Legal Frameworks for Adaptive Management
Why adaptive management

• Traditional legal models either fail to deal with complexities or uncertainties or act as actual barriers
  – Will perform more poorly under changing climatic condition
• Adaptive management assumes ongoing change and can address ecosystem-scale issues
• “Weak” and “strong” versions of AM
  – Trial and error/evolutionary approach
  – Passive AM (most common)
  – Active AM
• All require monitoring and evaluation, and “learning by doing” – challenge for law which typically guarantees regulatory certainty
Legal adoption of AM

- Very few statutory references to/definitions of AM - Administrative guidelines or agency practice
- New Zealand - *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* – info to be taken into account in approving activities or making regulations for EEZ
- Inclusive list of measures that constitute an ‘adaptive management approach’:
  
a. allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored;

b. any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.
Legal adoption of AM

- Extensively litigated in USA, challenging lack of detail in agency management plans that purport to rely on AM approach – about half of all plans rejected
- Australia and NZ - focused on improving flexibility of conditions on project approvals
  - Environmental objectives clearly specified, way of attaining may be modified following monitoring
  - Some link AM with application of the precautionary principle
Improving the adaptiveness of law

• 2 levels for improving adaptiveness of legal arrangements
  – Greater agility – in-built review mechanisms, sunset clauses for regulatory objectives or entire statute etc
  – Specific legal tools
Legal tools for AM

1. Inclusion of climate change, resilience, adaptiveness in statutory management objectives
2. Formal requirements for monitoring and evaluation
3. Staged/tiered decision-making
4. Triggers and conditional approvals
5. Proportional/decision rules based on resource abundance
Legal tools for AM

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Legal tools for AM

1. Inclusion of climate change, resilience, adaptiveness in statutory management objectives

2. Formal requirements for monitoring and evaluation

3. Staged/tiered decision-making (project-level spatial, duration, intensity; programmatic)

4. Triggers and conditional approvals

5. Proportional/decision rules based on resource abundance
Challenges

• AM n/a to irreversible impacts
• AM n/a where *transformation* is the appropriate adaptation strategy
• Hard to bolt AM strategies onto existing laws, activities, development etc
• End/limit law’s privileging of private property rights
• AM is expensive
• Requires institutional will to admit mistakes
• Requires political will for ongoing funding and to change course
References