity was a significant point of contestation, especially the lack of baseline data from which to assess impacts.

As noted in an earlier NZAIA newsletter article, concerns about the quality of information about environmental impacts in the application were expressed by several submitters. The Key Issues report, and other EPA-commissioned reports, had also highlighted some critical concerns with the impact assessment information in TTRL's application. TTRL provided a brief summary of the impacts of the proposed activity (to accompany the full application).

The DMC in its Decision Report identified three key potential impacts (aspects of which were inter-related):

1. The sediment plume, which was expected to have significant adverse effects on benthic life in the near-field (up to 3 km) through reduction in light affecting primary production, and direct effects such as smothering. adversely affecting existing interests in commercial, recreational, and customary fishing.
2. Effects on Marine mammals, not just from the sediment plume but, more significantly, from noise produced by the mining vessels.
3. Human impacts, particularly disruptions to the use of the natural resources of the STB for commercial fishing, personal enjoyment, and customary practices.

The DMC considered that the impact of most effects would be felt at a localised scale. It concluded that the mining operation would not affect fish species at a population level. The DMC report did not accept submitter evidence about the effects on kaimoana, or effects arising from heavy metal accumulation or toxicity.

With regard to the mining site, the DMC report noted:
The mining site itself will suffer direct impacts from the removal and processing of seabed material which will result in a catastrophic destruction of existing benthos on the seabed in the mining site itself. Recovery will take time and the species mix may be different but we accept the evidence that benthos will recolonise the area and it will recover to perform a similar ecological function (Summary of Decision, para 20, p. xiii)

Conditions imposed on the consent holder are designed to limit the intensity of the plume and its effect on the environment. Noise generated by the mining operation was another impact managed by consent conditions.

The DMC emphasised the temporal and spatial variability of impacts in the EEZ and CMA environment:

The physical environment of the STB is challenging, dynamic and complex. It will have a significant influence on how TTRL undertakes its mining operation. It will also have a significant influence on how the project affects the environment, especially the spread and effect of the sediment plume. We consider that TTRL is well aware of the challenges and has incorporated them into its proposed project design (para 931, p.197)

In terms of overall quality of information on which to base its August 2017 decision, the DMC asserted its confidence that it had the best available information in accordance with sections 61(1)(b) and 87E(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act). This does not mean 'complete information'. Section 61 sets out information principles. While section 61(2) requires the

DMC to favour environmental protection in addition to caution, if the information available is uncertain or inadequate, the DMC noted that there was no requirement for it to apply the precautionary principle.

Key stakeholders' perspectives of impacts

The EPA received nearly 14,000 submissions on the 2016 application, the majority of which were submitted by a third-party website (such as Kiwis Against Seabed Mining or Greenpeace). Overwhelmingly, they opposed the application. Just over 260 submissions were made directly to the EPA. Of these submissions, according to the submissions analysis undertaken for the EPA, approximately 56% supported the proposal in full or in part, and nearly 42% were opposed to the proposed activity because of the concerns related to the three broad areas highlighted above.

South Taranaki iwi and hapu were strongly opposed to the application and are among those groups that have appealed the decision. Among the key stakeholders are recreational and commercial fishing interests, and recreational diving groups.

What happens now?

After the decision was released in August, appeals were lodged by Forest and Bird, Taranaki-Whanganui Conservation Board, Te Kaahui o Rauru, Te Runanga o Ngati Ruanui Trust, a group of commercial fishing interests, Kiwis Against Sea-bed Mining and Greenpeace, and Te Ohu Kaimoana. The timing of a High Court hearing is as yet unknown.

After appeals have been resolved, the consents can commence. Before commencement of mining a monitoring plan must collect two years' worth of baseline data. This and subsequent monitoring data during the operations, will further inform management plans and operational decisions, as required by the consent conditions.

Issues for impact assessment highlighted by this decision

The TTRL decision highlights weaknesses in New Zealand's policy and statutory framework for impact assessment. These range from specific gaps such as the lack of requirement on the DMC to take into account the principles of the Treaty when making decisions on applications, to more generic concerns about the nature of consultation. Iwi representatives were extremely dissatisfied with TTRL's approach to consultation. Ngāti Ruanui (acknowledged as holding mana whenua) declined to engage with TTRL on its terms or to prepare a cultural impact report. The Board noted:
A cultural impact assessment by tangata whenua is good practice for applications such as this and is highly desirable, but it is non a statutory requirement for applications under the Act. The absence of such an assessment in the documentation accompanying the application is not a fatal flaw (para 691, p.152)

The Board noted that participation of iwi was necessary for some conditions attached to the consents. This places iwi in an invidious position.

Despite a recommendation from the EPA's own Māori Advisory Committee, Ngā Kaihautū Tikanga Taiao (NKTT) that TTRL include educational and/or training activities to be delivered by tangata whenua, so as to improve TTRL awareness and understanding of tangata whenua perspectives, values, history, interests, tikanga and kawa, the DMC said it could not impose this as a consent condition.

Another more generic concern with the policy and statutory framework is the different definition of the term "environment" in the EEZ Act as "the natural environment, including ecosystems and their constituent parts and all natural resources of New Zealand and its waters". Legal counsel for the DMC made it clear that:

Unlike under the RMA, effects on people and communities, amenity values, and social, economic, aesthetic, and cultural conditions are not effects on matters that make up the "environment" for the purposes of the Act.

In our view, however, the DMC should take into account any evidence or information before it about relevant cultural perspectives of effects on the natural environment, alongside scientific or technical information. This would include information about the values that Māori hold in the natural environment, such as values in taonga species or in the mauri of land, water, or other elements of environment." (Memorandum of Counsel Assisting the Decision-Making Committee – Further Response to Minute 40, 17 May 2017, page 20, paragraph 90)

Ideally, this needs to be made much clearer in the legislation.

Another issue is the statutory requirement for the marine consent authority to consider existing interests. This means that future interests cannot be considered. This was a concern for submitters who wanted possible future whale-watching activity to be considered in the DMC's decision about the economic impact of the proposed sea-bed mining. Consideration of future interests is needed to ensure that short-term economic gain does not outweigh much greater future long-term economic gain.

No cost-benefit analysis was undertaken which some submitters thought would provide a more robust assessment of economic benefit. Instead, the DMC was influenced by MBIE's view that the proposed activity that would contribute positively to the country's broader economic development strategy. More guidance is perhaps needed on how economic benefits should be assessed.

For further information on impact assessment and marine consent applications see:

Cheyne, C. M. (2016). Trans-Tasman Resources Limited application for seabed mining consent. In *New Zealand Association of Impact Assessment Newsletter* (Issue. 2)

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The wreck of the MV Rena:

culture, risk and resilience in impact assessment

Hamish G. Rennie

The wreck of the MV Rena and the subsequent resource consent processes, to enable the dumping and discharging of contaminants through abandoning the remnants of the wreck, created considerable division in the Bay of Plenty region, especially within iwi. Much of this conflict related to the nature of the effects, their monitoring and mitigation. The Rena case provides useful lessons for the impact assessment community.

Background

The basic facts of the wreck are as follows. On 11 October 2011, the 37,000 tonne MV Rena ran aground on Ōtāiti (previously commonly known as Astrolabe Reef). The reef is about 7km from Motiti Island and about 12km from the Bay of Plenty coast. Despite salvage efforts the Rena shifted and slowly broke apart, especially after storms in 2013 and 2015. Containers, plastic beads, oil, copper clove and Tributyl Tin (TBT – from the paint on its hull) were major contaminants discharged during this period with some TBT and possibly copper clove likely to continue to be discharged from the wreck's remains into the future.

There was a huge public response to the grounding of the Rena and the discharges of oil and other contaminants that washed up on the coast, and closed fishing grounds. Thousands of volunteers worked on beach clean-up activities, with tangata whenua at Maketu playing a lead role (Biswell 2014). In addition to the voluntary work, about $900 million has been spent on salvage and clean up (making it the second most expensive salvage in the world) and it was estimated that further salvage to completely remove the wreck and debris could cost over $450 million. Removing the remains of the wreck would be extremely difficult if not impossible, would be hazardous, and was considered likely to further damage Ōtāiti.

An application was made to dump (by abandonment) the remains of the Rena and allow ongoing discharges. The applicant was not the owner (an overseas company) and the intention is to transfer funds from the owner to the applicant (the Astrolabe Community Trust set up for this purpose) to monitor and take action to address any problems arising from the wreck's remains and associated discharges. The application was approved by a hearing panel of the Bay of Plenty Regional Council with a number of conditions and this was appealed to the Environment Court.

After grounding it became apparent that Ōtāiti was a very important wahi tapu. A number of iwi management plans were also completed, and decisions were made on relevant sections of the proposed regional coastal environment plan.

The effect of the grounding and associated discharges on the mauri of the area and on tangata whenua and kaitiaki was particularly evident, but the extent to which abandoning the wreck would continue to affect people was contested. Despite interest in the potential for the wreck to serve as a recreational dive site and an historic feature, there was initially almost universal agreement that the wreck should be removed.

Consequently, the owner (not the applicant) went to considerable efforts to consult particularly with tangata whenua. A consequence of this consultation was considerable additional removal of wreckage, beyond what had originally been considered feasible, and an unknown number of agreements were reached with various parties. At least some of these agreements included clauses requiring the affected party to publicly support the application to abandon the Rena. One included substantial funds to be provided to a trust based in Maketu whose trustees were assumed to represent the tangata whenua of the area, a matter that was contested. The essence of these agreements was included in the consent conditions by the Council and some of these conditions gave rise to aspects of the appeal.

Despite the initial general opposition to the application, by the time the appeal was heard at the Environment Court in March 2017 there were only two appellants and two parties in support of their appeals – referred to collectively as the 'Iwi appellants'. There were many other groups, including hapu, that supported the application, primarily on the grounds that they did not wish to see further damage to Ōtāiti and the surrounding area caused by attempts to remove the remains of the Rena, they did not want people to lose their lives attempting further salvage, and that they considered Ōtāiti was restoring itself by colonising the wreckage. The trust funds would help to restore both the mauri of the area and the mana of affected tangata whenua.

Whether or not there needed to be a resource consent for abandoning an unconsented activity was an issue that the Court had to consider. The Court effectively agreed that there was value in having a consent to ensure that there was a means to monitor and inform the public, and where necessary to take action to address issues that might arise (e.g. due to further release of contaminants or storm or tsunami movement of wreckage). Moreover, the conditions provided a means to help restore the mana and kaitiaki role of tangata whenua through establishing a Kaitiaki Reference Group as part of the process of monitoring the site. In reaching its decision to allow the application, the Court made a number of changes to the conditions of the consent.

Photo credit: Joel Crump

Biophysical environment

There were two major problems for the assessment of the effects of a consent to dump and discharge. The first was that if a proposal had been made to dump the Rena and discharge in this particular setting, then it is improbable that any of the experts giving evidence in support of the applicant would have suggested that the effects of the dumping and discharging would not be significant. However, their assessments in light of the application were generally based in the context that the event had already happened and considerable effort had been made to address the wreckage and released contaminants and it was not feasible to do much more. Their focus was on the degree to which further discharges and effects of dumped wreckage would *further* adversely affect the environment. This was contrasted with the potential adverse effects of further attempts to remove the wreck and the potential to discharge further contaminants in pulses during that removal process, as opposed to longer term release (if any).

The appellants were concerned that accepting the level of discharges and damage would potentially set a precedent for what might be considered acceptable environmental effects in future applications for dumping and discharging from vessels. The Court's decision is quite clear that this should not be seen as a precedent. They also had concerns over the proposed monitoring regime and the lack of suitable control sites that could enable the effects of the Rena to be distinguished from more general changes in the marine environment.

The second and more difficult issue was the starting point for assessing the effects. This was tied to some complex legal questions that had troubled the Commissioners in the Council Hearing. Under the Marine Transport Act (MTA) notices had been issued requiring the removal of the wreck and these notices could be considered as deemed consents for work to remove the wreck, not to allow it to stay. When the last of those notices was lifted from 31 March 2016 the wreck and any activity related to it (including any attempt to remove it) effectively became (or remained) an unconsented activity. The appellants argued that the

existing wreck represented unconsented dumping and discharge, for which the applicants were trying to gain legitimacy rather than remove the wreck, so granting it would prevent alternatives such as removal being considered. They consequently took the view that the effects of the Rena commenced at the point of impact and any assessment of the effects had to start with the pre-impacted state of the environment.

The applicant argued that they did not need a consent at all as the wreck had been removed to the extent that was acceptable to lift the notices under the MTA. They were primarily seeking consent to provide a mechanism to meet commitments to the people of the region to provide ongoing management of the wreck. The position taken by the applicant and the Council, and some of their supporters, being that without the consent the Rena would become an unmanaged wreck.

The Court concluded that the 1 April 2016 state of the area was essentially similar to the state at the time of the hearing. Notably, rather than try to distinguish the consented (by the MTA notices) discharges from the unconsented discharges, all participants accepted that the cumulative loading over time should be the indicator of the effects of the discharges and that it was the cumulative change into the future that needed to be monitored against various trigger levels. Thus the conditions on the consent provided for monitoring that would enable actions should the levels of contaminants detected exceed those permitted by the consent.

Socio-cultural environment

Impacts on the socio-cultural environment lie at the heart of the Rena case. The social impacts were largely related to the effects on heritage and recreation values and were addressed in these sections of the assessment. The cultural issues revolved more around mauri, katiakitanga and mana. The owner paid for some cultural assessments of the impact of the grounding and subsequent actions to be undertaken by tangata whenua organisations and individuals. Some of these assessments included tangata whenua using a multi-criteria assessment technique known as the 'mauri-o-meter'. There was no doubt that the mauri of Ōtāiti and the affected environment had been significantly diminished by the impact of the Rena and subsequent break-up and discharges, and to some extent by damage caused during removal of parts of the wreck. The question was more whether actions to restore the mauri of Ōtāiti were possible and if so how.

The cultural relationships of tangata whenau to Ōtāiti and the affected coastal areas derive from ancestral connections and active ongoing kaitiaki relationships that are intimately connected with the concern for mauri and manawhenua. The mauri of tangata whenua is affected by the diminishment of the mauri of Ōtāiti and with that comes a loss of health and mana. Mana is affected by the ways in which kaitiaki relationships are exercised and enabled. A complicating factor became the nature of the agreements reached by the owner with some of the tangata whenua, and their expression in the initial consents. There was considerable confusion over overlapping claims and jurisdictions. In effect, aspects of the consent conditions, while giving effect to agreements with some tangata whenua groupings, had caused offence to others.

The agreements had meant that while initially the majority of tangata whenua groups had been opposed to the application, by the time of the Court hearing the majority had reached positions where they were no longer in opposition to the application. The Court emphasised that this did not reduce the legitimacy of the concerns of the remaining tangata whenua in

opposition. In its interim decision the Court provided an opportunity for elders to resolve the matters at issue over the offending conditions (notably the provision of funds to the trust in Maketu).

For impact assessors the lessons are clear. The owner was largely successful through open engagement with tangata whenua groups on a face to face basis and the use of Māori experts, most of who had relationships with tangata whenua of the area (e.g. Sir Wira Gardner). This included offering to fund the cultural impact assessments (not all such offers were accepted) and facilitating the role of well-respected and technically skilled tangata whenua nominated representatives to assess the effects of the Rena and the salvage activities on Ōtāiti. They also provided for mana whenua to carry out appropriate rituals at the site.

However, it is also important to recognise the value of provisions in conditions that enable and facilitate the ongoing exercise of kaitiaki relationships, but also to be sure not to do so in a way that can be seen as adversely affecting the kaitiaki relationships of others. This is a difficult line to tread. The uniting point lies in the focus on mauri of the affected wahi tapu. In this respect the interest of the Court in the use of the mauri-o-meter may be significant for other future cultural impact assessments.

Conclusion - risk and resilience

It is important to acknowledge that this was an event of low probability, but high impact. Such events are specifically required to be considered when carrying out an assessment of a proposal under the Resource Management Act (RMA). The development of the port facilities at Tauranga pre-date the RMA requirements, so whether such issues as the possibility of a ship being wrecked due to the development of the Port were considered is a somewhat pointless topic at this stage. However, such issues should not be dismissed as fanciful, outside the RMA or unable to be mitigated.

There are a number of wrecks around the New Zealand coastline that are testament to a wreck being more probable than not. Therefore, it seems wise to adopt the consequences-focused approach being promoted for developing resilience to hazardous natural events (see, for instance, Saunders & Kilvington 2016). This would mean ensuring that the consequences of a wreck, rather than the probability of its occurrence, are considered in any impact assessment involving port facilities. It also highlights the need to consider the route by which vessels attracted to new facilities, or an event, might take, not just the area of high vessel congestion and most probable spill. In other words, when considering, for example, port developments to support an event like the America's Cup, the assessment needs to consider the potential effects of a wreck of one of the many vessels attracted to the event. Similarly, proposals to dredge port facilities to increase the capacity to have larger vessels come to the port, or to relocate a particular type of vessel from one port to another (e.g. from Auckland to Northland) should consider the consequences of a wreck. This means considering not just the sensitivity of the ecological environment, but also the social and cultural environment and the potential effects on mauri and mana of rare, but significant, events such as the wreck of the Rena.

Disclaimer

I appeared *pro bono* as an expert planning witness for the 'Iwi appellants' in the Environment Court appeal of the Bay of Plenty Regional Council's decision to grant consent to the abandonment of the wreck. The analysis here is subsequent to the decision of the Court and critically distanced from the evidence I presented.

Acknowledgement

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High Court leaves the door ajar for RMA controls on fishing

In our February Resource Management Update, we discussed the Environment Court decision of *Motiti Rohe Moana Trust v Bay of Plenty Regional Council,* where the Trust sought a declaration that it is lawful for the Council to include objectives, policies and rules in its proposed Regional Coastal Environment Plan to control fishing activities within its boundaries (on the grounds of maintaining indigenous biodiversity and recognising and providing for mana whenua interests). The High Court has now issued its decision on appeal from the Environment Court's decision.
The key issue before the Environment Court was the interface between the RMA and the Fisheries Act 1996, and particularly the application of s 30(2) of the RMA (which prevents regional councils from controlling the taking, allocation or enhancement of fisheries resources). The Environment Court held that the Council could include controls in the Plan to restrict the taking of fish and fishing methods for purposes other than managing fishing or fishing resources, including on those grounds mentioned earlier.

The Attorney-General, on behalf of the Ministry for Primary Industries, appealed to the High Court, where Whata J considered the tension between s 30(2) of the RMA and a regional council's indigenous biodiversity function pursuant to s 30(1)(ga). The High Court found that a regional council may exercise its functions to manage the effects of fishing that are not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs (which is otherwise addressed via the Quota Management System under the Fisheries Act), and that, notwithstanding s 30(2), a regional council may perform its function under s 30(1)(ga) to maintain indigenous biodiversity within the coastal marine area, but only to the extent strictly necessary to perform that function.

While the High Court's reasoning largely accorded with that of the Environment Court, Whata J did not consider that the declaration correctly captured the correct scope of s 30(2). The Court held that the declaration made did not place clear limits on the extent to which a regional council could control fishing in pursuance of its functions, which could lead to unqualified incursion into the sustainable utilisation of fisheries resources under the Fisheries Act. For that reason, Whata J allowed the Attorney-General's appeal in part, with the declaration set aside and leave reserved to the parties to make submissions on the form of a declaration. In his final decision, Whata J declined to make a formal declaration, as any final declaration on the broad, essentially hypothetical questions posed by the Attorney-General ran the risk of overreach or oversimplification. Instead, Whata J identified that the legality of control in disputed areas will need to be worked out "at the finer grain" through the plan-making process, using his earlier analysis as a reference guide.

In February, we suggested that under the Environment Court’s approach, regional councils would have greater scope to protect marine life through regional coastal plans, which could generate gains for biodiversity and help to address environmental effects of fishing practices in the coastal marine area, but could also increase regulatory costs for the fisheries industry and create significant uncertainty regarding what management system will apply. In the High Court, however, Whata J commented that the ability of regional councils to provide for

matters not controlled under the Fisheries Act "does not open the door to carte blanche regional council regulation of the adverse effects of fishing on the aquatic environment", and that primacy must be given to management of the effects of fishing under the Fisheries Act. Any controls in this area are likely to be highly contentious and subject to further challenge through the plan-making process.

Daniel Minhinnick and Rachel Robilliard

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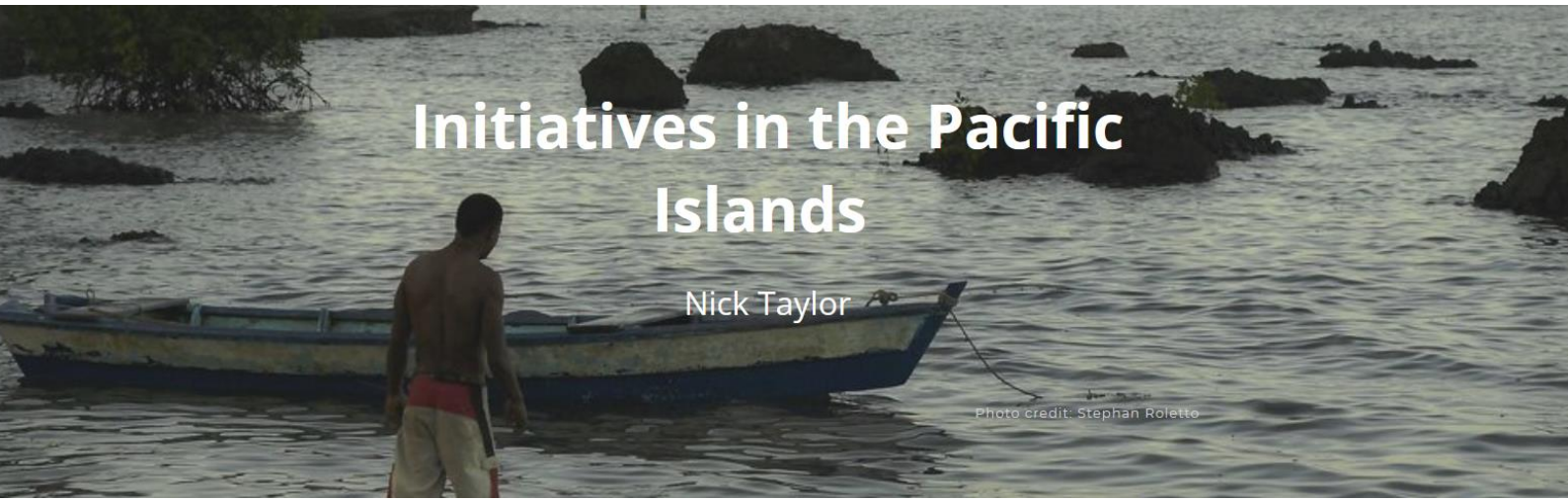

Initiatives in the Pacific Islands

Nick Taylor

Environmental management is a key issue for Pacific Island countries and territories. Naturally, with their island environments, management of the marine environment is a central issue. The Pacific Islands are faced with marine impacts from climate change, ocean acidification, pollution such as marine rubbish, overfishing, off shore mining, and numerous coastal developments. Reef systems and inshore fisheries are under constant pressure from a range of effects, as are the livelihoods of island people and customary practices that derive from marine and coastal resources.

NZAIA has worked with the Secretariat for the Pacific Regional Environment Programme (SPREP) to support the development of impact assessment practice, under the guidance of our Memorandum of Understanding. Collaboration between our organisations was part of the technical input to development of the EIA guidelines "Strengthening Environmental Impact Assessment: Guidelines for Pacific Island Countries and Territories" published by SPREP. The EIA guidelines point out that impact assessment is required in the Pacific at both project (site specific) and strategic levels. In particular, SEA has considerable potential to provide a framework for better application of IA to policy, plans and programmes, with the objective of increasing sustainability and the resilience of island ecosystems, societies and economics. Examples include coastal zone planning and tourism strategies and plans.

The SPREP EIA Guidelines indicate that climate change considerations and disaster risk reduction and management are key themes for Pacific Island impact assessments to address, particularly at the strategic level. There is also room to improve the ways that island nations tackle other complex problems such as marine spatial planning and coastal area management to accommodate increasing pressure from population, urban development, and expanding infrastructure.
Specific to IA and the marine environment are issues such as coastal erosion and extraction of sand and aggregates, reclamation, vulnerability to climate events and natural hazards such as cyclones and tsunami, pollution of coastal waters with human or other waste streams, noxious spills, coastal developments such as resorts, harbours, marinas and other transport infrastructure, damage to coral reefs, aquaculture development, and sustainability of fish harvesting. Social and economic concerns include employment and business opportunities, lifestyles and livelihoods, customary rights and practices, and recreational uses.

Reliable information is essential for impact assessment and monitoring purposes anywhere. Indicators for IA and the marine environment as outlined in the guidelines can include:

- live coral cover in an area
- lagoon/harbour water quality measures (e.g. of pH, dissolved oxygen, total nitrogen, total phosphorus, total suspended sediment in lagoon water, pathogens, agricultural chemicals and heavy metals)
- amount and type of fishing activity
- fish biomass harvested (by species) per year
- sea level rise (millimetres per year)
- presence of threatened animal or plant species
- presence of invasive species with potential ecological consequences
- amount of mangrove, seagrass beds and coastal vegetation
- visual amenity
- levels and types of tourist activity and use.

Capacity building and professional support are an important part of IA practice in the Pacific. In respect to climate change as an overarching theme for impact assessments to consider, it is useful to note that SPREP coordinates the Pacific Climate Change Roundtable in partnership with the Council of Regional Organisations of the Pacific, Pacific Island governments, development partners and donors. The roundtable is the key platform for dialogue amongst the Pacific climate change community through its working groups and portal to support members in developing approaches to the effects of climate change.

Some other initiatives of interest are the recent High-Level Pacific Blue Economy Conference in Fiji: hosted by the Pacific island Development Forum, drawing attention to the likely future pressures on marine resources and challenges of sustainable oceans in a changing climate. Also, the upcoming 3rd Annual Asia-Pacific Deep Sea Mining conference in Singapore in late Nov.

The World Bank Pacific Possible report looks at transformative opportunities for Pacific Island countries over the next 25 years and identifies the region's biggest challenges that require urgent action, including deep sea mining, fisheries and climate change and management of natural disasters. Networks are an important part of building IA practice in the Pacific, to help provide and support regional expertise and experience, and to source practical assistance where practitioners are working in relative professional isolation. The Pacific Network for Environmental Assessment (PNEA) aims to support government officials from Pacific island countries and territories who work with environmental impact assessment (EIA) and strategic environmental assessment (SEA).

Strategic Environmental Assessment in a New Zealand Context

Chantal Whitby

In New Zealand strategic environmental assessment (SEA) is not a commonly applied term, however, there are examples where the broad principles of SEA have been directed towards policies and plans. These principles have been employed for both the development of new plans and policies, as well as to plan changes, including national policy statements, regional plans, and land and water management plans (Taylor and Morgan, 2016). The Resource Management Act (RMA) is one such instance in New Zealand where SEA concepts are reflected in legislation. For instance, the RMA focuses on ensuring sustainable management, refers to 'effects-based' assessments, and emphases the need for public participation. Specifically under the RMA, Section 32 (s32) is used as a tool to analyse plans and policies (Morgan, 2016), albeit, it is much less focused on an integrated environmental outlook, instead placing more prominence on economic considerations (Taylor and Morgan, 2016). Additionally, s32 reports tend to lack systematic analysis, with heavy weighting given to procedure rather than being outcome-focused, and they often have a deficiency in the testing of alternative options for effects (Morgan 2016). That said, s32 reports are not the only instance in New Zealand where the standards of SEA are applied to policies, plans, and programmes.

Examples of SEA in New Zealand

The subsequent examples are not explicitly titled as SEAs and although they do not necessarily follow an SEA framework, they contain a number of aspects, which are shared with SEA. The National Policy Statement for Freshwater Management provides an example of where multidisciplinary teams worked collaboratively with various stakeholders and the community to develop a national policy, reflecting the SEA principle of early engagement with the community (Taylor and Morgan, 2016).

At a regional level, Environment Canterbury, via the Canterbury Water Management Strategy, placed importance on collaboration as part of their strategic planning, as well as the inclusion of participatory methods. Their approach included the SEA philosophy of having a well-researched baseline by ensuring that a social baseline was established before applying different scenarios of land-use change to assess the potential effects of a variety of policy and planning options (Taylor and Mackay, 2016).

Another application of SEA principles in New Zealand includes the Canterbury District Health Board's Health in All Policies team (HiAP), whose aim is to ensure that public policies, plans, and strategies across all sectors consider health outcomes. To meet this aim HiAP have worked collaboratively with local councils to establish strategies across the different tiers of governance, from board level to operational level. They have also written integrated assessments based on social, environmental, economic, and cultural values, for incorporation into plans. In addition, the HiAP have invited the community and stakeholders to make recommendations on early strategy drafts (Murray, 2016).

Is SEA working in New Zealand?

In New Zealand, in many instances, SEA is being undertaken but not via an SEA framework per se or under the title of SEA (Taylor and Morgan, 2016). The examples above illustrate the application of certain SEA principles, including early and active community participation; collaboration and a tiered approach with links to other processes; evidence based assessment with a well-researched baseline; assessment of the potential effects of proposals; and an integrated approach which considers all aspects of the environment (including ecological, social, cultural, and economic systems). However, many of the principles of SEA are often lacking from these assessments or are not considered in thorough detail. This is clearly evident in the majority of s32 reports, New Zealand's closest formal equivalent to SEA, where reports often take a weak approach, becoming a 'tick box' exercise rather than being outcome-focused.

SEA's potential in New Zealand

So there are gaps which need to be addressed if SEA is to be achieved comprehensively and consistently in New Zealand. Specialists have identified some specific strategies which would benefit from the application of SEA, such as the predator-free New Zealand project, which will involve many partners, including NGOs, communities and government agencies. In this instance it has been recognised that SEA could be used to apply a consistent framework across the different project locations (Russell and Taylor, 2016). It has also been acknowledged that SEA has the potential of assessing broader issues like climate change, including tipping and turning points, for the country's primary industries. For example, SEA would help with on-farm decisions by identifying thresholds and resilience indicators, resulting in more resilient communities with improved adaptation abilities (Cradock-Henry, 2016). In addition, practitioners have seen the need for SEA in the tourism sector where public and private sector management are combined. It has been identified that SEA would improve the government's current reactive approach to one which is more proactive (Simmons, 2016).

How can we deliver positive strategic outcomes from impact assessment? - Insights

It is clear that while there are the foundations and potential for SEA in New Zealand, there is not a common understanding of what constitutes SEA, which is likely a reflection that there are no clear guidelines on SEA principles or a framework of reference. There is legislation which hints at the concept of SEA, such as the RMA and its s32, although it appears that if this is to form the basis of SEA in New Zealand it will require some extensive reworking. Therefore, it could be that a combination of legislative changes, as well a clear SEA guiding framework, would assist New Zealand in realising its SEA potential.

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