

The Motiti Decision: Implications for Coastal Management

INTRODUCTION

The recent Court of Appeal decision in *Attorney-General v The Trustees of the Motiti Rohe Moana Trust* ([2019] NZCA 532) has wide-ranging implications for managing the sustained pressures on biodiversity in coastal ecosystems.

The *Motiti* decision signals a profound change in the way in which regional councils will need to manage the territorial sea. In this article, I explore some of the implications of the decision for environmental management, in light of the recent public notice of decisions on the proposed Marlborough Environment Plan (MEP) by the Marlborough District Council on 21 February 2020.

This is relevant given the biodiversity crisis unfolding in our marine environment, as reported in *Environment Aotearoa 2019* (Ministry for the Environment, April 2019). For example, scientists have shown that intact biodiverse biogenic (or “living”) habitats are massively reduced in areas within the Exclusive Economic Zone (EEZ), including the territorial sea, following extensive contact of the seabed by heavy fishing gear (Figure 1).

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THE MOTITI DECISION IN CONTEXT

In *Motiti*, the Court of Appeal determined the statutory relationship between the Resource Management Act 1991 (RMA) and the Fisheries Act 1996 (FA) in the protection and maintenance of biological diversity (“biodiversity”), which is primarily centred on indigenous biodiversity.

The Court of Appeal considered whether regional councils could manage fishing to maintain biodiversity under the RMA without seeking to manage fisheries resources. (For earlier Environment and High Court decisions, see

Sally Gepp and Madeleine Wright "A New Weapon in the Battle for Marine Biodiversity: Environment Court Approves First Example of Regional Coastal Plan Controls on Fishing" August 2018 RMJ).

The Court of Appeal accepted that the RMA and FA "look at each other" and are intended to complement each other (at [58]). An inference is that regional coastal plans and fisheries management should also complement each other and therefore need to be well-integrated.

However, the Court of Appeal was not asked to turn its mind to the different and competing definitions of biodiversity between the statutes. This has arguably been germane to the systemic institutional failure to protect biodiversity since the ratification of the Convention on Biological Diversity (CBD) in 1993 (Steve Urlich and others "The Earth Summit 25 years on: Why is biodiversity continuing to decline?" April 2018 RMJ).

The RMA defines biodiversity in s 2:

biological diversity means the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems.

This definition links species with ecosystems by recognising the ecological functions and habitats created by the interactions of species with their environment (Steve Urlich and others "What it Means to Maintain Biodiversity in our Coastal and Marine Environment" April 2018 RMJ).

The FA omitted "and the ecological complexes of which they are a part" from its definition (s 2), which arguably means that ecological processes are largely unprotected – yet these are essential for safeguarding ecosystem resilience and sustaining the abundance and diversity of life.

The Court of Appeal was cognisant of the FA's recognition that biodiversity should be maintained, but that "... it allows that principle to be weighed against other considerations" (at [50]). This is because the maintenance of biodiversity only needs to be taken into account, not given effect to (FA, s 9). The Court of Appeal highlighted that the FA does pursue protection of habitat where it is of particular significance (at [50]). However, Ministry of Fisheries scientists acknowledged in 2016 that no formal definition or operational criteria for the identification of habitat significance had been developed 20 years after the enactment of the FA (Martin Cryer,

Pamela M Mace and Kevin J Sullivan "New Zealand's ecosystem approach to fisheries management" [2016] 25 Fisheries Oceanography 57).

MARLBOROUGH ENVIRONMENT PLAN

Biogenic habitats that remain have survived by chance or due to self-protecting seafloor topography, as Marlborough District Council (the Council) discovered when it undertook an inventory of potential ecologically significant sites in 2011.

Over 120 sites were identified as significant following a marine expert group assessment using well-accepted criteria (Rob Davidson and others *Ecologically significant marine sites in Marlborough, New Zealand* (2011)). Section 6(c) of the RMA requires as a matter of national importance, "the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna".

The Council commenced a survey and monitoring programme in 2014 in partnership with the Department of Conservation (DoC). Updated imagery from previously identified significant sites revealed that loss of habitat had occurred for some biogenic habitat types on soft sediments (for example, horse mussel beds and bryozoans), which were vulnerable to heavy fishing gear impacts.

In June 2016, the Council notified the proposed Marlborough Environment Plan (the MEP), which included objectives, policies and methods related to protecting biodiversity in the coastal marine environment. The Council adopted a narrow approach to biodiversity protection in promulgating rules by confining itself to s 6(c) of the RMA (see Policy 8.3.8 of the MEP – note the numbering in the notified MEP was Policy 8.3.7) and prohibiting dredging and bottom-trawling at those sites assessed as significant by its marine experts. Opponents to this policy sought leave to include these provisions in the *Motiti* proceedings, given the legal questions were similar.

Policy 8.2.10 of the proposed MEP seeks to promote the maintenance, enhancement or restoration of ecosystems, habitats and areas of indigenous biodiversity not identified as significant, but that are important for the continued functioning of ecological processes. The implementation method (see [8.M.1]) is that decision makers are to have

regard to the policy in assessing Part 2 RMA matters. This requires robust data to effectively characterise the receiving environment, along with an assessment of environmental effects for activities, including whether there are significant biodiversity values.

However, the Council passed up the opportunity to put appropriate controls on seabed disturbance throughout the Marlborough Sounds to maintain biodiversity under s 30(1)(ga) of the RMA. In my advice to the Council as its coastal scientist in August 2015, a prohibition on recreational and commercial dredging to maintain biodiversity was seen as necessary and supportable by available ecological evidence.

I argued that the prohibition was necessary and consistent with an ecological definition of maintaining biodiversity. Maintenance is about taking action for ecological complexes to function as habitats, as would have occurred prior to repeated physical disturbances (Steve Ulrich and others "What it Means to Maintain Biodiversity in our Coastal Marine Environment" April 2018 RMJ).

I recommended that the Council establish environmental bottom-lines for the biophysical condition of seabed habitats (as per Hon Simon Upton's speech to the House introducing the Third Reading of the Resource Management Bill (4 July 1991) 516 NZPD 3030). These ecological complexes are compromised by frequent and extensive seabed disturbance, which effectively 'maintain' them in a degraded state. The need for controls outside of s 6(c) RMA sites is analogous to indigenous vegetation clearance rules on land in general.

This challenged the questionable notion in the MEP that maintaining biodiversity in the coastal marine area should primarily be centred on a rule to protect remnant habitats that attain s 6(c) status. The irony is that if those s 6(c) RMA sites are damaged by accidental or deliberate actions, then the Council would remove them from the schedule of significant sites in the MEP.

Moreover, the Council chose not to implement controls to 'maintain' these ecological complexes back to a state of ecological functioning – i.e., they would be 'maintained' in a degraded state. Several sites in Marlborough identified as significant in 2011 were not scheduled in the MEP in 2016, after monitoring revealed the biogenic habitat had been lost or degraded. This is a flawed premise which is inconsistent with the RMA's biodiversity definition.

THE MOTITI DECISION AND THE MEP

The MEP Hearings Panel referenced the Court of Appeal's decision in *Motiti* in confirming the proposed rule to protect known ecologically significant sites in the Marlborough coastal marine area (Andrew Maclellan, Peter Hamill and Steve Ulrich *Proposed Marlborough Environment Plan—Topic 6: Indigenous Biodiversity* (Marlborough District Council, hearing report, 21 February 2020) at [149]–[163]).

The prohibition on seabed disturbance at s 6(c) RMA sites has been widened to include reclamation, deposition of dredged material and anchoring at some vulnerable sites (at [182]–[187]).

In its reasoning, the Hearings Panel stated (at [162]):

On the factual evidence heard by the Panel as to the risks to Indigenous Biodiversity from seabed disturbance, sedimentation effects, and water quality effects, the Panel is satisfied that there is a demonstrated need to protect Indigenous Biodiversity in the Sounds which is under threat from those aspects.

Despite this, the Hearings Panel declined to extend the seabed disturbance prohibition further, such as to protect the ecological complexes that sustain the feeding habitat of the nationally endangered New Zealand king shag (at [237]–[251]).

Bottom-trawling for flatfish and other fish species, and dredging for scallops, are open to occur within a 25-kilometre radius of king shag breeding areas (Figure 2).

These activities not only damage biogenic structures, but also water column turbidity increases from sediment disturbance which can affect the ability of king shag to find prey as a visual predator. The removal of fish biomass by trawling also has an unknown effect on prey availability, and the frequent, intense disturbance to the seabed disrupts ecological function and decreases resilience.

My expert advice to the Hearings Panel reflected this in recommending the protection of feeding areas for king shag as significant habitats under s 6(c) of the RMA. The consequence is that these areas would become free from adverse effects of activities that disturb their prey and inhibit their foraging. This precautionary argument had been previously tested at a small scale in the Marlborough Sounds, where an appeal for a mussel farm in Beatrix Bay

within the accepted foraging range of a king shag colony was declined (*R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81).

There are approximately 840 birds remaining of this species, which are endemic to Marlborough. Jackson J and others in *Davidson* assessed that the risk of king shag going extinct from a small reduction in feeding area occupied by mussel lines was low. Nevertheless, the farm was refused on the slight chance it might contribute to extinction, as the loss of king shag feeding habitat was an adverse effect to be avoided under Policy 11(a)(i) and (ii) of the *New Zealand Coastal Policy Statement* (Department of Conservation (4 November 2010) at 16).

This decision also drew attention to the ongoing cumulative effects to king shag habitat from dredging and trawling, and sedimentation from land use, which interact to degrade the seabed and reduce visibility in the water column for king shag foraging (*Davidson* at [197] and [207]).

The Hearings Panel instead determined that it would create a new policy that would require consideration of the potential adverse effects on king shag feeding areas (at [250]–[251]). Policy 8.3.5 applies when assessing the actual or potential adverse effects of activities in the coastal marine area. The deliberative wording “take into account” affords a lower level of protection to the feeding habitat of king shag from cumulative effects, compared to more directive guidance for decision makers to protect these areas from frequent disturbances that are inimical to ecological complexes.

The use of the word “activities” implies the inclusion of seabed disturbance from fishing in light of *Motiti*, in addition to aquaculture and recreational mooring applications.

Fishing vessels that employ dredging and bottom-trawling methods may need to apply for resource consent within king shag feeding areas, which extend over hundreds of thousands of hectares.

This would be a significant change and would require an assessment of effects underpinned by high-quality information, for example, as currently occurs for aquaculture. Applicants will need to show that activities will not result in the decline of indigenous biodiversity. Jackson J and others offered a salutary warning in *Davidson*: “we were simply given inadequate information ... to determine that the application should be granted” (at [298]).

The Hearings Panel offered no evaluation against the five indicia considered by the Court of Appeal in *Motiti* which may be used to objectively gauge when regional councils should intervene (at [64] and [65]). These are: (a) Necessity; (b) Type of control; (c) Scope; (d) Scale and (e) Location. This omission from the Hearings Panel may potentially assist any appeal.

The Council may face appeals from conservationists alarmed at the decision to make seabed disturbance discretionary in king shag feeding areas. Fishing interests may also oppose the precedent of having to apply for resource consent to obtain permission to carry out fishing activities in large areas that might have adverse effects on the protected habitat of an endangered species.

In both scenarios, the Council will need to convincingly demonstrate why it is necessary to put controls on fishing in certain areas, but to allow the ongoing damaging and destructive effects to biodiversity and its associated ecological functioning from extensive seabed disturbance outside these areas. It will be interesting to see the reconciliation with the RMA and the ‘avoid’ policies within the *New Zealand Coastal Policy Statement*, especially in terms of the urgent need to establish biophysical bottom lines for seabed ecosystems throughout the Marlborough coastal marine area, which the Council failed to do.

The *Motiti* decision and the MEP point to the need for other regional councils to turn their minds to the protection of the habitats of species classified as threatened in the territorial sea. This is likely to result in extensive survey and monitoring costs in each region. Councils may also consider a transfer of powers under s 33 of the RMA to the Ministry of Fisheries for compliance, given the infrastructure, resources and expertise required to enforce any fishing-related prohibition at s 6(c) RMA sites. In Marlborough, many sites are remote from the sheltered waters of the Marlborough Sounds.

FUTURE MANAGEMENT OF COASTAL MARINE AREAS

The implications of *Motiti* are wide-ranging and nuanced and will become apparent over time. For example, cultural reasons to protect biodiversity could result in place-based fishing restrictions to prevent the decline of biodiverse

kelp forests and proliferation of kina barrens caused by overfishing of species that prey on kina (*Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 240).

The Court of Appeal decision points to the need for co-management appropriate to the scale. *Motiti* 'invites' the Ministry of Fisheries, DoC, regional councils and iwi to work much more closely together in the coastal marine area. Improved management structures may be needed

(Steve Ulrich and others "Marine Guardians – A Novel Solution to Improving Our Marine Management" April 2019 RMJ).

How an ecosystem focus to management can also be brought about will be the subject of future research on potential legislative, policy and practice change to better integrate our collective efforts to protect biodiversity in the territorial sea. *Motiti* is an invitation to finally get that waka launched.

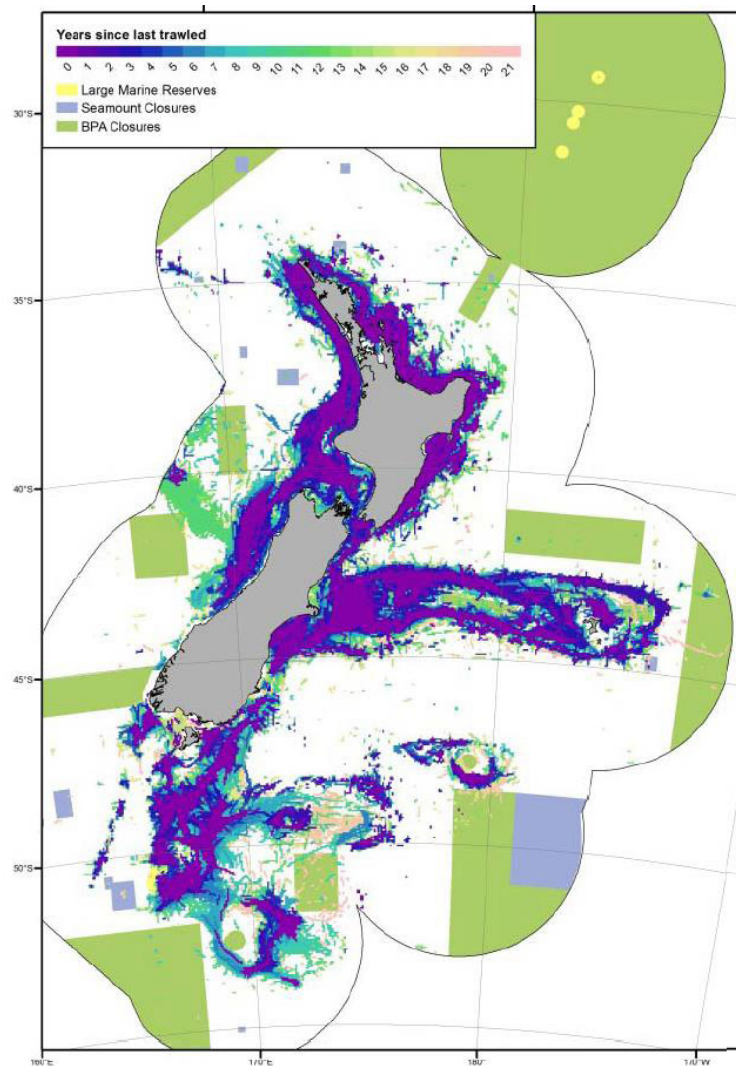


Figure 1: The number of years since each reporting cell was trawled for all species in New Zealand's Exclusive Economic Zone 1990–2014 (Figure 30 from J Black and R Tilney *Monitoring New Zealand's trawl footprint for deepwater fisheries: 1989–90 to 2010–11* (Ministry for Primary Industries, New Zealand Aquatic Environment and Biodiversity Report No 142, January 2015) at 39.

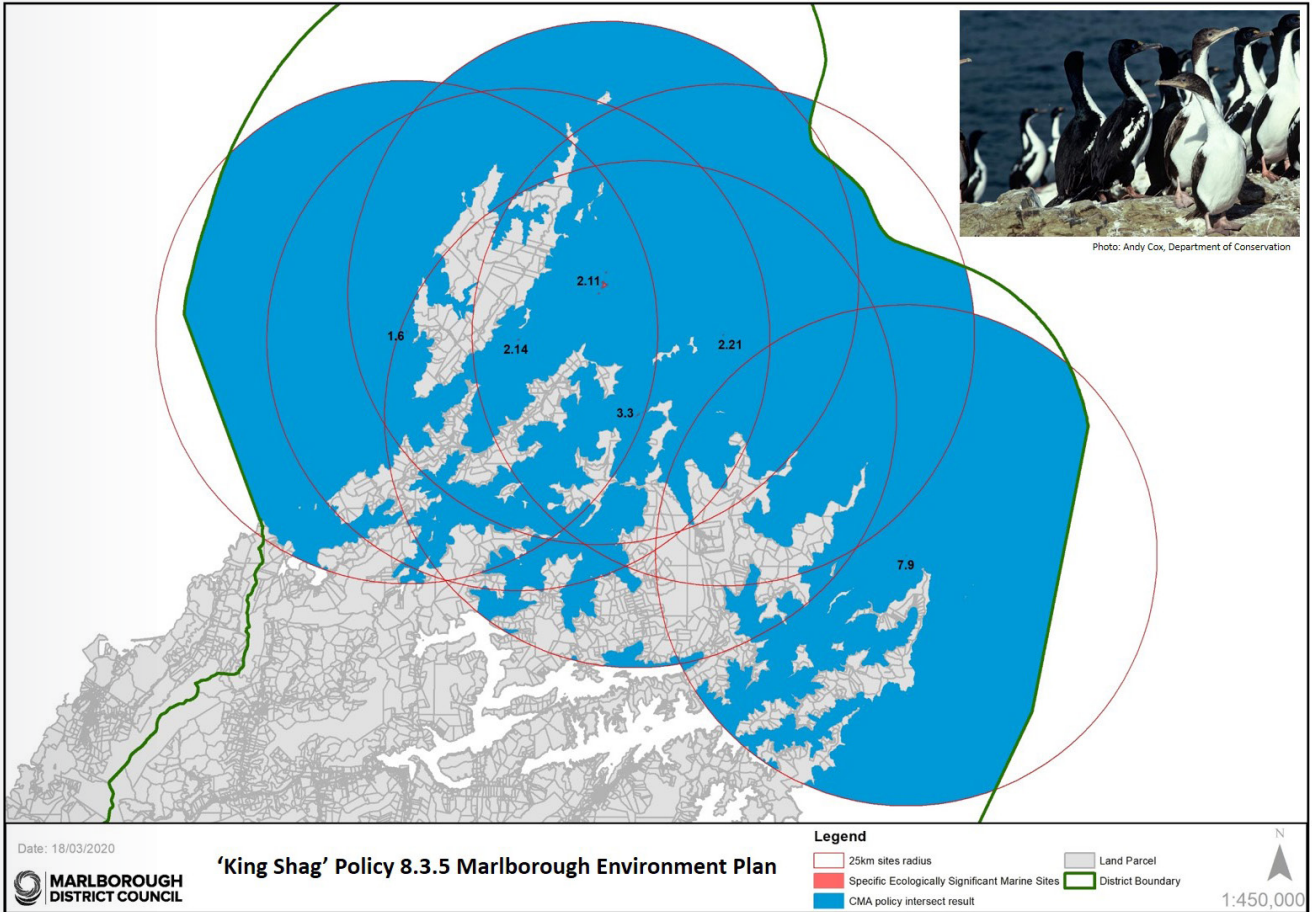


Figure 2: Spatial extent of New Zealand king shag feeding areas (blue shading) identified in Policy 8.3.5 of the MEP. The circles are the 25-kilometre radius around individual breeding colonies, denoted by numbers, which are scheduled in the MEP as s 6(c) RMA sites.