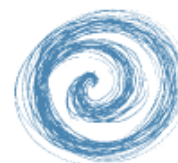


# OCEANS POLICY SECRETARIAT

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**OCEANS POLICY**

## **PARTICIPATION IN OCEANS MANAGEMENT**

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## Introduction

1 The New Zealand government has committed to improving its ability to engage effectively with the public. The government's Sustainable Development Programme of Action reflects a commitment to work in partnership with local government and other sectors and encourage transparent and participatory processes<sup>1</sup>.

2 Stage One of the Oceans Policy process revealed that people want to have confidence in decision-making about the marine environment and want to be part of the decision-making process. The Stage One report entitled *Healthy Sea: Healthy Society* summarises the results of consultation and particularly emphasises the desire of New Zealanders to participate more effectively in oceans management. The challenge for an oceans policy is to ensure that people are able to participate effectively in matters of importance to them.

3 The purpose of this paper is to:

- identify 'principles of participation' underpinning recent New Zealand legislation
- outline the provisions for participation in marine management legislation and assess whether they are satisfactory
- assess implementation barriers to effective participation
- raise issues that should be addressed by an oceans policy.

## Public participation principles and outcomes for oceans

4 A number of principles for public participation can be taken from the State Services Commission in their 1995 paper *The Public Service and the Public*,<sup>2</sup> and the Sustainable Development Programme for Action<sup>3</sup>, as shown below:

**Principle One:** Transparent and participatory processes should be encouraged<sup>4</sup>.

**Principle Two:** Official information should be increasingly available to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies.

**Principle Three:** There is a requirement to provide sufficient time for those consulted to prepare a meaningful response.

**Principle Four:** Consultation should occur while policy options are still open and when there is a need for further information and points of view to be taken into consideration.

**Principle Five:** There is a general obligation to provide members of the public with an opportunity (either in writing or in person) to make representations where they may be affected directly by decisions<sup>5</sup>. It is generally desirable to consult with parties interested in or affected potentially by new policies<sup>6</sup>.

<sup>1</sup> Sustainable Development for New Zealand, Programme of Action

<sup>2</sup> The Public Service and the Public, A paper in the guidance series 'Public Service Principles, Conventions and Practice', State Services Commission, published in September 1995.

<sup>3</sup> Sustainable Development for New Zealand, Programme of Action

<sup>4</sup> Sustainable Development for New Zealand, Programme of Action

<sup>5</sup> The Public Service and the Public, A paper in the guidance series 'Public Service Principles, conventions and Practice, State Services Commission, published in September 1995.

<sup>6</sup> The Public Service and the Public

**Principle Six:** There is a general duty, on application, to provide persons with reasons for decisions affecting them. Where applicable, it should be made clear to applicants what avenues are open to them to appeal a decision.

5 These principles spring from the belief that participation by the public is a positive and desirable thing. People think this because public participation, both generally and in respect of marine management, has two major benefits:

- Involving different people improves the quality of policy decisions through access to information they hold and their relative perspectives. The policy is therefore more likely to reflect real problems and acknowledge competing interests.
- If people are involved in the decision-making process they are more likely to understand why a particular decision has been made and accept the legitimacy of the outcome and comply with the decision.

An Oceans Policy should seek to maximise these benefits while trying to reduce unnecessary transaction costs. It must also recognise that opportunities for public participation need to be appropriate to the nature and scale of activity proposed and its likely impacts. In some circumstances, such as in a biosecurity emergency, participation may not be appropriate.

6 In summary, transparent and participatory processes should lead to better decisions and increased legitimacy of (and compliance with) decisions. In general, people should be given a chance to participate meaningfully in decisions that affect them.

## **Assessing current legislation on oceans management**

7 Current opportunities for the public to participate in marine management fall into three main categories:

- input into management frameworks
- input into consents/concession processes
- involvement in management

Each category for involvement will be explained and discussed below.

### **Input into management frameworks**

8 Management of the oceans in New Zealand is governed in a variety of ways: planning frameworks, centralised decision-making and market-based models. Planning frameworks are at national or regional levels, and in are generally high level documents that define management objectives and regulate activities in relation to these objectives. The Continental Shelf Act has centralised decision-making, and fisheries management is through the market-based quota management model albeit regulated by the government.

9 In general, plan-based legislation requires public participation in the preparation of the plans<sup>7</sup>. This usually means that the plan is publicly notified and submissions are called for (before a specified closing date). The Resource Management Act, the Conservation Act, the Biosecurity Act and the Marine Reserves Act all have plan-making processes that are required to be open to the public, and there are no statutory limits on who can participate.

10 The Continental Shelf Act is the key existing instrument for management of the oceans beyond the 12 nautical mile limit of the territorial sea. Under this Act decisions to grant permits for mining are made by the Minister of Energy. The Act has no statutory requirement for public participation, which means that people have no certainty that they will have opportunities to be involved in future decisions made under the Act.

11 Commercial fisheries resources are allocated in a market model. The total allowable catch (TAC) for each fish stock is set by the government and includes an allowance for the customary and recreational sectors and a total allowable commercial quota. Portions of the total allowable commercial catch are bought and sold under a market framework.

12 The Fisheries Act 1996 has a large number of provisions that require the Minister to consult with “such persons or organisations as the Minister considers representative of those classes of persons having an interest in the issue concerned, including Maori, environmental, commercial and recreational interests”. This is generally interpreted widely by the Ministry of Fisheries to allow anyone with an interest to have their say (the key exception to this is decisions in relation to enforcement actions where some degree of confidentiality is necessary for successful planning and management operations).

13 The complex and technical nature of fisheries management decision-making means that fisheries management consultative processes tend to focus on stakeholder groups who have expressed a particular interest in fisheries management (environmental, customary, commercial and recreational groups). Limited attempts are made to proactively involve the general public in decision-making, which has led to a public perception that fisheries management is not transparent.

### **Input into consents/permits processes**

14 People can apply for permission to do things which are not permitted activities in plans created under the Resource Management Act. To obtain permission to carry out mining activities within the 12-mile limit requires approvals under the Crown Minerals Act and the Resource Management Act. Outside the 12-mile limit the Resource Management Act does not apply; applications for petroleum mining are under the Crown Minerals Act, and all other mining applications must be applied for under the Continental Shelf Act.

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<sup>7</sup> See Appendix One

## **The Resource Management Act 1991**

15 There are no ‘standing’ constraints under the Resource Management Act 1991, which means anyone can make submissions to plans or consent hearings. Decisions on resource consents may be either public or limited public processes depending on the actual or potential effects of the activity and the way the activity is classified in the plan (e.g. controlled or discretionary).

16 Full public notification is costly and councils have to establish in their plans the circumstances in which consents will be fully notified. Some resource consents require only the written approval of affected parties rather than full public notification<sup>8</sup>. Most applications appear to be notified in the marine environment because it is difficult to identify which people may be affected by an application.

17 There is considerable debate about council practice with respect to public notification. The current Resource Management Amendment Bill has introduced “limited notification” procedures that require only those “adversely affected” by an activity with minor effects to be notified. In some cases, it has been argued that the Resource Management Act process provides too much opportunity for participation, and parties with a spurious interest in the matter have used the process to hold up an application for their own ends. On the other hand, people argue that too few consent applications are ever notified.

## **Mining**

18 To obtain permission to carry out mining activities within the 12-mile limit requires approvals under the Crown Minerals Act and the Resource Management Act. There are no general requirements for public consultation on the granting of new permits under the Crown Minerals Act, although relevant iwi are consulted about permits proposed for their rohe. Assessment of the environmental effects of mining falls under the Resource Management Act and there are opportunities for the public to make submissions on proposals.

19 Outside the 12-mile limit, the Resource Management Act does not apply; applications for petroleum mining are under the Crown Minerals Act and all other mining applications are made under the Continental Shelf Act. Sometimes consultative processes have taken place<sup>9</sup> but the lack of a statutory planning process means that there is a level of uncertainty about whether there will always be a participatory process.

## **Being involved in management**

20 There is a range of opportunities under different pieces of legislation for people to become directly involved in the management of an area or resource.

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<sup>8</sup> On average 95% of consents are non-notified – Ministry for the Environment (2002), Annual Survey of Local Authorities

<sup>9</sup> Establishment of the Maui platform in Taranaki case – consultation did take place. Neptune resources case: no consultation took place. See Neptune Resources case study.

## **Fisheries**

21 Iwi groups have the ability to have a direct input into the management of particular areas; for example, mataitai reserves such as the one at Rapaki in Lyttleton Harbour.

22 Taiapure management committees are appointed by the Minister of Maori Affairs who nominates people considered to be representative of the local Maori community. To date all taiapure management committees have included representatives from the local community and other stakeholder groups, in addition to tangata whenua.

## **Resource Management**

23 Section 33 of the Resource Management Act 1991 allows councils to devolve functions to another public authority.<sup>10</sup> Functions have been transferred between local authorities, but no functions have been transferred to any iwi. A study by the University of Waikato suggests that lack of resources on both sides, rather than an unwillingness to consider transfers, has been the biggest constraint to date<sup>11</sup>.

## **Marine reserves**

24 There are sixteen marine reserves around the country and applications are currently being processed for a further ten.<sup>12</sup> Some marine reserves have marine reserves committees appointed by the Minister of Conservation (under specific criteria) they are established to provide oversight and guidance of the Department of Conservation's management of marine reserves. The community is often involved in helping the Department of Conservation with law enforcement. Community advisory committees consisting of representatives from tangata whenua, community and recreation groups help with the management of most marine reserves.

## **Involvement in overall priority setting**

25 The public have a range of opportunities to be involved in decision-making and management under specific statutes. However there are very limited mechanisms for them to be involved in assessing priorities for competing activities proposed under different statutes. For example, outside the 12 nautical mile limit there may be a situation in the future of a marine farm and an oil rig proposed for the same area under different legislation. In that situation, there would be limited opportunity for the public to indicate which use they would prefer.

26 The fragmented nature of oceans management means that participation opportunities are essentially limited to input into whether a specific activity should

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<sup>10</sup> The functions, powers or duties (with exceptions) can be transferred to any local authority, iwi authority, Government department, statutory authority, and joint committee set up for the purposes of section 80 of the Act. Refer to Section 33 of the Resource Management Act 1991.

<sup>11</sup> Factors Facilitating and Inhibiting Transfers to Iwi under Section 33 of the Resource Management Act, by Hamish Rennie, Jill Thompson and Tikitu Tutua-Nathan, University of Waikato, 1999.

<sup>12</sup> Department of Conservation website [www.doc.govt.nz](http://www.doc.govt.nz) 25/2/03

take place under a specific act, rather than wider input into what range of activities might be given priority.

## **Implementation issues**

27 Even when participatory processes are statutorily required, implementation problems can arise. Choosing tools for public participation in decision-making or management is difficult because the tool must be appropriate to both the type of decision and the stakeholders involved. Consultation guides are published for both councils<sup>13</sup> and central government<sup>14</sup> which aim to try and provide advice to agencies about which participatory processes work best in which situations. Currently decision-makers primarily use the following methods to involve the public:

- informing and educating people about policies, strategies or decisions
- seeking views and ideas in relation to a policy proposal from relevant people or groups
- involving the public in the management of a particular area.

Community groups also seek out opportunities to become involved in governance and decision-makers should be able to respond appropriately.

28 This section of the paper outlines the major problems that agencies or the public face in trying to work together, taking into account that there are a variety of tools for involvement available. The issues can be summarised as: lack of knowledge, capacity of the public or decision-makers, and balancing the negative effects of participation.

### **Lack of knowledge**

29 One of the main barriers to effective participation is the lack of knowledge or incorrect information that the public may have on any given issue. This is particularly important because in order to participate the public must:

- know what opportunities they have to input into decision-making
- have a good understanding of the issues involved in that topic.

30 A study by the Wellington Regional Council<sup>15</sup> indicated a lot of confusion between the city/district council and regional council responsibilities, as well as limited awareness of the Wellington Regional Council's functions and activities in relation to the marine environment. This lack of knowledge highlights that the public may not even know which agency to approach when trying to find information on a particular issue.

31 Stage One of the Oceans Policy process highlighted that amongst the general public there is in particular a significant lack of understanding of fisheries

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<sup>13</sup> See the quality planning website [www.qualityplanning.govt.nz](http://www.qualityplanning.govt.nz)

<sup>14</sup> See work by the State Services Commission and the Ministry of Social Development.

<sup>15</sup> 'Our Marine Environment: Residents' perspectives', AC Nielsen and Wellington Regional Council, June 2001.

management in New Zealand (particularly of the Quota Management System)<sup>16</sup> In general, it was found that people identified with issues involving the coastline and inner harbours but had little or no connection with, or appreciation of, issues concerning the deep sea.

### **Capacity of the public**

32 The public, iwi or stakeholder groups may not have the time or resources to spend on participation. The public have indicated frustration at the lack of co-ordination between government consultation processes. This problem of time and resources seems to affect iwi particularly. There is anecdotal evidence that the stress placed on kaumatua or kuia has been called ‘death by hui’.

33 Most members of the public are not strongly interested in participating or they have other priorities. Often people will only participate when they feel that something is at stake. People also rely on the ‘free rider’ effect, expecting other members of the community to have the same view as them.

34 The lack of take-up of management tools such as mataitai and taiapure may be an indication that the amount of time and resources needed are too great for community groups. Another problem is that a mataitai cannot go ahead until a kaitiaki is appointed and tribal boundaries are agreed between iwi or hapu, which can be difficult.

35 Some decisions are complicated and in order for people to participate effectively they may need background in the issues. For example there may be some technical elements to fisheries management that are particularly complex.

### **Capacity of decision-makers**

36 The State Services Commission acknowledges that “identifying and informing interest groups, seeking their views, building the results into the overall analysis and feeding back requires substantial investments of time and effort”. Often agencies (and councils, in particular) can find this a struggle as they have deadlines and budgets to meet.

37 Decision-makers may not have the capacity to weigh the opinions of different members of the community. This is particularly difficult if the people who participate are not representative of the community. Interest groups and organised lobbies can often be a lot more articulate, organised and well-resourced than single members of the public and it can be difficult to take this into account.

### **Balancing the negative effects of public participation**

38 Issues in the marine environment can often stir up conflict and polarise people’s views. Often the types of consultation methods used provide incentives for

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<sup>16</sup> Healthy Environment; Healthy Society – Report of the Ministerial Advisory Committee on Oceans Policy.

people to promote extreme views as a negotiating position and/or because they feel under threat.

39 Often the public have unrealistic expectations about outcomes from public participation. This means that if people do not get the result that they want from one round of consultation, they do not wish to participate again<sup>17</sup>.

40 Participation can have negative effects if long processes mean that business proposals cannot proceed within acceptable timeframes. An example of this is the high level of participation that occurs under the Resource Management Act, which businesses argue can hold up their proposals for an unreasonable length of time.

## Conclusions

41 Statutory opportunities for the public to participate in marine management vary depending on the statute or policy in question. The Resource Management Act has comprehensive provision for public participation, but issues arise around a perceived lack of transparency in the fisheries process (because of complexity) and a legislative gap outside the territorial sea under the Continental Shelf Act. There is also a fundamental issue about how the public should be involved in setting priorities across conflicting uses in the marine environment. At present there is no mechanism for public values to be incorporated into oceans management as a whole.

42 There are also a number of implementation issues that may prevent people being able to participate effectively in marine management. Some of these issues arise because the public does not have the capacity to become properly engaged in the process, and other issues arise because decision-makers do not have the ability (often through a lack of time or resources) to allow for more effective public participation.

43 Gaps in the legislative framework, and implementation problems around public participation, stand in the way of high-quality decision-making, legitimacy of (and compliance with) decisions, and the ability of people to participate meaningfully in decisions that affect them.

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<sup>17</sup> 'Encouraging Significantly Better Consultation as an Input to Policy Advice' State Services Commission, 2000.

## Appendix One. Statutory requirements for participation

### **Biosecurity Act 1993**

Pest Management strategies – national and regional: National Pest Management Strategies must be publicly notified and the Minister must seek public submissions. A Board of Inquiry (a public process) must be held where significant parties are opposed to significant elements of a National Pest Management Proposal. The process for approving regional Pest Management Strategies is similar to the national process. Public notification is required, submissions received and considered, and a decision taken by the regional council. A regional council may use Hearings Commissioners in much the same way as a Board of Inquiry is used at the national level.

There is a specific requirement to consult tangata whenua in the preparation of a regional Pest Management Strategy. Potential effects on matters related to Maori is specified as a reason why a Pest Management Strategy (national or regional) might be required (s.57 and s.72).

Biosecurity emergencies: The Minister is also required to consult (“to the extent practical”) before recommending that a biosecurity emergency be declared (as defined in part 7 of the Biosecurity Act).

### **Conservation Act 1987 (National Parks Act 1980 & Reserves Act 1977)**

Conservation plans: There is a statutory requirement for participation in the formation of plans under the Conservation Act 1987. Conservation management strategies are required to be publicly notified and are required to have a submissions process (Section 7). The conservation management plans also follow the same process.

Involvement in management: The Reserves Act contains a range of provisions for delegating management to community boards or others. A number of reserves are managed under these provisions (for example the Kaiteriteri reserve in Nelson). While these are not in the marine environment, they are useful models for successful public participation in actual management.

### **Continental Shelf Act 1964**

The Continental Shelf Act 1964 applies to the granting of minerals (other than petroleum) permits outside of the territorial sea. The issuing of licenses to explore or mine is at the discretion of the Minister for Energy. There are no requirements for public participation under the Act.

### **Crown Minerals Act 1991**

The Crown Minerals Act 1991 prescribes centralised decision-making. The Minister grants permits and prepares minerals programmes. The Minister may delegate the granting of permits to the Chief Executive of the Ministry of Economic Development, but not decision-making relating to minerals programmes (s.6). There is public participation around the creation of new minerals programmes and their review (10 yearly).

There is no public consultation around the granting of mining permits, except if the permit is in relation to the rohe (land area) of a particular iwi/hapu, in which case they are consulted about how they think the permit will affect their interests. While there is no public participation around the granting of minerals permits, the public have the opportunity to comment upon the environmental effects of mining activities, either through the Resource Management Act plan creation process or on decisions regarding individual mining activities.

### **Fisheries Act 1996**

A large number of provisions within the Fisheries Act 1996 require the Minister of Fisheries to consult with such persons or organisations as the Minister considers representative of those classes of persons having an interest in the issue concerned, including Maori, environmental, commercial and recreational interests. (This is generally interpreted widely to allow anyone with an interest to have their say).

Section 12(1)(b) of the Fisheries Act 1996 requires the Minister to provide for the input and participation of tangata whenua before making sustainability decisions under Part 3 of the Act. The Minister must also have particular regard to kaitiakitanga when making those same decisions. The fact that kaitiaki, nominated by tangata whenua, are being appointed by the Minister under the customary regulations makes the requirement to have regard to kaitiakitanga a very real and tangible one in the context of fisheries management.

### **Historic Places Act 1993**

Any person may propose a place, area or wāhi tapu for registration under the Historic Places Act 1993 and may make a submission on such proposals when they are publicly notified.

### **Marine Reserves Act 1971**

A number of bodies can propose a marine reserve and the proposal is then publicly notified and notice in writing is given to people that have land adjoining the proposed reserve. A plan with the proposed marine reserve marked on it is then available for people to look at, in the Department of Conservation office nearest to the proposed reserve. People have two months to raise objections to the reserve. The

submissions are considered by the Minister of Conservation in conjunction with the Minister of Fisheries and the Minister of Transport.

The Department of Conservation is responsible for caring for and managing marine reserves. Each reserve is administered by a Marine Reserve Committee that consists of six to eight people who are appointed by the Minister of Conservation (and who are picked to specific criteria). The Committee must prepare a Marine Reserve Management Plan which is also open to public submission.

The Marine Reserves Act 1971 is currently being reviewed, with the Department of Conservation leading the process; however the participation requirements are likely to remain the same.

#### **Maritime Transport Act 1994**

Under the Maritime Transport Act 1994, the Maritime Safety Authority develops rules/regulations in consultation with the maritime community and other interested parties. These are required to be publicly notified with a period for public submissions to be received.

Dumping permits under the Marine Transport Act may be publicly notified depending on the potential environmental effects of the activity.

#### **Resource Management Act 1991**

**National Policy Statements:** The New Zealand Coastal Policy Statement follows the same process required for preparing a national policy statement, with the exception that the Minister involved is the Minister of Conservation and not the Minister for the Environment. A Board of Inquiry is appointed by the Minister, and the public is able to make submissions on the proposed Coastal Policy Statement or National Policy Statement.

**Regional Coastal Plans:** The process of developing plans occurs under the First Schedule, and the public has the right to make submissions on proposed plans and can lodge a reference with the Environment Court on decisions made by the council on the plan. Meetings are held in public and the public has the right to be heard.

**Regional Councils** are required to consult with other government agencies and tangata whenua when preparing plans. Informal consultation can occur at a pre-notification stage, when councils scope out issues and approaches with the community and stake-holders.

**Consents:** There is no requirement for 'standing' under the Resource Management Act 1991, which means anyone can make submissions to plans or consent hearings. However decisions on resource consents may be either public or limited public processes depending on the actual or potential effects of the activity and the way the activity is classified in the plan (e.g. controlled or discretionary). Full public notification is costly and the council has to establish in the plan the circumstances in which consents will be fully notified. Some consents require only the written approval of affected parties rather than full public notification.

There is considerable debate about councils' practice with respect to public notification and the current Resource Management Amendment Bill has looked at the concept of limited notification procedures to reduce costs for applicants. Decisions on consents (as with plans) are appealed to the Environment Court (for a *de novo* hearing) and then to the High Court, but only on points of law. Consultation with tangata whenua is also expected on individual resource consents and designations. Applicants have to reveal what effects, if any, a proposal will have on matters of significance to Maori. They must also state what consultation is carried out, which provides a mechanism for local authorities to suggest that more information/consultation is required before an application is accepted

#### **Submarine Cables and Pipelines Protection Act 1996**

The Submarine Cables and Pipelines Protection Act 1996 provides for the protection of submarine cables and pipelines from damage by fishing operations or ships anchoring. The legislation requires consultation with affected parties when making regulations about cable and pipeline protection.