

Legal Opinions

**Managing Risks Associated with Outdoor Use of
Genetically Modified Organisms**

Dr Royden Somerville QC

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CONFIDENTIAL

TO: Mr G J Mathias

Thomson Wilson

P O Box 1042

WHANGAREI

INTERIM OPINION
ON LAND USE CONTROLS AND GMOs

Dr R J Somerville QC
Barristers Chambers
PO Box 5117
Dunedin

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EXECUTIVE SUMMARY

1. Pursuant to the Resource Management Act 1991 (the RMA) the Whangarei District Council (WDC) has jurisdiction to control land use activities involving outdoor field-testing and the release of genetically modified organisms (GMOs) for research or commercial use, to promote the sustainable management of natural and physical resources of the district.
2. The provisions of the Hazardous Substances & New Organisms Act 1996 (HSNO) do not preclude the WDC from exercising its jurisdiction to control GMO-related land uses within its district plan pursuant to the RMA.
3. Any objective to take a precautionary approach to managing risks associated with GMO-related land uses, the development of policies to establish GMO-exclusion areas or GMO-management areas, and methods for implementing such an objective and policies in a district plan, need to accord with the provisions of Part II, sections 31 and 32, and any relevant regulations pursuant to the RMA.
4. A precautionary approach to managing risks involving GMO-related land uses is possible pursuant to section 3(f), section 5(2)(a)(b) and (c), section 7, and section 32(4) of the RMA.
5. A strong precautionary management objective which involves a policy of establishing GMO-exclusion areas within which GMO-related land uses are prohibited, is available to the WDC.
6. An alternative precautionary risk management objective which involves a policy of establishing a GMO-management area or areas within which GMO-related land uses are controlled by risk management methods including rules and standards, while GMO-related land uses outside the management areas are prohibited, is available to the WDC.
7. The Environment Court is able to consider whether the objectives, policies, and methods developed by the WDC are valid pursuant to the relevant provisions of the RMA on a plan reference.
8. The WDC has jurisdiction to develop a long-term council community plan to address sustainable development approaches to manage risks associated with GMO-related land use activities pursuant to the LGA.
9. The WDC has jurisdiction to develop and promulgate bylaws for its district for the purpose of protecting, promoting, and maintaining public health and safety associated with GMOs pursuant to the LGA.

10. The High Court is able to judicially review provisions of a long-term council community plan or bylaws promulgated under the LGA to determine whether they are intra vires the provisions of the LGA, reasonable, and for a proper purpose.
11. Because of HSNO procedures for addressing environmental risks, there is a greater chance of a successful challenge in the High Court against bylaws addressing the same purpose under the LGA than a long-term council community plan established under the LGA for sustainable development purposes.
12. The Environmental Risk Management Authority (ERMA) is required to take into account provisions of a district plan developed under the RMA, and a long-term council community plan and bylaws developed under the LGA, when considering notified applications for approvals involving the trialling or release of GMOs within the district. However, ERMA is not bound by such instruments.

OPINION

1.0 INSTRUCTIONS

Thank you for your instructions of 28 January 2004.

You have asked for my interim opinion on three matters:

1. Does the Whangarei District Council (the WDC) have jurisdiction to impose land use controls to manage risks involving genetically modified organisms (GMOs)?
2. If so, how does it develop and implement such controls incorporating a precautionary approach?
3. Could such controls be successfully challenged in the Environment Court or High Court?

2.0 INTRODUCTION

My opinion focuses on the provisions of the Resource Management Act 1991 (the RMA) and the Local Government Act 2002 (the LGA) when considering whether the WDC as a territorial authority has jurisdiction to impose land use controls in planning instruments to manage risks involving outdoor field-testing and the release of GMOs for the purposes of research or commercial use. I also consider whether the provisions of the Hazardous Substances and New Organisms Act 1996 (HSNO) preclude that in the case of a district plan under the RMA.

In this opinion I use for illustrative purposes two general ways in which precautionary approaches can be incorporated into objectives, policies, and methods for managing environmental risks involving GMO-related land uses. The first is by establishing GMO-exclusion areas over part or all of the district,¹ and the second is by using GMO-management areas.² These two approaches are not exhaustive, but demonstrate the legal implications of managing what may be perceived by the people and communities of the district as a significant environmental risk.

The definition of “environment” in the RMA and in the HSNO Act is the same.

“Environment” includes –

- (a) Ecosystems and their constituent parties, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and

¹ Exclusion areas were raised by the Royal Commission on Genetic Modification 2001, 13.1: “that the methodology for implementing HSNO section 6(e) be made more specific to:

...

- allow for specified categories of genetically modified crops to be excluded from districts where their presence would be a significant threat to an established non-genetically modified crop use.”

In Australia, on the 31st July 2003, the Ministerial Council responded to concerns about the commercial cultivation of GM crops in jurisdictions, with the issuing of a new policy principle recognising non-GM crop growing areas, declared under state or territory law (Gene Technology Act recognition of designated areas principle 2003) in New South Wales, Victoria, Tasmania, South Australia, Western Australia and Australia Capital Territory. The policy principle binds the gene technology regulator, prohibiting the grant of any GMO licence which is inconsistent with the policy principle.

² Cf aquaculture management areas (AMAs) in a proposed regional coastal plan for Tasman District approved by the Environment Court in *Golden Bay Marine Farms Ltd v Tasman District Council* W42/01.

- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

When I address RMA matters, I consider the role of a territorial authority and the contents of a district plan, rather than the role of a regional council and the contents of regional resource management instruments. The matters I address in a district context are not precluded because of statutory requirements involving regional policy or planning instruments.

Much of what I say about developing objectives and policies to address environmental risks concerning GMO-related activities in a district plan will apply to regional instruments. However, a further opinion would be needed to address a regional council's jurisdiction to impose controls on GMO-related land use activities.

If the WDC were to decide to control GMO-related land uses it would be useful if that could be achieved so that regional and district objectives and policies were integrated. However, whether or not a regional response could be achieved, for there to be efficient and effective regulatory land use controls, the territorial authority would need to be involved.

3.0 WDC's JURISDICTION TO MANAGE ENVIRONMENTAL RISKS INVOLVING GMO-RELATED LAND USES PURSUANT TO THE RMA AND LGA

3.1 Purposes of RMA and LGA

The objective of establishing a precautionary risk management approach to GMO-related land uses, the development of policies creating GMO-exclusion areas or GMO-management areas over all or part of the WDC's district, and methods for implementing such an objective and policies, need to be for the purposes of promoting the sustainable management of the natural and physical resources of the district pursuant to the RMA (s5(1)), and of promoting the social, economic, environmental, and cultural wellbeing of communities in the present and for the future, pursuant to the LGA (s10(b)).

The objectives of these two statutes contain two concepts: sustainable management (RMA) and sustainable development (LGA). These are interrelated and apposite to judging whether their statutory purpose is being furthered.

Under the RMA, the local government environmental policy-maker and the specialist Environment Court are working towards the same objective, that of sustainable management as defined in section 5(2) of the RMA. The way that is achieved is by a public law process which recognises the two main concepts in the RMA, namely the provision for the development of environmental policies to promote the goal of sustainable management and the use of integrated environmental management to implement that goal.

Section 5 states, inter alia:

5. Purpose –

...

(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 5(2) contains a multitude of ethical considerations. This means an environmental decision-maker has considerable leeway when making policy and strategic decisions in order to attain the goal of the legislation. The concepts in section 5(2) are flexible which enables the RMA to provide successfully for an over-arching goal, without defeating its specific provisions, which may be more restrictive in purpose.

Under the LGA, the concept of sustainable development is recognised. Section 10(b) states:

10. Purpose of local government

The purpose of local government is-

- ...
- (b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

Sustainable development encourages social and economic development, but only so long as the biophysical environment is not degraded to a point where future generations of humans would be prejudiced. In promoting sustainable development, the aim is that society and the environment should be ecologically sound, economically viable, and socially just. Ecology and economics should not be treated in a dichotomous way but should be linked for the wellbeing of future generations.³

Because of the language in section 5(2) of the RMA and 10(b) of the LGA, the WDC has to make value-judgements about what will promote sustainable management or

³ New Zealand has also signified its acceptance of the goal of sustainable development by becoming involved internationally through the 1992 United Nations Conference on Environment and Development (UNCED, or The Earth Summit) which produced inter alia, the Rio Declaration on Environment and Development (the Rio Declaration) and the Environmental Agenda for the 21st Century (Agenda 21). The Rio Declaration identifies twenty-seven guiding principles on sustainability. Agenda 21 is a forty chapter plan for use by governments, local authorities, and individuals, to implement the principle of sustainable development.

sustainable development in its district. It needs to be involved in a transparent and participatory process involving people and communities of the district and identifying the value-choices the community believes should be preferred in the public interest.

The WDC may consider that the way rural land is used in its district is a significant resource management issue. The people of the district may consider that sustaining the principal uses of rural land in the district depends on avoiding or managing environmental risks associated with GMO-related activities. This sustainability objective may be in order to promote a number of values within the purpose provisions of the statutes, ranging from socio-economic, cultural, health and safety values, to concerns about the biophysical environment, for example, biological diversity.

When exercising a statutory power of decision-making involving a value-based choice as to what will promote sustainable management or sustainable development, both the RMA and the LGA provide guiding principles for the decision-maker.

When addressing whether GMO-exclusion areas or GMO-management areas in the district would promote the purpose of the RMA, the principles contained in sections 6, 7 and 8 need to be considered. Section 7 is particularly relevant:

- 7. Other matters** – In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
- (a) Kaitiakitanga:
 - [(aa)The ethic of stewardship:]
 - (b) The efficient use and development of natural and physical resources:
 - ...
 - (d) Intrinsic values of ecosystems:
 - ...
 - (f) Maintenance and enhancement of the quality of the environment:
 - (g) Any finite characteristics of natural and physical resources:

Whether land use controls involving GMO-related land uses would promote sustainable development in the district, would require consideration by the WDC of section 14(1)(h) of the LGA.

14. Principles relating to local authorities

(1) In performing its role, a local authority must act in accordance with the following principles:

...

- (h) in taking a sustainable development approach, a local authority should take into account –
 - (i) the social, economic, and cultural well-being of people and communities; and
 - (ii) the need to maintain and enhance the quality of the environment; and
 - (iii) the reasonably foreseeable needs of future generations.

3.2 Additional statutory provisions under the RMA for district plans

The RMA stipulates that each territorial authority prepare a district plan⁴ to assist it to carry out its functions in order to achieve the purpose of the Act.⁵ For the purpose of carrying out its functions under the RMA and achieving the objectives and policies of its district plan, a territorial authority is empowered to include in its plan rules which prohibit, regulate, or allow activities.⁶ In making a rule, the territorial authority is to have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect.⁷

Preparing district plan provisions to address GMO-related land uses as a significant resource management issue means the WDC needs to comply with section 74(1) of the RMA.

74. Matters to be considered by territorial authority – (1) A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part II, its duty under section 32, and any regulations.

Section 31 states:

31. Functions of territorial authorities under this Act - (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

- (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use,

⁴ S73(1).

⁵ Ibid, s72.

⁶ Ibid, s77B.

⁷ Ibid, s76(3).

- development, or protection of land and associated natural and physical resources of the district:
- (b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of –
 - ...
 - (ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
 - ...
 - (f) any other functions specified in this Act.

The definition of “effects” in section 3 is:

- 3. Meaning of “effect”** – In this Act, unless the context otherwise requires, the term “effect” ... includes-
- (a) Any positive or adverse effect; and
 - (b) Any temporary or permanent effect; and
 - (c) Any past, present, or future effect; and
 - (d) Any cumulative effect which arises over time or in combination with other effects-
- regardless of the scale, intensity, duration, or frequency of the effect, and also includes-
- (e) Any potential effect of high probability; and
 - (f) Any potential effect of low probability which has a high potential impact.

Section 32 states:

- 32. Consideration of alternatives, benefits, and costs-** (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by-
- ...
 - (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1); or
 - (d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1.
- (2) A further evaluation must also be made by-
- (a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and
 - (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.
- (3) An evaluation must examine-
- (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
 - (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
- (4) For the purposes of this examination, an evaluation must take into account-
- (a) the benefits and costs of policies, rules, or other methods; and
 - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

- (5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.
- (6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

Because there is a presumption in section 9 of the RMA that land can be used unless there are specific provisions in a plan which prohibit that or require a resource consent, a section 32 analysis needs to show why that presumption should be rebutted and why precautionary objectives, policies, and methods are needed to manage environmental risk as the most appropriate ways to achieve the purpose of the RMA.⁸

The reference to “risk” in section 32(4)(b) in the context of uncertain or insufficient information would suggest a need to consider management steps which anticipate future adverse effects which cannot be quantified by a probabilistic risk analysis.⁹

A precautionary risk management approach involves taking anticipatory measures and considering alternatives in light of potential significant or irreversible harm that could result from proceeding on the basis of uncertain and/or inadequate information.¹⁰

A precautionary approach to managing environmental risk is recognised in section 3(f), section 5(2)(a)(b) and (c), section 7, and section 32(4) of the RMA.

Any objective to take a precautionary approach to managing environmental risks associated with GMO-related land uses, the development of policies to establish GMO-exclusion areas or GMO-management areas, and methods for implementing such an objective and policies in a district plan, need to accord with the provisions of Part II, sections 31 and 32, and any relevant regulations pursuant to the RMA.

Therefore, I am of the opinion that there is jurisdiction under the RMA for the WDC, and the Environment Court standing in its place, when considering a district plan

⁸ Cf the position with the coastal marine area, water, and air where there is a reversed presumption and activities involving such resources are prohibited unless a section 32 analysis shows that plan provisions or resource consent procedures will promote the purpose of the RMA.

⁹ Section 32(4)(b) is wider than the wording in section 7 of the HSNO Act which refers to scientific matters when taking a precautionary approach.

¹⁰ The precautionary approach is discussed further in section 4 of my opinion.

reference, to control land uses regarding activities which involve GMOs in order to promote the sustainable management of natural and physical resources.

3.3 Statutory provisions under the LGA for long-term council community plans

If the community believes an outcome it wants in the district, in terms of its present and future social, economic, environmental and cultural wellbeing, is to have GMO-related activities excluded or managed in restricted areas, such an outcome could be included in a long-term council community plan.¹¹

This is the best strategic instrument in the LGA in which to set out a significant policy statement in order to promote sustainable development which reflects community values concerning GMO-related matters.¹² Section 93(1) of the LGA requires every local authority to have a long-term council community plan at all times.

The processes for adopting a long-term council community plan and its general content are stated in Part 6 of the LGA. The provisions also set out the obligations and special consultative procedures for the determination and adoption of such a plan.

In section 5 of the LGA, “community outcomes” in relation to a district or region, means:

- 5. Community outcomes**, in relation to a district or region, -
 - (a) means the outcomes for that district or region that are identified as priorities for the time being through a process under section 91; and
 - (b) includes any additional outcomes subsequently identified through community consultation by the local authority as important to the current or future social, economic, environmental, or cultural well-being of the community.

Under section 91(2) of the LGA, the purposes of the identification of community outcomes include, inter alia:

¹¹ A long-term community plan has a much longer focus than the annual plan.

¹² Pursuant to Part 1 of Schedule 10, a long-term community plan should set out a summary of the local authority’s policy on determining significance (as defined in section 5).

91. Process for identifying community outcomes

...

- (2) The purposes of the identification of community outcomes are –
- (a) to provide opportunities for communities to discuss their desired outcomes in terms of the present and future social, economic, environmental, and cultural well-being of the community; and
 - (b) to allow communities to discuss the relative importance and priorities of identified outcomes to the present and future social, economic, environmental, and cultural well-being of the community;

A long-term council community plan, once adopted by resolution of a local authority has the effect of providing a formal and public statement of the authority’s intentions in relation to the matters covered in the plan (s96(1)), which could include outcomes involving GMO-related activities within its district. As a statement of intention only, the plan is non-binding in the sense that once it is adopted a local authority may, subject to limitations under sections 80 and 96, make decisions inconsistent with its plan under section 96(3). No person is entitled to require a local authority to implement a plan’s provisions under section 96(4).

Therefore, the WDC has jurisdiction to develop a long-term council community plan to address sustainable development approaches to manage risks associated with GMO-related land use activities pursuant to the LGA.

3.4 Statutory provisions under the LGA for bylaws

Section 145(b) of the LGA provides a general bylaw-making power for territorial authorities who may make bylaws for their district for the purpose of “protecting, promoting and maintaining public health and safety”.¹³

Section 155(1) of the LGA provides:

155. Determination whether bylaw is appropriate

- (1) A local authority must, before commencing the process for making a bylaw, determine whether a bylaw is the most appropriate way of addressing the perceived problem.

¹³

Pursuant to section 86, the special consultative processes need to be followed.

Therefore, the WDC has jurisdiction to develop and promulgate bylaws for its district addressing perceived health risks associated with GMOs pursuant to the LGA.

3.5 The HSNO Act and the RMA

Whether the HSNO Act precludes objectives, policies, and methods for managing risks associated with land uses involving GMOs being included in a district plan needs to be addressed.

For a useful summary of the scheme of the HSNO Act, see *Mothers against Genetic Engineering Inc v Minister for the Environment*.¹⁴ Since that decision, which sets out the approval procedures to do with new organisms being imported, developed, field-tested or released, the 2003 Amendment to the HSNO Act has been enacted and addresses conditional releases.

The purpose of the HSNO Act as stated in section 4 is to:

protect the environment, and the health and safety of people and communities by preventing or managing the adverse effects of hazardous substances and new organisms.

The purpose of the RMA is stated in section 5:

5. Purpose - (1)The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

While both enactments have provisions in common and refer to the protection of the environment and the health and safety of people and communities, the focus of the HSNO Act is clearly more limited, applying only to hazardous substances and new

¹⁴

CIV2003-404-673.

organisms.¹⁵ Although the guiding principles which inform a decision-maker when acting under the RMA and the HSNO Act are couched in similar language they are not the same in every respect and relate to achieving different statutory purposes.¹⁶

Section 25 of the HSNO Act states:

- 25.** Prohibition of import, manufacture, development, field-testing, or release –
- (1) No -
- (a) hazardous substance shall be imported, or manufactured: and
- (b) new organisms shall be imported, developed, field-tested or released: otherwise than in accordance with an approval issued under this Act or in accordance with Parts XI to XV of this Act.

The principal question, when interpreting the provisions of the HSNO Act and the RMA, is whether the HSNO Act, being later in time, expressly or impliedly precludes the WDC from developing and implementing district plan provisions which are aimed at managing risks associated with GMO-related land uses.

Where two statutes deal with the same subject matter and it is reasonably possible to construe the provisions so as to give effect to both, then that must be done.¹⁷ In such a case the correct approach to interpretation is to first attempt to give each its effect without creating conflict or inconsistency between the two. It is only in cases where statutes are “so inconsistent with, or repugnant to the other that the two are incapable of standing together” that it is necessary to decide which statute is to prevail.¹⁸

Whether there has been an express or implied repeal of the RMA is addressed by firstly comparing the extent of the overlap of issues in both statutes.

In *Minister of Conservation v Southland District Council*¹⁹ the Environment Court addressed the overlapping provisions of the RMA and the Forests Amendment Act

¹⁵ For example, the definition of “natural and physical resources” are the same in both statutes. Cf definition of “effects” in the RMA (s3(f)) which is precautionary and not found in the HSNO Act.

¹⁶ Sections 6, 7 and 8 of the RMA and sections 5, 6, 7 and 8 of the HSNO Act.

¹⁷ See *Stewart v Grey County Council* [1978] 2 NZLR 577, 583.

¹⁸ Ibid. 583.

¹⁹ A039/01, 17.

1993.²⁰ It considered the purpose of the two statutes, and applying the principles of statutory interpretation concerning overlapping statutes, held:

The stated purpose of each Act refers to sustainable management. The definition of sustainable forest management in Part IIIA shows that it is concerned with the sustainability of the forest. By comparison, the definition of sustainable management in the 1991 Act shows that it is concerned with effects on all natural and physical resources of the environment, particularly effects on resources that are external to those being managed. [para 77]

The purpose of Part IIIA may overlap to an extent with the purpose of the 1991 Act, in that sustainability of an indigenous forest may also be part of sustainability of management of natural and physical resources generally. However, exempting certain SILNA land from the control for the purpose of sustainability of the forest does not conflict with applying to that land the control for the purpose of promoting sustainable management of natural and physical resources generally, particularly in respect of external effects. [para 81]

From that consideration we find that although there is some overlap of issues between the two enactments, they are capable of being construed so that they stand together, each having its effect without creating conflict between them. [para 84]

Where there is overlap between the two statutes and inconsistency is unavoidable, then the specific statute will prevail over the general. In *Stewart v Grey County Council* the Court found the Mining Act 1971 prevailed over the Town and Country Planning Act 1953, as the Mining Act was an exclusive code with regard to the use of land for mining purposes and thus pre-empted the land use control provisions of the Town and Country Planning Act, p584.

In principle, the general provision remains intact but it is inapplicable to the situation covered by the specific legislation and is impliedly repealed.²¹ An example is the case of *Ngati Kahu Ki Whangaroa v Northland Regional Council*²² where the Court found that the effect of the Fisheries Act 1996 was to exclude the functions of the

²⁰ The Forests Amendment Act 1993 inserted a new Part IIIA in the Forests Act 1949. Part IIIA states:

The purpose of this Part of this Act is to promote the sustainable forest management of indigenous forest land.

The term “sustainable forest management” is defined as follows-

‘Sustainable forest management’ means the management of an area of indigenous forest land in a way that maintains the ability of the forest growing on that land to continue to provide a full range of products and amenities in perpetuity while retaining the forest’s natural values.

The term “indigenous forest land” is defined as follows-

‘Indigenous forest land’ means land wholly or predominantly under the cover of indigenous flora.

²¹ Burrows, *Statute Law in New Zealand* (2nd Ed), 277.

²² A95/2000, 17.

relevant local authorities under the RMA where an overlap existed. There are also specific provisions in the RMA which do that.²³ There are no provisions in the HSNO Act which exclude the functions of a district council under the RMA.²⁴

Also, the functions of the Environmental Risk Management Authority (ERMA) under the HSNO Act are different from those of the WDC under section 31 of the RMA.

Section 11 of the HSNO Act states:

11. Powers, functions, and duties of Authority – The Authority may-

- (a) Advise the Minister on any matter relating to the purpose of this Act, including, but not limited to, -
 - (i) The extent to which persons are complying with the provisions of this Act:
 - (ii) Inconsistencies or conflicts between any controls placed on hazardous substances and new organisms under this Act and any controls placed on any hazardous substance and new organisms under any other Act:
 - (iii) The consideration and investigation of the use of environmental user charges in accordance with section 96 of this Act:
- (b) Monitor and review-
 - (i) The extent to which the Act reduces adverse effects on the environment or people from hazardous substances or new organisms:
 - (ii) The enforcement of this Act including, but not limited to, the exercise of any power under section 103 of this Act by any enforcement officer:
- (c) Promote awareness of the adverse effects of hazardous substances and new organisms on people or the environment and awareness of the prevention or safe management of those effects:
- (d) Contribute to and cooperate with international forums and carry out international requirements as directed by the Minister:
- (e) Enquire into any incident or emergency involving a hazardous substance or a new organism:
- (f) Keep such registers relating to hazardous substances and new organisms as may be required by this Act or as may be necessary to administer this Act:
- (g) Carry out any powers, functions, and duties conferred on it by or under this Act or any other enactment.

ERMA is required to consider matters related to the environmental effects concerning a specific GMO rather than establishing integrated policies on a district-wide basis for

²³ See section 30(2) of the RMA: **30. Functions of regional councils under this Act** - ... (2) The functions of the regional council and the Minister of Conservation [under subparagraph (i) or subparagraph (ii) or subparagraph (vii) of subsection (1)(d)] do not apply to the control of the harvesting or enhancement of populations of aquatic organisms, where the purpose of that control is to conserve, [use,... enhance, or develop any fisheries resources controlled under the Fisheries Act 1996].

²⁴ The Environment Court has held the RMA is not subject to the Reserves Act 1977 when considering land which involves both statutes. See *Auckland Volcanic Cones Soc Inc v Transit NZ Ltd* A203/2002.

managing land uses in order to promote the sustainable management of the natural and physical resources of the district.

Therefore, the functions of each authority need not produce inconsistent controls and as such it should be presumed that the HSNO Act was not intended to limit the general provisions of the RMA and the functions of a territorial authority in relation to managing the risk of significant or irreversible adverse environmental effects from the use of land for GMO-related activities to promote the purpose of the RMA.

A contextual interpretation of the HSNO Act and the RMA suggests that the application of the decision-making process by ERMA under the HSNO Act and the WDC under the RMA need not be incompatible with the legislative regimes in each statute.²⁵

However, the WDC would need to take into account ERMA's view of site specific matters and, to use the High Court term, "tread carefully".²⁶

The High Court in *Bleakley v Environmental Risk Management Authority*²⁷ recognised that the RMA provisions go beyond the provisions of the HSNO Act.

Given that the authority found there was no such danger of escape, there was no obligation in law – and it certainly was not appropriate – for the authority to venture into more orthodox pollution issues. It is true that the Act has an environmental protection purpose, as does the Resource Management Act, however, that prima facie wide purpose is to be read in the context of its subject-matter and specifics. It is to protect the environment against hazardous substances and organisms, and not on a wider scale. The wider scale is the role of others under general legislation in the RMA. Thus, if spraying milk on pastures were to raise a concern that heritable material might escape, that would be a concern for the authority. If after authority action, there was no risk of escape of heritable material but there remained a risk of another environmental character – eg destruction of aquatic life in streams – that would be a concern to be dealt with under the Resource Management Act. It would not be an authority matter, despite the breadth of the opening sections of the Act. It is a not unfamiliar judicial problem to reconcile legislation relating to specific activities, and a general legislation in the Resource Management field. This ground of appeal cannot succeed.

²⁵ When interpreting the provisions of the statutes, the Interpretation Act 1999 applies.

²⁶ See *The Director-General of Civil Aviation v the Planning Tribunal* CP128/95, p11.

²⁷ [2001] 3 NZLR 213, 243.

In *Minister of Conservation v Southland District Council*, when comparing the provisions of the RMA and the Forests Amendment Act, the Environment Court stated:

The intended relationship between Part IIIA and the 1991 Act is indicated by the duty imposed by Part IIIA that any resource consent required under the 1991 Act for cutting or felling any indigenous timber pursuant to a sustainable forest management plan is to be obtained. [para 79]

Section 142(2) of the HSNO Act expressly addresses the Act's relationship to the RMA with regard to the storage, use, disposal, or transportation of any hazardous substance, requiring every person exercising a function under the RMA to comply with the HSNO Act and any regulations made under the HSNO Act in that regard. However, it is recognised in the HSNO Act that greater levels of control can be imposed pursuant to the RMA.

Section 142(3) states that:

nothing in subsection (2) of this section shall prevent any person lawfully imposing more stringent requirements on the storage, use, disposal, or transportation of any hazardous substance than may be required by this Act... where such requirements are considered necessary by that person for the purposes of the Resource Management Act 1991.

There is nothing in the HSNO Act to preclude the WDC imposing greater levels of control in its district plan for RMA purposes than those imposed by ERMA under the HSNO Act even though the controls relate to GMO-related land uses.²⁸

In *The Director General of Civil Aviation v The Planning Tribunal*²⁹ the Tribunal considered the effect of an aircraft accident upon the environment. It found that although an accident may be a low probability, its potential effect is such as to militate against the granting of a resource consent for a heliport in the district. Although the Director-General of Aviation had issued a conditional determination in respect of the proposed heliport, and the Civil Aviation Authority as the statutory body charged with investigating whether the proposed heliport would be safe had

²⁸ Often, more than one statute involves a consenting or standards regime for addressing natural and physical resources; for example, the RMA and the Building Act 1991. See *Christchurch International Airport v Christchurch City Council* [1997] 1 NZLR 573.

²⁹ CP128/95.

approved it, the Planning Tribunal was entitled to take a more particular look at the communities affected.

In this case the Tribunal directed itself precisely to these matters and concluded that an air accident in this area, although of low probability, would have a high potential impact on the social and economic conditions of the local communities dependent on the tourist trade. Plainly air safety must be considered by the Council and the Tribunal. While the essential function of the Director is to set the minimum safety standards that are acceptable, and that must involve some degree of risk, and while in the ordinary situation that would normally satisfy a Council or the Tribunal, nevertheless the Tribunal is entitled to take a more particular look at the communities affected. I think too as a matter of law it is open to the Tribunal to require a higher degree of safety than that required by the Director. A Council and the Tribunal is not necessarily thereby contradicting the Director, as the issues are not identical. Further, the Director's requirements could involve obvious error and it would be contrary to the public interest that prima facie this should bind a Council or the Tribunal.(pp8-10)

If the Council imposed a lower standard of safety than ERMA, the ERMA controls would prevail in specific situations. The application of the RMA cannot lower the level of control which is imposed by ERMA under the HSNO Act. If for RMA purposes, which may relate to district-wide socio-economic or cultural matters rather than just health and safety matters or potential impacts on biophysical values of the area, further controls are needed, there is nothing in the HSNO Act to prevent such controls being included in a district plan.

ERMA is obliged to co-operate with a district council where resource consents for land use activities are required under the RMA.

The Hazardous Substances and New Organisms (Methodology) Order 1998 states that ERMA:

2(e) "Must co-operate with other bodies (for example, government departments, Crown entities, and local bodies), in particular, when a hazardous substance or new organism also requires approvals under other enactments."

Therefore, I am of the opinion that the provisions of the HSNO Act do not preclude the WDC from exercising its jurisdiction to control GMO-related land uses within its district plan pursuant to the RMA.

4.0 PRECAUTIONARY APPROACH TO MANAGING ENVIRONMENTAL RISKS IN A DISTRICT PLAN PURSUANT TO THE RMA

A checklist for establishing district plan provisions is:

To-

- Identify issues.
- Determine environmental results to be achieved.
- Specify objectives.
- Specify policies.
- Specify methods including rules.
- Specify standards, terms and conditions for rules or activities.³⁰

If a resource management issue is to manage GMO-related land use risks where there is uncertainty, a lack of information, and complex environmental systems, a district plan's objectives and policies will be largely based on value-judgements about what level of control will promote sustainable management of the natural and physical resources of the district. Methods, such as rules and standards for implementing such risk management objectives and policies, are likely to be more mechanistic.

4.1 Addressing environmental risk management in objectives and policies in a district plan

Environmental risk decisions involve legal, scientific, cultural, economic, and political questions. Ultimately, environmental risk management is governed by values which in turn determine the choices made by decision-makers and society at large.

Environmental risk is the product of the probability of untoward environmental harm resulting from the activity, and the severity of the consequences of unintended adverse effects (consequence rating), especially those which in the future might result in harm to people or damage to other components of the environment. A number of

³⁰ In preparing a plan a territorial authority must have regard to management plans and strategies prepared under other Acts (s66(2)).

qualitative terms are used with environmental risk, such as “acceptable,” “tolerable,” and “minor.” These terms take on particular significance when one needs to address the risk of serious or irreversible environmental impacts under the RMA.

If risk is seen as a continuum from minor to significant, then a local authority must decide what is so significant for the environment that it is unacceptable, because it would not promote the goal of the RMA and therefore needs to be managed.

Traditionally, the role of the civil courts involves considerations of the onus of proof, causality, party contributions and damages, when adjudicating and deciding common law actions, and the courts are concerned about what has happened in the past, (the law normally following changing social values). Whereas, a local authority and the Environment Court, when dealing with the risk of potentially significant or irreversible adverse environmental effects, have to address worst-case situations, future policy and planning issues, and evidential concepts involving the treatment of scientific uncertainties, by considering risk management techniques such as the precautionary approach. Risk assessment, decision-making, and management need to be ongoing, as environmental risk is changing all the time.

The precautionary principle is a post-modern approach to making decisions about risk management where it is not possible to remove scientific and behavioural uncertainties systematically, and ways need to be found to regulate the use and development of natural and physical resources that take such uncertainties into account.

It helps frame a process for making value-choices in the absence of reliable scientific evidence of the likelihood of some environmental impacts and the seriousness and irreversibility of their consequences.

The precautionary principle is an approach which has been developed in international environmental law.³¹ For example, the Rio Declaration, Principle 15 states:

³¹ For example, the Rio Declaration on Environmental Development, Principle 15, Agenda 21, Chapter 17. Agenda 21 states the principle, inter alia, as: “When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if the cause and effect relationships are not fully established scientifically.” The precautionary

In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to protect environmental degradation.

The application of the precautionary principle is essentially a risk management approach and a values-based policy response to environmental risks rather than a quantitative risk assessment approach.

It is a principle that allows for reflexive management responses to serious environmental risks. It facilitates adaptive approaches to managing these risks so that as information comes to hand management approaches can be reviewed, amended and refined. It allows for emphasis to be placed on a participatory process and the use of various disciplines to determine on behalf of society what an acceptable risk is.

If there is reasonable uncertainty regarding possible environmental damage arising out of a proposed course of action, then risk management becomes an established decision norm by applying the precautionary principle or applying a precautionary approach. Uncertainty and a lack of information lead to a bias towards precaution rather than being neutral in environmental decision-making.

In *Shirley Primary School v Telecom Mobile Communications Ltd*³² the Environment Court considered that the wording of section 3(f) encapsulates precisely what the precautionary approach is about. (s3(f)). It considered it is unnecessary to rely on international expressions of the precautionary principle.³³ Section 3(f) states:

concept has been included in the preamble to the Convention on Biological Diversity 1992: “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat”. The 1996 Environment 2010 Strategy, Ministry for the Environment, states: “the precautionary principle should be applied to resource management practice, where there is limited knowledge or understanding about the potential for adverse environmental effects or the risk of serious or irreversible environmental damage.” See also the most recent Sustainable Development Action Programme (January 2003) that endorses the principle. [1999] NZRMA 66.

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However, there may be occasions where it is still necessary to apply the precautionary principle and the court has not excluded that possibility. See *Ngati Kahu Ki Whangaroa v Northland Regional Council* A95/2000.

3. Meaning of “effect” – In this Act, unless the context otherwise requires, the term “effect” ... includes –

...

(f) Any potential effect of low probability which has a high potential impact.³⁴

In *Golden Bay Marine Farmers v Tasman District Council*³⁵ the Environment Court considered the application of a precautionary approach in reference proceedings on a proposed regional coastal plan. It held:

A precautionary approach in reference proceedings on a proposed plan or plan change may be applied in various ways:

- (a) through the application of and analysis of the factual evidence under the provisions of s.3 RMA, particularly s.3(f) – that regard be had “*to potential effects of low probability but high potential impact*”;
- (b) after findings of fact are made, a precautionary approach may be inbuilt into the various relative provisions of the plan – objectives, policies, rules, methods, etc;
- (c) such a precautionary approach may define the classification of the activity – prohibited, discretionary, controlled – depending on the nature of the activity;
- (d) such an approach may be supported by statutory management plans or other methods;
- (e) such an approach may be promoted through the application of review conditions under s.128, and decisions on enforcement orders where the Environment Court has a discretion to make orders in certain circumstances (s.319(2)).³⁶

If the WDC wishes to apply a precautionary approach when considering the use, development, and protection of natural and physical resources of the district, then there is a real advantage if it states that in the objectives and policies of the district plan, so that a hearing committee or the Environment Court is directed to act on known ethical concerns for the district, involving future generations.

³⁴ In *Clifford Bay Marine Farms Ltd v Marlborough District Council* C131/2003 the Environment Court confirmed its interpretation and application of section 3(f) in the *Shirley Primary School* case.

³⁵ W42/01 at 76. The New Zealand Coastal Policy Statement (the NZCPS) includes the precautionary approach to activities with unknown but potentially significant adverse effects. This means a regional coastal plan needs to reflect such an approach to environmental risk management. Policy 3.2.10.

³⁶ The Court also considered on the evidence that several parties were attempting to turn the principle into a standard, whereas it is an approach fully recognised in the provisions of the RMA.

A strong precautionary risk management approach available to the WDC is to implement a policy of establishing GMO-exclusion areas within which GMO-related land uses are prohibited.

An alternative precautionary risk management approach which involves a policy of establishing a GMO-management area or areas within which GMO-related land uses are controlled by risk management methods including rules, while GMO-related land uses outside the management areas are prohibited, is also available to the WDC.

If a local authority and Environment Court were left to address the potential effects of GMO-related land use without guiding precautionary risk management objectives and policies in a district plan, the approaches taken by the Environment Court to environmental risks in *Land Air Water Association v Waikato Regional Council*³⁷ would apply. These are a consideration of:

- (i) Evidence of adverse effects or risk to the environment, rather than mere suspicion or innuendo;
- (ii) The gravity of the effects, regardless of scientific uncertainty, if they do occur;
- (iii) Uncertainty or ignorance regarding the extent, nature, or scope of potential environmental harm;
- (iv) The effects on the environment – whether they are serious or irreversible;
- (v) Recognition that the Act does not endorse a “no-risk” regime;
- (vi) The impact on otherwise permitted activities.

4.2 Methods for incorporating precautionary rules and standards into district plans

4.2.1 Rules

Section 76(1)(a) and (b) state:

- 76. District rules** – (1) A territorial authority may, for the purpose of –
- (a) Carrying out its functions under this Act; and
 - (b) Achieving the objectives and policies of the plan, - include [rules in a district plan].

³⁷ A110/01. For another Environment Court case addressing environmental risks see *Contact Energy Ltd v Waikato Regional Council* A4/00.

Rules can categorise GMO-related land use activities and impose environmental standards.³⁸

Categorisation of activities for GMO-exclusion areas

A strong precautionary approach is to create a GMO-exclusion area within which GMO-related land uses are categorised as prohibited activities. This means it would require a plan change application and a section 32 analysis to change the activity status or redefine the exclusion area.

Categorisation of activities for GMO-management areas

If a GMO-management area were to be established, site-specific approvals may be contingent on a low acceptability level of environmental risk (non-complying activity status). A further method is to approve the activity subject to conditions and environmental standards additional to any controls ERMA may have imposed (restricted discretionary or controlled activity status).

4.2.2 Environmental Standards for GMO-management areas

Environmental standards

There are three principal types of environmental risk standards:

- environmental technology standards;
- environmental performance standards; and
- environmental process standards.

Environmental technology standards

These are prescriptive standards setting out environmental safeguards or methods to be used in specific situations. These standards prescribe the technology to be used to achieve planned environmental outcomes. They are often expressed in numerical or narrative terms. Therefore, when preparing environmental technical standards at the

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time of consultation with experts, industry, and those members of the public with a particular interest in the risks being addressed, a range of values is drawn on. These standards rely on science and the local authority's understanding of science to predict the best approach to managing environmental risk. They are sometimes referred to as design or specification standards. The main drawback of using environmental technological standards in statutory plans and resource consent conditions when compliance with a technological standard is all that is required to have legal authority to continue with an activity, can be that because the best science at the time of the implementation applies, there may be no incentive for developers or consent authorities to invest in research and development to find better ways for managing environmental risk.

Environmental performance standards

Environmental performance standards are usually framed in such a way that environmental policy goals are set out for developers by local authorities. In the future, local authority decision-makers and developers can work together to meet environmental performance standards, and to include in plans and resource consent conditions³⁹ environmental performance goal outcomes which are designed to place less stress on the environment and mitigate risks. Predictive modelling with conservative risk thresholds is a precautionary approach to setting performance standards. However, uncertainty, a lack of information and complex environmental systems may make it difficult to establish what acceptable environmental performance standards are when addressing significant GMO-related environmental risk.

Environmental process standards

Applying the precautionary approach as a part of any regulatory regime, requires a format which includes not only formal rules prescribing what action should be taken (formalistic), but also goals to guide actions (contextual). The formalistic approach to

³⁹ Common law principles for planning conditions require that the conditions (i) be imposed for a planning purpose and not an ulterior purpose, (ii) they must fairly and reasonably relate to the development proposed, and (iii) they must not be so unreasonable that no reasonable planning authority could have imposed them; see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, [1980] All ER 731, and applied in *Housing New Zealand v Waitakere City Council*, CA158/00.

regulatory regimes has the advantage of consistency for environmental decision-makers. But it often needs to be developed using a scientific basis so that “numerical”, environmental, technological, and environmental performance standards can be set, whereas, using the contextual approach in a regulatory regime involves providing the tools to select the best options for addressing uncertainties surrounding environmental risks.

The inclusion of a precautionary approach in a regulatory regime involves placing risk management in a process context for deciding what value to place on the environment (when determining what is acceptable risk in the long term), and for setting the management goals and the ways of achieving them. Environmental standards which allow this to happen are sometimes referred to as environmental process standards.

Process-based standards address procedures and parameters for achieving a desired result, in particular, the process to be followed in managing identified risks of serious or irreversible environmental adverse effects. These are useful standards when addressing environmental risks that are difficult to measure because of uncertainty and changing information. They are adaptive management-orientated standards which identify processes to be followed to achieve sustainable management.

4.3 Adaptive risk management methods for GMO-management areas⁴⁰

Another precautionary risk management approach is to use adaptive risk management methods.

Adaptive risk management techniques are derived from new scientific and ecological insights that interpret the natural world as dynamically changing, full of uncertainty, and continually surprising.⁴¹ Management actions and monitoring programmes are carefully

⁴⁰ The Environment Court has accepted such methods as appropriate precautionary risk management approaches when addressing aquaculture development and sustainability of the marine ecosystem in *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* W25/2002, *Golden Bay Marine Farmers v Tasman District Council* W19/2003, and *Clifford Bay Marine Farms Ltd v Marlborough District Council* 131/2003.

⁴¹ A T Iles “Adaptive Management: Making Environmental Law and Policy More Dynamic, Experimentalist and Learning” (1996) *Envtl. & Pl LJ* 288.

designed to generate reliable reporting and to clarify the reasons underlying outcomes, actions and objectives, and are then adjusted, on the basis of this feedback and improved understanding. In addition, decisions, actions and outcomes are carefully documented and communicated to others so that knowledge gained through experience is passed on.⁴²

If precaution is placed at the forefront of managing risk then existing RMA methods are useful tools. Appropriate adaptive precautionary risk management techniques involving plan provisions, and resource consent conditions, include the use of conditions subsequent which incorporate procedures and environmental controls. These allow for risk management procedures to be used after a proposal is under way to allow for the management of the proposal to adapt to new and changing risk information.

Methods which allow the management of environmental risks where there is a lack of information and uncertain science, include staging, monitoring, management plans, best practicable option (BPO), co-regulation, reviews, limited resource consent terms, financial contributions, performance bonds and financial assurance requirements.⁴³

A district plan can set out formulae for calculating financial instruments, funding research, and monitoring requirements as effective precautionary measures. If damage were to occur by way of environmental contamination from approved sites within a managed area, then financial instruments can be used requiring the land user to pay for clean-up costs and effective mitigatory steps.⁴⁴

⁴² See CS Holling (ed) *Adaptive Environmental Assessment and Management*, John Wiley & Sons, Chichester, 1978, 286. Examples of adaptive management approaches are seen in LH Gunderson, CS Holling, S Light (eds), *Barriers and Bridges of the Renewal of Ecosystems and Institutions*, Columbia University Press, New York, 1995; KN Lee, *Compass and Gyroscope: Integrating Science and Politics for the Environment*, Island Press, Washington DC, 1993; DS Slocombe, "Implementing Ecosystem-based Management" (1993) 43 *Bioscience* 612; and LH Gunderson, S Light, CS Holling, "Lessons from the Everglades: Learning in a Turbulent System" (1995) *Bioscience* Supplement S-66.

⁴³ The High Court has confirmed the ability to change the rate and way a development proceeds, through the use of a review condition specified in a resource consent in *Minister of Conservation and others v Tasman* DC HC, Nelson C1V2003-485-1072, 9.12.03

⁴⁴ See section 108, RMA for the ability to impose financial contributions by way of resource consent conditions.

These methods allow for environmental administrators and decision-makers to work through the tensions that might occur with the conflicting interests and values of applicants to use land for GMO-related activities, local authorities, members of the community, iwi and others. The whole process is designed to be transparent.

A further opinion would be required, accompanied by expert economic and planning advice, before decisions could be made as to the appropriate categorisation of GMO-related land use activities and the most effective and efficient controls for inclusion in a GMO-management area.

5.0 THE ABILITY TO CHALLENGE PROVISIONS IN A DISTRICT PLAN, COMMUNITY PLAN AND BYLAWS IN THE ENVIRONMENT COURT OR HIGH COURT

5.1 Environment Court and RMA

The Environment Court is able to consider whether objectives, policies, and methods developed by the WDC for inclusion in its district plan, are valid pursuant to the relevant provisions of the RMA on a plan reference.

The court has held that value-judgements are normally not justiciable, but the beliefs and the information upon which the values are developed, are able to be examined by the court. See *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*.⁴⁵

Therefore, the evaluation carried out under section 32 by the WDC when developing any objective, policy or method, to promote the purpose of the RMA needs to be robust. It needs to show why the resource management issues involved with GMO-related land uses cannot be addressed by leaving any risk assessment and management decisions to ERMA pursuant to the HSNO Act.

Considerable multi-disciplinary work would be required to carry out such an evaluation.

5.2 High Court and long-term council community plans under LGA

Because it is promulgated pursuant to statutory powers, a long-term council community plan developed under the LGA as a strategic statement of what is considered will promote sustainable development in a district can be reviewed in the High Court. However, the High Court is unlikely to set aside the provisions of a statutory instrument that contains policy statements based on community values. This is because, as one author has noted:

By contrast, courts tend to consider that except in extreme cases, they should not interfere with decisions of policy made by governmental bodies. This is partly because judges are not elected by or directly answerable to the people; and partly

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C168/2002.

because court procedures are not seen as the most appropriate way of making policy decisions.⁴⁶

The reason for that approach is stated by Richardson P in *Wellington City Council v Woolworths NZ Ltd (No.2)*.⁴⁷

There are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene.

However, the procedures followed by the WDC in establishing the long-term community plan could be challenged in the High Court. Such challenges can be based on the fact that the procedures were not followed according to law, that a breach of natural justice was involved, that the local authority acted unreasonably, unlawfully or irrationally, or that the long-term community plan is ultra vires the LGA because it addresses matters which it has no jurisdiction to address pursuant to the LGA.⁴⁸

5.3 High Court and bylaws under LGA

In order for a bylaw to be invalidated by the courts, it must be deemed so unreasonable that no reasonable body of persons could in good faith have passed it.⁴⁹ However, a court is slow to hold void a bylaw that has been validly made by a local authority, on the grounds of unreasonableness, and it is presumed that the local authority will not act unreasonably.⁵⁰ The superior courts will often defer to local authorities with regard to their bylaw-making powers.⁵¹

⁴⁶ P Cane, *An Introduction to Administrative Law* (3rd ed), Clarendon Press, Oxford, 1996, 112.

⁴⁷ [1996] 2 NZLR 537 (CA).

⁴⁸ See *Takapuna City Council v Auckland Regional Council* [1972] NZLR 705, p711; “The law on this topic is already well settled, though its application may sometimes be difficult. The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.” (9 *Halsbury’s Laws of England*, 3rd ed, 62 para 129).

⁴⁹ See *McCarthy v Madden* [1914] 33 NZLR 1251, 1259.

⁵⁰ See *Everton v Levin Borough Council* [1953] NZLR 134, 136.

⁵¹ In *McCarthy v Madden* [1914] 33 NZLR 1251, 1268.

However, a bylaw may be declared invalid where it unnecessarily interferes with a primary right of the public without producing a corresponding benefit to the inhabitants of the locality.⁵² A bylaw that is partial and unequal in its operation may also be declared invalid on the grounds of unreasonableness.⁵³

In this case a bylaw passed by a local authority that would prohibit GMO-related activities would not extinguish an existing right. Indeed, section 25 of the HSNO Act prohibits the field-testing or release of any GMOs without approval under the Act. As such, no right under the general law is being abridged. Furthermore, section 145 of the LGA gives a local authority the power to make bylaws to protect, promote, and maintain public health and safety, which allows for the regulation of private activities in accordance with the empowering statute and for the prohibition of certain activities on these grounds. Such a bylaw may not be unreasonable in principle merely because it prohibits the release of GMOs considered to be of significant risk to public health and safety by a local authority.

Section 14 of the Bylaws Act 1910 states that no bylaw shall be invalid merely because it deals with a matter already dealt with by the laws of NZ, unless it is repugnant to the provisions of those laws. While the HSNO Act also deals with the assessment and management of risk for the purpose of the health and safety of people and their communities, this does not prevent a local authority from passing a bylaw prohibiting persons from trialling or releasing GMOs in the interest of public health and safety.

However, I am of the opinion that because the purpose of the HSNO Act is to “protect the environment and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms” (s4), a bylaw purporting to have an identical purpose, means it would be open to the High Court to declare it unreasonable if it were promulgated without an in-depth risk assessment of the sort undertaken by ERMA.

⁵² See *Martin v Smith* [1933] NZLR 636, 642.

⁵³ See *Hanna v Auckland City Corporation* [1945] NZLR 622, 631.

6.0 CONCLUSION

I am of the opinion that there is jurisdiction under the RMA for the WDC and the Environment Court to control land uses regarding activities which involve outdoor field-testing or the release of GMOs for research or commercial use, in order to promote the sustainable management of natural and physical resources.

There is nothing in the HSNO Act or the Hazardous Substances and New Organisms Amendment Act 2003 to preclude land use controls being included in district plans pursuant to the RMA. Providing the WDC changes its district plan in accordance with its functions under section 31, the provisions of Part II, its duty under section 32, and any regulations, then it has jurisdiction to impose land use controls for GMO-related activities.

I am also of the opinion that precautionary objectives, policies, and methods could be lawfully included in the WDC's district plan to manage risks involving GMO-related land uses.

I have considered the provisions of the LGA and am of the view that the sustainable development of the district could include the management of GMO-related risks. There could be strategic benefits from developing a sustainable development policy under the LGA for inclusion in a long-term council community plan. However, I am less confident that a bylaw prohibiting GMO-related activities for health and safety purposes, established under the LGA, could resist a legal challenge by judicial review in the High Court.

Dr R J Somerville QC

23 February 2004

31 March 2005

Thomson Wilson
Barristers & Solicitors
P O Box 1042
DX AP24512
WHANGAREI

Attention: Mr G J Mathias

Dear Partners

Opinion on land use controls and GMOs

Thank you for your letter of the 12th of December 2004.

Introduction

In my interim opinion of the 23rd of February 2004, I suggested:

A further opinion would be required, accompanied by expert economic and planning advice, before decisions could be made as to the appropriate categorisation of GMO-related land use activities and the most effective and efficient controls for inclusion in a GMO-management area.

A report entitled *The Community Management of GMOs II - Risk and Response Options* (the report) has now been prepared by Messrs Terry and Kyle which addresses these matters. I have consulted with them over legal aspects raised in the report.

You have asked for my opinion on two points:

1. *Provide advice on an as required basis with respect to the options for framing a rule change under the Resource Management Act including comment on the merits of different generic options, such advice to be shared directly with other consultants assisting the Council on this matter.*
2. *Provide a review of a suggested plan change to assess it against the requirements of section 32 of the Resource Management Act, its expected robustness to legal challenge and any potential variations to the proposed rule that could improve it.*

Advice to consultants on options

In my interim opinion I set out a fundamental checklist for establishing district plan provisions for incorporating a precautionary approach to managing environmental risks pursuant to the Resource Management Act 1991 (the RMA).¹

A checklist for establishing district plan provisions is:

To –

- Identify issues.
- Determine environmental results to be achieved.
- Specify objectives.
- Specify policies.
- Specify methods including rules.
- Specify standards, terms and conditions for rules or activities.

I am of the opinion the report contains sufficient information for the district council to undertake the above process. It identifies risk management options available pursuant to the RMA, and the consequences of potential adverse environmental effects (including on economic conditions) from using land in the district for GMO-related activities. It also highlights the ability to include financial instruments in a district plan as an efficient and effective risk management method.

In my opinion, subject to a comprehensive consultation programme with the community, from a legal perspective the report provides a sufficient foundation for the preparation of a specific chapter in a proposed district plan with an objective of managing risks associated with GMO-related land uses, and policies and methods to implement that objective in order to promote sustainable management of the land resources of the district pursuant to the RMA.²

¹ Interim opinion, section 4, page 23.

² Report, page 48.

Section 32 requirements

If the community urges the district council to prepare GMO-related land use risk management objectives, policies, and methods, to be incorporated into its proposed district plan, or a private plan change were promoted to do that, then section 32 of the RMA applies to the proposed plan provisions.

You have asked for my assessment of any suggested plan change in terms of section 32. The heading of section 32, “*consideration of alternatives, benefits, and costs*”, describes the statutory purpose of the section when a district council evaluates a proposed plan change to address environmental risks associated with GMO-related land uses as a significant resource management issue for its area.³

The mandatory components of any evaluation are set out in section 32(3), and (4).

- (3) An evaluation must examine-
 - (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
 - (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
- (4) For the purposes of this examination, an evaluation must take into account-
 - (a) the benefits and costs of policies, rules, or other methods; and
 - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

The way the work of Messrs Terry and Kyle has evolved means that at this stage it focuses on options for the council rather than suggesting specific draft plan provisions. Notwithstanding that, I am satisfied that there is sufficient information in the report to undertake a section 32 analysis if the district council were to proceed to consult with the community and develop objectives and policies for inclusion into its district plan to manage the level of environmental risk the community is prepared to accept in order to promote the sustainable management of the land resources of the district.

³ Section 5(2) and (3) of the Interpretation Act 1999 allows for the headings of sections to be used to establish the meaning of a provision.

However, if a district plan is to include financial instruments as a method for mitigating or offsetting adverse environmental effects resulting from GMO-related land uses, then further work is required before a section 32 assessment could be completed.⁴

Section 108(10) states:

108. Conditions of resource consents –

...

- (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless –
- (a) The condition is imposed in accordance with the purposes specified in the plan [[or proposed plan]] (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
 - (b) The level of contribution is determined in the manner described in the plan [[or proposed plan]].

If the council were to consider, as part of a section 32 evaluation, that it was not appropriate to include objective(s), policies, and methods for managing environmental risks associated with GMO-related land uses (including the use of financial instruments) in order to promote sustainable management of the land use resources of the district, then it still has other statutory obligations pursuant to the RMA.

Even without plan provisions, if there was potential or actual damage from GMO-related land uses to adjacent land or to the wider community, the district council can become involved in enforcement issues pursuant to sections 17 and 314.

Because the council is a public authority and is obliged to act in the public interest when exercising its statutory duties, it can be subject to judicial review proceedings in the High Court for the way in which it exercises any discretion it has to act or not to act.

A relevant statutory duty is found in section 35, which states, *inter alia*:⁵

⁴ For a discussion of the challenges of undertaking a section 32 assessment when introducing financial instruments into a district plan to address adverse environmental effects from a proposed land use, see M.J. Grant, *Equity in the Environment? Financial Contributions* 7th RMLA Conference, Christchurch, September 1999, pages 11, 16, 17.

⁵ An appeal on the grounds that a statutory body should be immune from a claim for negligence for a failure to enforce conditions of a water right (including a monitoring condition), was rejected by the Court of Appeal in *Taranaki Catchment Commission & Regional Water Board v Roach* [1983] NZLR 641.

35. Duty to gather information, monitor, and keep records - (1) Every local authority shall gather such information, and undertake or commission such research, as is necessary to carry out effectively its functions under this Act.

(2) Every local authority shall monitor-

(a) The state of the whole or any part of the environment of its region or district to the extent that is appropriate to enable the local authority to effectively carry out its functions under this Act; and

[(b) the efficiency and effectiveness of policies, rules, or other methods in its policy statement or its plan; and]

(c) The exercise of any functions, powers, or duties delegated or transferred by it; and

(d) The exercise of the resource consents that have effect in its region or district, as the case may be, -

and take appropriate action (having regard to the methods available to it under this Act) where this is shown to be necessary.

[(2A) Every local authority must, at intervals of not more than 5 years, compile and make available to the public a review of the results of its monitoring under subsection (2)(b).]

I note that there is reference in the report to civil liability issues which may face a district council concerning environmental damage resulting from GMO-related land uses.⁶ It is not within the scope of my instructions to address this matter. However, public authority liability is a complex subject and in my opinion, one cannot assume that the district council would be immune from liability as a result of the way in which it exercises its statutory duties under the RMA, and particularly if it has made commitments to manage GMO-related land use activities in its long-term council community plan promulgated under the Local Government Act 2002.⁷

⁶ At page 51 of the report there is reference to a Crown Law Office opinion of the 3rd November 2004: *Advice on potential for civil liability arising from rules controlling GMOs*.

⁷ For issues concerning civil liability and public authorities, see Butler and McLay *Liability of public authorities*, NZ Law Society Booklet June 2004. For a discussion of liability issues and GMO-related activities, see S. Todd, *Liability issues involved, or likely to be involved now or in the future, in relation to the use, in New Zealand, of genetically modified organisms and products*"; E.J. Currie *Liability for damage from genetic modification*, *Biotechnology & Law* 2004, 2nd Annual Lexis Nexis Conference, March 2004; Simon Terry and others *Who Bears the Risk? Genetic Modification & Liability* (2 ed, Chen Palmer & Partners and Simon Terry Associates Ltd, Wellington, 2001); Charles River Associates *Review of Chen, Palmer & Partners and Simon Terry Associates, Who Bears the Risk* (Charles River Associates (Asia Pacific) Ltd, Wellington, 2001); M. Christensen and P. Horgan "Genetic Modification: The Liability Debate" (unpublished, 2001) http://www.lifesciencenz.com/Repository/020118_liability.pdf *Liability for loss resulting from the development, supply, or use of genetically modified organisms*, Study Paper 14, Law Commission May 2002.

The law concerning claims for economic loss resulting from a breach of statutory duty by a public authority is not circumscribed and depends to a large extent on the nature of a relevant statutory duty.⁸ The High Court has confirmed that it would expect to try and link common law obligations to the statutory obligations contained in the RMA.⁹

The RMA does not preclude civil actions. Section 23 of the RMA states:

23. Other legal requirements not affected - (1) Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.

(2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.

(3) Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provisions of this Act.

[emphasis added]

Conclusion

I am satisfied that the report provides sufficient information to allow consultation with the community in order to make the necessary judgements about what level of control over GMO-related land uses will promote sustainable management of the natural and physical resources of the district pursuant to the RMA.

I am also satisfied that if the council, after consultation with the community, were to develop objectives and policies for managing the risk of adverse environmental effects from GMO-related land uses, that there is sufficient information in the report to carry out a section 32 evaluation of them. However, methods (including rules

⁸ Currently in England and Wales the general test as to whether or not there could be a claim in negligence against a public authority involves questions such as:

- Does the statute in question exclude a private law remedy?
- Can a common law remedy co-exist with the statutory duty or power?
- Has there been an omission? Is there a duty of care to do something or refrain from doing something?
- Has the public body undertaken a responsibility which gives rise to a common law duty of care?

See A.R. Keene, *Negligence claims against public bodies*, New Law Journal, 21 January 2005, p86.

⁹ See *Ports of Auckland v Auckland City Council* [1999] NZLR 600.

covering financial instruments) would still need to be developed for inclusion in the district plan before a section 32 assessment of a proposed plan change could be completed.

Whether or not the council proceeds to initiate a plan change to address environmental risks associated with GMO-related land uses in its district, it still has statutory and public law obligations pursuant to the RMA.

I have not addressed the issue of risks to the district council of civil proceedings if environmental damage resulted from GMO-related land uses, in the absence of objectives, policies or methods (including controls) for the managing of such a risk, because that is outside the scope of my instructions. However, it should not be assumed that the district council, as a public authority, will automatically be immune from liability.

Yours faithfully

Dr R J Somerville QC

Dr R J Somerville QC
Barristers Chambers
106 George Street, Dunedin 9058

18 January 2013

PO Box 5117 DXYP80539
Telephone (03) 477 3488
Facsimile (03) 474 0012
Mobile 0274323109

Email rjs@barristerschambers.co.nz

Thomson Wilson Law
Barristers & Solicitors
P O Box 1042
WHANGAREI 0140

Attention: Graeme Mathias

Re: Outdoor Use of Genetically Modified Organisms (GMOs)

I. Introduction

Thank you for your instructions of 21 November 2012. I have reviewed the January 2013 draft section 32 analysis (the evaluation) and proposed plan provisions on the outdoor release of genetically modified organisms (GMOs) in terms of the Resource Management Act 1991 (the RMA or the Act) and relevant case law. I have not revisited the matters I addressed in my earlier opinions.

The plan provisions commissioned by the Inter-council working party on GMO risk evaluation and management options (working party) provide for a precautionary approach to the way the use of natural resources is managed for the outdoor use of GMOs in order to achieve the purpose of the RMA.

In my opinion I focus on the legal implications of the proposed policies and rules which include a classification of activities as prohibited or discretionary in order to achieve the objective of a precautionary approach to managing the risk of potential adverse effects of GMOs on the environment from the activities.

II. Background

A precautionary risk management response is often used when risks are identified but are difficult to assess due to a lack of information and uncertainty about the effects on the environment of a proposed use of natural resources. This can involve scientific uncertainty. It is a policy response that reflects the values of the community expected to bear the environmental risks, and its acceptability or tolerance of such risks.

The section 32 evaluation discloses that the consultation process by the working party with the relevant communities of interest, and by local authorities during the development of their long term plans and other local government instruments, established that the relevant communities consider the risk associated with outdoor GMOs is a significant resource management issue. The evaluation also records that iwi authority plans indicate that iwi wish to have a precautionary approach taken to the resource management issue. The consultative process indicates that there is a community desire for RMA controls and not merely for a reliance on the consenting processes contained in the Hazardous Substances and New Organisms Act 1996 (HSNO).

There is no national policy statement (NPS) or national environmental standard (NES) in place under the RMA which addresses the outdoor release of GMOs. There is a proposed NPS on indigenous biodiversity, but at this stage that is not required by law to be given effect to in RMA instruments prepared by local government.

The evaluation addresses the application of the precautionary approach by the prohibition of the general release of GMOs pursuant to the RMA because at the time of preparing these proposed planning provisions there is a lack of sufficient information in order to address the risk of potential adverse effects of the relevant activities on the environment. By placing a burden on the proponent of such an activity to provide sufficient information in order to meet the statutory tests for plan changes would allow for the community bearing the risks to be involved in that RMA process.

The evaluation also addresses the application of the precautionary approach by using a discretionary activity classification in respect of the field trials of GMOs. These RMA controls relate to risk management approaches which are additional to those the Environmental Protection Authority (EPA) can utilise during the field trials contained in the HSNO.

III. Section 32 Tests

I have considered whether the statutory tests in section 32(3) and (4) of the RMA have been addressed in the evaluation of the proposed plan changes contained in the draft document.

Section 32 evaluation

32 Consideration of alternatives, benefits, and costs

(3) An evaluation must examine-

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account-

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

[Emphasis added]

IV. Objectives

The proposed objectives state:

Proposed Objective

1.4.1¹

The environment, including people and communities and their social, economic and cultural well being and health and safety, is protected from potential adverse effects associated with the outdoor use, storage, cultivation, harvesting, processing or transportation of GMOs through the adoption of a precautionary approach, including adaptive responses, to manage uncertainty and lack of information.

¹ See also Objective 2.3.1.

Proposed Objective 1.4.2²

The sustainable management of the natural and physical resources of the district/region with respect to the outdoor use of GMOs, a significant resource management issue identified by the community.

In evaluating the proposed objectives the following factors are relevant:

- (a) The proposed objectives are aimed at using a precautionary approach to address a significant resource management issue with the goal of achieving the purpose of the Act.³
- (b) The precautionary approach is consistent with the ethic of stewardship and kaitiakitanga contained in section 7(a)(aa) and the obligation to future generations in section 5(2)(a).
- (c) The use of a precautionary approach to risk management in RMA policy and planning instruments is not unusual for addressing risks involving the environment.⁴
- (d) The evaluation recognises that the precautionary approach to risk management is also used in international instruments for addressing GMOs which New Zealand is a party to.⁵
- (e) A precautionary approach allows for a flexible way to manage the use, development and protection of natural resources in order to respond to information as it becomes available. This is sometimes called 'adaptive management'.
- (f) A precautionary approach allows for regulatory controls to be put in place if predictions about the likelihood of potential adverse effects on the environment of an activity cannot be assessed sufficiently and may turn out to be erroneous.

² See also Objective 2.3.2.

³ Section 5(2).

⁴ For example, the New Zealand Coastal Policy Statement. The Bay of Plenty Regional Council

⁵ Proposed Regional Policy Statement refers to a precautionary approach in respect of GMOs. The United Nations Convention on Biodiversity and the Cartagena Protocol.

- (g) A precautionary approach to managing risks recognises that uncertainty and a lack of information are reasons for putting controls in place in terms of section 5(2)(c) rather than reasons for not having RMA controls and permitting an activity under the Act.
- (h) Uncertainty about the level of risk in respect of potential adverse effects on the environment from the general release of GMOs into the environment is relevant when determining what will achieve the sustainable management of the natural resources in the areas concerned. There are uncertainties about how to manage the co-existence of GMOs with other conventional uses of natural resources, and how to establish separation distances.⁶ Also there is uncertainty about how to evaluate the risk of potential adverse effects of the activities on the environment in terms of section 3(f) of the RMA in order to protect the environment and safeguard the life-supporting capacity of natural and physical resources in the area.⁷
- (i) A precautionary approach also allows for the proponent of an activity to carry the burden of providing sufficient information, rather than the burden being placed on the decision-maker to locate sufficient information in order to make a decision about whether the activities in a policy and planning context should be allowed.

V. Policies and Rules

One of the proposed policies for managing the risks relating to the release of GMOs and aimed at achieving the objective of adopting a precautionary approach is set out as follows:

Proposed Policy 1.4.1.1 and 2.3.1.1

To adopt a precautionary approach by prohibiting the general release of a GMO, and by making outdoor field trialling of a GMO a discretionary activity.

⁶ These issues are not restricted to New Zealand. See Mary Dobbs, "Excluding Coexistence of GMOs? The Impact of the EU Commission's 2010 Recommendation on Coexistence", *Review of European Community in International Environmental Law* (RECIEL) 20(2) [2011] at 180.

⁷ (f) any potential effect of low probability which has a high potential impact.

Other policies relate to RMA controls in respect of outdoor field trialling of GMOs.

In my opinion the evaluation has addressed the provisions in section 32(4)(b) of the RMA which requires the evaluation of the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods. It is apparent that that evaluation is particularly relevant in respect of the proposed policies.

Dr Kenneth Palmer in "Local Authorities Law in New Zealand"⁸ addressed the provision in section 32(4)(b) as follows:

The reference to the "risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods" requires consideration of the precautionary principle or precautionary approach in respect of policy and plan provisions. Although the RMA has no equivalent provision applying to a resource consent application, a Court has held that the precautionary approach is implicit in the sustainable management purpose under s5 of the RMA, in relation to providing for health and safety and safeguarding the life supporting capacity of air, water, soil and ecosystems.⁹

Prohibited activity status

The evaluation contains a rationale for prohibiting the general release of a GMO in district and unitary plans pending the availability of sufficient information about the risk of any potential effects of the activities on the environment. The evaluation also reflects community values in respect of the environmental risks the community is prepared to accept at the moment.

The evaluation recognises that the aim is not to exclude the general release of GMOs in the long term if sufficient information becomes available to address the risk of their potential adverse effects on the environment. The evaluation indicates that the burden should be on the proponent to satisfy the statutory requirements for a plan change by providing sufficient information and that would also involve the wider community in the process.

In respect of the use of a prohibited activity classification Dr Palmer has summed up the legal position as follows¹⁰:

⁸ Brookers, Wellington, 2012 at page 819.

⁹ Shirley Primary School v CCC [1999] NZRMA 66 (EnvC)(safety of electronic communications facility);
Francks v CRC [2005] RNZRMA 97 (HC) (Building line restriction justified for erosion risk).

¹⁰ "Local Authorities Law in New Zealand" Brookers, Wellington, 2012 at page 842.

The categorisation as a prohibited activity is not a category that should be liberally adopted, but should be reserved for justifiable situations. The situations may relate to the need to take a precautionary approach, where effects from activities are not known, or to regulate a staged approach, provide for comprehensive development, express community expectations as to undesirable or unacceptable developments (nuclear power stations, oil storage, meat works) or other justifiable grounds. The Court in the *Coromandel Watchdog* case noted that the discretion could be influenced by the cost benefit analysis and precautionary approach raised under the s32 evaluation, the need to achieve the purposes and principles in Part 2 of the RMA, and the need to consider the effect of activities on the environment. The Court held that the view of the RMA as a permissive, effects-based philosophy oversimplified the obligation on local authorities. It stated:

"The labels 'permissive' and 'effects-based' do not comprehensively describe the sustainable management purpose in s5 of the Act. The use of those labels should not overshadow the numerous matters that are required to be considered by local authorities when undertaking the processes required by the Act."

The Court of Appeal in **Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development**¹¹ addressed whether the use of a prohibited activity classification as a precautionary approach in respect of mining would be lawful. The reasoning of the Court would also apply to the outdoor release of GMOs. The Court was addressing the situation where a planning authority had insufficient information about a proposed activity and wished to take a precautionary approach, even though it did not rule out the possibility of that activity being permitted in the future. The planning authority was not prohibiting prospecting as an activity.

It discussed the issue as follows:

[16] The philosophical debate which arose in the Environment Court proceedings was as to whether prohibited activity was an appropriate status where a planning authority did not necessarily rule out an activity, but wished to ensure that a proponent of the activity would need to initiate a plan change. Plan changes require a different and more consultative process than that for applications for resource consent in relation to a discretionary activity or a non-complying activity. In essence, the proponent of a plan change faces a higher hurdle. There is the potential for greater community involvement.

The Court recorded the view that there may be a number of occasions when a precautionary approach could be taken. Two occasions which appear to be relevant are set out at paras [34](a) and (d):

¹¹ [2008] RMLR 77.

[34] ...

(a) Where the council takes a precautionary approach. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available. He gave an example of a plan in which mining was a prohibited activity, but prospecting was not. The objective of this was to ensure that the decision on whether, and on what terms, mining should be permitted would be made only when the information derived from prospecting about the extent of the mineral resource could be evaluated;

(d) Where it is necessary to allow an expression of social or cultural outcomes or expectations. Prohibited activity status may be appropriate for an activity such as nuclear power generation which is unacceptable given current social, political and cultural attitudes, even if it were possible that those attitudes may change during the term of the plan;

The Court also emphasised that it needed to be apparent that the local authority was not in a position to assess the effects of the activity at the time of establishing the activity status rather than merely giving the activity prohibited status to defer the consideration of the effects until a specific proposal came before it. It held as follows:

[45] We agree with the Courts below that, if a local authority has sufficient information to undertake the evaluation of an activity which is to be dealt with in its district plan at the time the plan is being formulated, it is not an appropriate use of the prohibited activity classification to defer the undertaking of the evaluation required by the Act until a particular application to undertake the activity occurs. That can be contrasted with the precautionary approach, where the local authority forms the view that it has insufficient information about an aspect of an activity, but further information may become available during the term of the plan.

Field trials which provide for further information are not prohibited and will be discretionary activities. Therefore, information coming from field trials could be used by a proponent for the general release of GMOs in order to initiate a plan change.

The Court of Appeal also held that:

[36] ... Yet it can be contemplated that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status was the most appropriate status in cases falling within the situations described in that paragraph.

In my opinion the evaluation allows the local authorities to make a judgement about using a prohibited activity status which would be consistent with the reasoning of the Court of Appeal.

Discretionary activity

The section 32 evaluation also addresses the benefits, costs and risks of having the alternative of no resource management controls in respect of field trials and leaving it to the HSNO procedures.

There is often the need to obtain consents under different statutory regimes for the same activity. This is not unusual although it will add to the transaction costs of gaining consent for the activity.¹²

The RMA also allows for a consideration of reverse sensitivity issues in relation to other uses and developments involving natural and physical resources in the vicinity of the proposed field trials.

The RMA allows for additional controls to those provided for by the HSNO in order to address environmental risks in respect of field trials.¹³ The evaluation addresses the benefits of having the ability to impose bonds, reviews, financial contributions and other adaptive management approaches in respect of field trials. It also covers the benefit of addressing risks in respect of local authority liability issues which may arise out of the outdoor use of GMOs.

¹² For example, consents under the RMA and the Building Act in respect of the same physical resources.
¹³ Sections 44, 44A, 45, 45A(2).

VI. Conclusion

In my opinion the evaluation meets the mandatory requirements in section 32(3) and (4) of the RMA. The proposed plan provisions give a clear indication of the way the local authorities will manage the risk of potential adverse environmental effects from the release of outdoor GMOs in order to achieve the purpose of the RMA.

The policies and rules designed to achieve the objective of taking a precautionary approach appear to be consistent with the Court of Appeal's reasoning in *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development*.

If there is any further information you require please do not hesitate to contact me.

Yours faithfully



Dr R J Somerville QC

cc: Dr Kerry Grundy

4 June 2014

CONFIDENTIAL

MEMORANDUM

To: Kerry Grundy, Simon Terry, John Kyle
From: Dr R J Somerville QC
Re: GMOs – Section 32 Review

Section 32 has been amended and came into force in December 2013.

32 Requirements for preparing and publishing evaluation reports

- (1) An evaluation report required under this Act must—
- (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
 - (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
 - (i) identifying other reasonably practicable options for achieving the objectives; and
 - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - (iii) summarising the reasons for deciding on the provisions; and
 - (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
- (2) An assessment under subsection (1)(b)(ii) must—
- (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
 - (i) economic growth that are anticipated to be provided or reduced; and
 - (ii) employment that are anticipated to be provided or reduced; and
 - (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and
 - (c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions. [Emphasis added]

The difficulty with applying the section 32 tests as set out in the 2013 Amendment is that objectives, policies and methods being considered in the context of the proposed provisions are addressing environmental risks which cannot be clearly assessed scientifically and need to be managed when there is significant uncertainty.

Where the science is uncertain, connecting science with environmental policy requires the use of what is sometimes known as “integrative science”. Adaptive management is an example of a policy response that involves integrative science. (See “Missing Links: Connecting Science with Environmental Policies” September 2004, Parliamentary Commissioner for the Environment, page 61.)

There are some relevant matters that result from the wording of the amendment which the local authority needs to be aware of. They relate to section 32(1)(b)(i), 32(1)(c) and 32(2)(b) of the Resource Management Act 1991 (the RMA).

I. Section 32(1)(b)(i) - “identifying other reasonably practicable options for achieving the objectives”.

A purposive interpretation of these words would suggest that the option being proposed in the instrument should also be reasonably practicable. If it is unreasonable or impracticable then it will not meet the test contained in section 32(1)(b)(i) which is mandatory.

The word “practicable” refers to an option that is achievable in practice rather than being purely a theoretical option. The practicable application of any theoretical approach would need to be considered. The Shorter Oxford English Dictionary definition of “practicable” is “1. Capable of being carried out in action; feasible.”

The word “reasonable” means that the reasons given can be considered objectively as being sufficient to address the practicable options. The words “reasonably practicable options” can be interpreted by referring to the definition in section 2 of the RMA of “best practicable option”. Admittedly this definition refers to “best practicable option” rather than “reasonably practicable option”. However, the definition in paras (a), (b) and (c) indicates what elements

would be relevant when determining practicable options pursuant to the RMA. I have emphasised the relevant wording.

best practicable option, in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—

- (a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
- (b) the financial implications, and the effects on the environment, of that option when compared with other options; and
- (c) the current state of technical knowledge and the likelihood that the option can be successfully applied [Emphasis added]

When identifying reasonably practicable options, the issue is whether it is reasonable and practicable to leave the management of environmental risks associated with field trials and the general release of GMOs to the EPA, rather than requiring a plan change pursuant to the RMA. The earlier section 32 evaluation found that it was not a reasonably practicable option to leave the matter to the EPA and not involve the RMA.

The option for achieving the objective raised in the evaluation by an amendment to the HASNO legislation has been examined in the section 32 evaluation. The Government has declined to pursue that option.

II. Section 32(1)(c) states:

contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

This direction involves the proportionality principle when exercising a statutory duty. The scale and significance of environmental, economic, social and cultural effects that are anticipated from the implementation of the proposal are not restricted to adverse environmental effects. They relate to the definition of effects in section 3 of the RMA.

3 Meaning of effect

In this Act, unless the context otherwise requires, the term **effect** includes—

- (a) any positive or adverse effect; and
- (b) any temporary or permanent effect; and
- (c) any past, present, or future effect; and
- (d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

- (e) any potential effect of high probability; and
- (f) any potential effect of low probability which has a high potential impact.

Therefore, it is important that positive environmental effects of prohibiting the release of GMOs until a plan change is sought are addressed.

III. Section 32(2)(b)

- if practicable, quantify the benefits and costs referred to in paragraph (a);

Section 32(2)(b) is relevant when dealing with employment opportunities in terms of section 32(2)(a)(ii). The plan change prohibiting the release of GMOs into the environment cannot be evaluated in terms of whether there will be an increase or reduction in employment figures.

IV. Conclusion

Overall, I consider that the section 32 evaluation, with Simon's additional work, is sufficient to address the amendment.