

IN THE MATTER of the Resource Management
Act 1991

AND

IN THE MATTER of Plan Change
PC18 Genetically Modified Organisms to the Far North District
Plan and PC131 Genetically Modified Organisms
to the Whangarei District Plan.

**RIGHT OF REPLY – COUNCIL REPORTING PLANNERS, DAVID BADHAM &
TAMMY WOOSTER**

MAY IT PLEASE THE COMMITTEE:

Introduction

1. This right of reply has been prepared by David Badham (on behalf of Whangarei District Council) and Tammy Wooster (on behalf of Far North District Council). “We” and “our” is used throughout this response where there is consensus of both authors in terms of professional opinion and recommendations.
2. Our Statement of Qualifications and Experience is provided in Attachment 1 of the s42A Report. In preparing this right of reply, we have read and agree to comply with the Code of Conduct for expert witnesses as set out in the Environment Court Consolidated Practice Note 2014. We have also read and are familiar with the Resource Management Law Association / New Zealand Planning Institute “Role of Expert Planning Witnesses” paper. The opinions expressed in this evidence, are based on our qualifications and experience, and are within our area of expertise. If we rely on the evidence or opinions of another, our evidence will acknowledge that.

3. At the conclusion of the hearing of submissions on plan change 131 (“PC131”) to the Whangarei District Council (“WDC”) District Plan and plan change 18 (“PC18”) to the Far North District Council (“FNDC”) District Plan the Hearings Commissioners requested a review of certain issues arising out of the evidence heard.

4. A summary of the points on which it is understood further submissions and analysis were required is as follows:
 - (i) What is the distinction between a genetically modified organism (“GMO”) and a new organism and can the relationship between them in terms of the Hazardous Substances and New Organisms Act 1996 (“HSNO”) and the Resource Management Act 1991 (“RMA”) be clarified with particular relationship to the plan changes and in that regard is the existing definition of a GMO in the plan changes appropriate?
 - (ii) Are there any provisions in the Regional Policy Statement (“RPS”), other than the GMO provisions which are under appeal, which is in any way relevant, either positive or negative, to the plan changes?
 - (iii) What consideration was given to the use of the non-complying activity status in the plan provisions both in relation to the provisions of the plan changes and the S.32 analysis?
 - (iv) What is the position of the S.42A reporting officers on the proposed use of the controlled activity status as proposed by Dr Bellingham in his evidence?
 - (v) What is the status of the evidence and submissions presented by or on behalf of Federated Farmers and Pastoral Genomics where the evidence and submissions tendered was not in fact formally presented as either evidence or submissions to the Committee? Dr Bellingham’s evidence to the Auckland Unitary Plan hearings was specifically referred to.
 - (vi) What is the Council’s position on the proposition of duplication between the HSNO and RMA regimes in relation to GMOs?

- (vii) Has their position on liability changed following submissions? How would the bonding regime envisaged by the plan changes apply?
- (viii) How would the containment of trials once an EPA approval had been granted work in a practical sense?
- (ix) What is the position of the S.42A reporting officers on the proposition that there be a total prohibition for both releases and trials as sought by some submitters?
- (x) Has GMOs been identified in the relevant planning documents as a significant issue?
- (xi) What is the difference in public participation opportunities under the different regimes provided by HSNO and the RMA? In particular making submissions on applications to EPA as against public engagement in planning processes under RMA.
- (xii) What provisions do the iwi/hapu management plans listed in the Section 42A report have in regard to GMOs?
- (xiii) Do provisions in iwi/hapu management plans have any standing in relation to applications for approval to the EPA?
- (xiv) Should the Committee consider the outstanding determination of the High Court on the appeal of the Environment Court decision?
- (xv) What consideration should be given to the submission of Mr Valley in relation to transgenics and the definition of GMOs in the plan changes?
- (xvi) How would monitoring work in terms of field trials with respect to access on adjoining or adjacent properties if required?

5. In addition, the Committee noted that there were some typographical “tidy ups” required. This has resulted in some further minor changes to the plan change text. Any changes as a result of the right of reply are highlighted in **Green** in the revised track change version of the plan change provisions which are included as **Attachment 1**.
6. This right of reply deals with points (ii), (iv), (viii), (ix), (x) and (xii). The remaining points will be dealt with by the Councils’ Legal Representative Graeme Mathias in his submissions.

Point ii. Operative Regional Policy Statement

7. Section 75(3) of the RMA requires that district plans “must give effect” to the regional policy statement of their region. On 8 May 2016 the RPS for Northland became partly operative. It is considered appropriate to have regard only to the relevant objectives as they provide the overall direction and framework for the subsequent policies and methods. We consider the following objectives are relevant to the plan changes:

3.4 Indigenous ecosystems and biodiversity

Safeguard Northland’s ecological integrity by:

- a) *Protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna;*
- b) *Maintaining the extent and diversity of indigenous ecosystems and habitats in the region; and*
- c) *Where practicable, enhancing indigenous ecosystems and habitats, particularly where this contributes to the reduction in the overall threat status of regionally and nationally threatened species.*

- 7.1 By taking a precautionary approach towards GMOs, we consider that the PC18 and PC131 provisions meet the objective of safeguarding Northland’s ecological integrity. Professor Heinemann’s evidence has demonstrated that there is scientific uncertainty over the outdoor cultivation of GMOs and the effects that they may have on aspects such as indigenous ecosystems and biodiversity. This is important as both the Far North and Whangarei districts

have significant areas of vegetation that provide habit for indigenous fauna, and regionally and nationally threatened species.

3.5 Enabling economic wellbeing

Northland's natural and physical resources are sustainably managed in a way that is attractive for business and investment that will improve the economic wellbeing of Northland and its communities.

7.2 By taking a precautionary approach towards GMOs, we consider that the PC18 and PC131 provisions meet the objective of enabling the economic wellbeing of Northland and in particular the Far North and Whangarei communities. Opposing submitters have stated that regulating GMOs in the district plans will result in unnecessary duplication and due to the bond and liability provisions, will create a barrier to any resource consent being applied for. Therefore, they argue that by having rules in the district plans it will not enable economic wellbeing. However, we consider that Professor Heinemann's evidence has demonstrated that there is considerable scientific uncertainty over the outdoor cultivation of GMOs. This is an important consideration due to the region's significant agricultural, horticulture, forestry, apiculture and tourism industries and the costs of dealing with unexpected consequences or unintended contamination. The precautionary approach has been supported by the evidence of Dr John Small, who concluded the economic cost of this approach was low, while there are three areas of benefit (market preferences, risk avoidance, policy management costs), which results in an overall net benefit.

3.6 Economic activities – reverse sensitivity and sterilisation

The viability of land and activities important for Northland's economy is protected from the negative impacts of new subdivision, use and development, with particular emphasis on either:

- (a) Reverse sensitivity for existing:*
 - (i) Primary production activities;*
 - (ii) Industrial and commercial activities;*
 - (iii) Mining*; or*
 - (iv) Existing and planned regionally significant infrastructure; or*
- (b) Sterilisation of:*
 - (i) Land with regionally significant mineral resources; or*
 - (ii) Land which is likely to be used for regionally significant infrastructure.*

**Includes aggregates and other minerals.*

- 7.3 By taking a precautionary approach towards GMOs, we consider that the PC18 and PC131 provisions meet this objective regarding reverse sensitivity and sterilisation. Concerns of this nature were presented in the evidence given by GE Free NZ and raised in other submissions. This was of particular concern to submitters that represented, operated or were consumers of organic products. It is considered that these concerns are valid as per the evidence presented by Professor Heinemann, and due to the fact in many instances a perception of an effect alone can result in reverse sensitivity. For example, it is arguable that organic consumers wouldn't purchase organic products known to be grown next to a GMO crop, and as a result organic growers may feel pressured to either stop growing or relocate their operations due to concerns over potential contamination. These issues would also be applicable to conventional growers. The evidence presented by Mr Martin Robinson demonstrated that his growing opportunities had been affected by a change in management of his neighbours land (from organic to conventional), where he felt he had to create an internal buffer to manage effects being created on adjoining land. By regulating GMOs through district plans we consider that appropriate regard and weighting can be given to reverse sensitivity and land sterilisation issues.

3.12 Tangata whenua role in decision-making

Tangata whenua kaitiaki role is recognised and provided for in decision-making over natural and physical resources.

- 7.4 We consider this objective is relevant as submitters representing tangata whenua have raised concerns over the uncertainty of GMOs and the adverse impact on the environment that could occur if they are not managed via a precautionary approach. In some instances, a preference for total prohibition has been stated due to the uncertainty over outdoor GMOs (this is discussed further under point ix. below). Evidence has been submitted that iwi and hapu in Northland during a GMO hui in 2012 at Kaikohe confirmed this position. It has been demonstrated through submissions and evidence submitted at the hearing that the approach being taken in the plan changes are generally supported by tangata whenua and some iwi / hapu management plans (this is discussed separately under point xiii).

Point iv. Controlled Activity Status

8. We have reviewed the Statement of Primary Evidence by Dr Mark Bellingham dated August 2015. As highlighted by the Committee, Dr Bellingham's evidence has been prepared with specific reference to the Proposed Auckland Unitary Plan ("PAUP") GMO provisions and without any reference or consideration of the PC18 and PC131 provisions. The weighting that should be attributed to Dr Bellingham's evidence is addressed in Mr Mathias's legal submissions. Notwithstanding the Committee's eventual position on this matter, we have addressed Dr Bellingham's recommendation of a controlled activity status below as it would apply to the PC18 and PC131 provisions.
9. Dr Bellingham's position is that GMOs that have been approved for general release by the EPA following field trials under the HSNO Act should be provided for as a controlled activity, rather than a prohibited activity as proposed in the PC18 and PC131 provisions.

10. We do not support Dr Bellingham’s position and maintain that a prohibited activity status for outdoor releases is appropriate for the following reasons:
- 10.1 A precautionary approach to the management of GMOs in PC131 and PC18 is appropriate given that scientific uncertainty exists. The evidence of Professor Heinemann clearly highlights that there is scientific uncertainty about the effect of the outdoor release of GMOs. In our view, the scientific uncertainty about the effects of GMO releases mean that it would not be appropriate to recommend any other activity status.
- 10.2 Dr Small’s evidence has demonstrated that there is an economic benefit in designating a prohibited activity status for outdoor release of GMOs and the potential costs of this course of action are modest. In our view, Dr Small’s evidence is comprehensive and compelling and provides a sound basis to conclude that there is a benefit in prohibiting outdoor releases of GMOs.
- 10.3 The GMO provisions are adaptive as well as precautionary. A discretionary activity status is provided for field trials (where prior approval has been obtained from the EPA). This means that should a GMO be proven to be safe and a net benefit can be provided, the provisions provide a framework for the plans to be changed to enable their outdoor use.
- 10.4 The GMO provisions represent an appropriate response to the wide public concern, including from Māori, expressed in the Whangarei and Far North communities during consultation and submissions.
- 10.5 Pursuant to section 104A of the RMA, a consent authority must grant consent to a controlled activity¹ and can impose conditions only for matters over which control is reserved. In our view, this would mean that decisions for resource consents for GMOs would become a “fait accompli” for the Whangarei and Far North communities once the EPA have approved a GMO for general release under the HSNO Act.

¹ Unless there is insufficient information to determine whether or not the activity is a controlled activity

Point vii. Containment of Field Trials

11. This is a difficult question to respond to as the management of containment would depend on the nature of the GMO, the nature of the outdoor field trial and the surrounding environment. Therefore, in response we have given regard to the proposed assessment criteria for outdoor field trials in the plan changes.
12. To apply for a discretionary consent, the information specified in 19.6.2.1 and GMO.2.3 must be provided. This includes evidence of approval from the EPA for the specific GMO which consent is sought. Requirements for field trials are outlined in sections 44, 44A, 45 and 45A and in more detail in schedule 3 of HSNO. All these requirements will have been judged to have been met before an approval is gained from the EPA for a field trial. Thus, they will apply to any application for a discretionary consent for a field trial from council.
13. Council then has the ability to apply further conditions if considered necessary or to decline the application if judged the effects cannot be avoided, remedied or mitigated. One of these conditions is the ability to require bonds to address possible harm from the trial which EPA cannot do under HSNO. The PC18 and PC131 provisions contain performance standards for field trials, bond requirements, monitoring requirements and assessment criteria in relation to field trials.
14. All these indicate how containment of a field trial will be achieved. Exact details on how they would work in a practice would depend on what the trial is and what the GMO is that is being trialled. These information requirements establish that the responsibility sits with the applicant to demonstrate to Council, or its delegated officer, that containment controls can be put in place and that they would work in a practical sense, and that there was a robust contingency plan if there was human error or any unexpected outcomes. If inadequate information was provided then in accordance with s104(6) of the RMA, the application could be declined.

Point ix. Total Prohibition

15. We maintain the position in our s42 Report. We do not support the request for total prohibition through making field trials a prohibited activity status rather than a discretionary activity for the following reasons:

15.1 A discretionary activity status for field trials is an important part of the adaptive management approach taken in plan changes. In our view, it is important that the GMO provisions do not totally foreclose potential opportunities for the outdoor use of GMOs in the future, should new evidence demonstrate that a particular GMO is safe and provides a net benefit.

15.2 Field trials are an important component in obtaining evidence and we consider that a prohibited activity status would unduly restrict them. We acknowledge the concerns raised by some of the submitters regarding the ability to adequately contain a field trial. We have addressed how the containment of a field trial would work in a practical sense in point vii. above.

15.3 All applications for resource consent under the GMO provisions must be publically notified. Therefore, any resource consent application for a field trial would provide for input from the community through the public notification process. This will allow for the concerns raised in submissions to be appropriately considered on a case by case basis.

15.4 As a discretionary activity, the Councils would have the discretion to decline the application or impose further conditions.

Point x. Significant Issue

16. Objectives 19.3.2 and GMO.2.1.2 clearly identify that the outdoor use of GMOs is a significant resource management issue identified by the Whangarei and Far North communities.

17. PC18 includes an issue statement in section 19.1.1. It is further considered that by not taking a precautionary approach to GMOs it could have an adverse impact on rural sustainability, partnership with tangata whenua, indigenous flora and fauna and

heritage, which are significant resource management issues identified in the Far North District Plan.

18. PC131 does not include an issue statement like the Far North Plan. The Whangarei District Plan does not have significant resource management issues in its rolling review structure and this is not required under the RMA for district councils. However, in section GMO1.1 – Description and Expectations – the first paragraph contains a statement to the same effect.
19. GMOs was identified in the s32 report (section 2.4) as being a significant issue for the community. This part of the s32 report and the evidence submitted by Dr Kerry Grundy provides the context of why the Inter Council Working Party was created for GMOs, and how it was identified as a significant issue for Northland communities. Section 2.4.2 of the s32 report details the Maori perspective. This is important as many of Northland's communities have a high Maori population in relation to other parts of New Zealand.
20. We therefore consider that it has been demonstrated that GMOs are a significant issue for the Whangarei and Far North communities including iwi and hapu. This has been demonstrated by the creation of the Inter Council Working Party, that the issue has continued be of concern since the early 2000's and the extent of submissions in support that the plan changes have generated.

Point xii. Iwi / Hapu Management Plans

21. Iwi and Hapu Management Plans were referenced in Paragraphs 32 – 36 of the s42A Report. We identified seven formally recognised Iwi and Hapu Management Plans for the Far North District and four for the Whangarei District. It is noted that two of the formally recognised Iwi and Hapu Management Plans apply to both districts.
22. We summarised in paragraphs 36 of the s42 Report that these documents generally opposed the release of GMOs to the environment and advocate for a precautionary approach to GMOs.

23. We understand that the Committee would like a more detailed analysis of each of the recognised iwi and hapu management plans. This is provided below:
24. Far North District:
- 24.1 Ngati Kuta ki Te Rawhiti Hapu Management Plan – Genetic Engineering is addressed in section 2.5 of this document. Ngati Kuta favour a precautionary approach based on scientific uncertainty and support a full and open process of consultation with hapu and the general public before any consent is granted.
- 24.2 Ngati Rehia Environmental Management Plan – Genetic engineering and modification is addressed in section 10.7 of this document. Ngati Rehia opposes GMO releases on the basis that it is contrary to whakapapa, represents untested dangers and is not essential to human wellbeing. Ngati Rehia consider that the control of GE is a central government issue, but until flaws in the legislation are addressed, local government should prohibit GE releases.
- 24.3 Nga Ture mo Te Taiao o Te Roroa: Te Roroa Iwi Environmental Policy Document – Genetic engineering is addressed in section 21 of this document. Te Roroa oppose GMO releases on the basis that it is contrary to whakapapa, represents untested dangers and is not essential to human wellbeing. Te Roroa consider that the control of GE is a central government issue, but until flaws in the legislation are addressed, local government should prohibit GE releases.
- 24.4 Kia matau, kia mohio e ora ana Te U Kai Po Iwi Environmental Management Plan o Nga Hapu o Whaingaroa – this document contains no specific reference to GMOs or genetic engineering.
- 24.5 Te Kahukura a Ngāti Korokoro, Ngāti Wharara me Te Poukā Hapu Environmental Management Plan – GMOs is addressed on page 39 of this document. The Hapū oppose the introduction of GMOs and support a GE Free rohe on the basis that it's contrary to whakapapa and tikanga, represents untested dangers and is in no way essential to human wellbeing. In addition,

the Hapū request that the costs of clean-up from any accidental or deliberate release of GMOs lie with Central Government or the user.

25. Whangarei District:

25.1 Patuharakeke Hapu Environmental Management Plan – Genetic Engineering is addressed in section 5.11 of this document. Patuharakeke support a precautionary approach to GMOs until it is adequately proven that the benefits of GMOs do not endanger their environment or mokopuna. Specific support is given to WDC's GMO provisions. In Patuharakeke's experience the tangata whenua consultation and engagement process for applications under the EPA is markedly inferior than what occurs under the RM Act.

25.2 Ngati Hau Hapu Environmental Management Plan – Biogenetic Engineering and Modification is addressed on page 113 of this document. Ngati Hau does not support the use of genetic engineering including research, trials and tests within the Ngati Hau rohe. Ngati Hau will consider requests for exemptions to this policy if it can be demonstrated that there will be no detrimental effects on the environment, local ecosystems, flora, fauna, wildlife and the Mauri and wairua.

26. Both Districts:

26.1 Te iwi o Ngatiwai Iwi Environmental Policy Document – GMOs is addressed in section 9.5.8 of this document. Ngatiwai support a precautionary approach to GMOs by councils until all risks can be fully understood. Until such time, a moratorium should be placed on all genetic engineering projects within Ngatiwai's rohe pending written approval of Tangata Whenua.

26.2 Nga tikanga mo te Taiao o Ngati Hine: Ngati Hine Iwi Environmental Management Plan – Genetic diversity is addressed in section 30 of this document. Ngati Hine oppose GMO releases on the basis that it is contrary to whakapapa, represents untested dangers and is not essential to human wellbeing. Ngati Hine consider that the control of GE is a central government

issue, but until flaws in the legislation are addressed, local government should prohibit GE releases.

3. Typographical ‘Tidy Ups’

27. The Committee advised of some typographical errors sighted in the notified wording of Plan Change 18 (FNDC). We reviewed the sections referred to us at the hearing:

27.1 19.6.1.1(b) – The Committee highlighted that the word ‘modified’ was erroneously left out of this sentence. Accordingly, we recommend the following change:

PC18 – Provision 19.6.1.1(b) <u>The use of non-viable genetically modified veterinary vaccines and viable genetically modified veterinary vaccines with a specific delivery dose supervised by a veterinarian²⁹⁴.</u>
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27.2 19.6.2.2 – Concern was raised by the Committee over the wording ‘akin to a bank guarantee’, as it was considered perhaps to limit applicant’s to using a bank to provide any required bond. However, we consider that the wording does not limit an applicant to a bank guarantee, as the wording ‘akin’ means similar for example, therefore other bond options could be considered by Council. We recommend that the wording is not altered.

27.3 19.6.3 – The Committee noted that prohibited had two t’s in the heading. Accordingly, we recommend the following change:

PC18 – Provision 19.6.3 <u>19.6.3 PROHIBITTED ACTIVITIES</u>
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27.4 PC18 Definitions Chapter 3 – the definition of genetically modified organism release refers to the Conservation Act 19874, and should be 1987. Accordingly, we recommend the following change:

PC18 – Definitions Chapter 3

GENETICALLY MODIFIED ORGANISM RELEASE

To allow the organism to move within New Zealand free of any restrictions other than those imposed in accordance with the Biosecurity Act 1993 or the Conservation Act 19874.

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