#### Inter-council Working Party on GMO Risk Evaluation and Management Options

Auckland Regional Council
Far North District Council
Kaipara District Council
Northland Regional Council
Rodney District Council
Waitakere City Council
Whangarei District Council

11 June 2010

Hon Nick Smith Minister for the Environment Parliament Buildings Wellington

#### Dear Minister

Council's of Northland and Auckland recently conducted a detailed public opinion survey of attitudes to genetically modified organisms (GMOs) and the management of them within the Northland and Auckland regions. This is the latest step in an initiative being pursued to address strong community concerns relating to GMOs. I write to detail the results of the polling, outline their place in the overall initiative, and seek your response to a series of questions to inform our next steps.

By way of background, local government sought changes to the Hazardous Substances and New Organisms Act 1996 (HSNO) in 2003 when it was being recast to facilitate conditional release of GMOs. In particular, it was submitted that changes to the amending legislation were required to at least allow councils to meet their responsibilities under other statutes when addressing GMOs. They currently have no more influence on decisions made by the Environmental Risk Management Authority (ERMA) than any other submitter or individual.

The councils of the Northland and Auckland regions have been subject to significant and continuous lobbying by their communities since the moratorium on GMO release was lifted in 2003. This has resulted in large numbers of submissions to annual plans, long-term council community plans, and district plans, together with petitions to councils, lobbying of councillors, and constant communication with staff.

In response, an Inter-council Working Party on GMO Risk Evaluation and Management Options (the Working Party) was formed to evaluate the risks to local bodies and their communities from the outdoor use of GMOs together with response options to those risks. The Working Party comprises the councils listed at the top of

Responsibilities under the Local Government Act and Resource Management Act were those highlighted by LGNZ in its submission.

this letter, along with Auckland and North Shore City Councils as observers. It has commissioned a series of reports to investigate the nature and extent of risks posed by GMOs and the mechanisms available to address these. A particular gap in the legislation the reports identified was the lack of liability under HSNO for damage arising as a result of an activity carried out in accordance with an ERMA approval (as further detailed in Appendix 1). Also identified were a range of response options that could be put in place through changes to the relevant councils' planning documents under the Resource Management Act 1991 (RMA).

A poll of residents conducted as part of the assessment of these options surveyed each constituency separately and yielded the following results (see Appendix 2 for details):

- More than two thirds of the residents in each area want councils to have a role in regulating the use of GM plants and animals, either by setting local rules or acting through the ERMA process. (Support by area ranged from 66% to 76%.)
- Around two thirds favour regulation of at least a strength that would make users of these GMOs legally responsible for any environmental or economic harm either through local regulation or by way of changes to national legislation. (Support by area ranged from 63% to 72%.)
- Around half the residents want councils to have the right to prohibit GM plants and animals, either by setting local rules or allowing communities, through their councils, the right to reject use of a particular GMO in its area when ERMA is processing applications. (Support by area ranged from 44% to 55%.)

The purpose of the poll was to gauge the degree to which communities are willing to accept risks associated with the outdoor use of GMOs, and to test options for responding to these risks. We took considerable care to frame the questions neutrally and the communities have clearly responded that they want fundamental change to the management of GMOs that addresses their concerns, particularly over liability, and/or allows for councils to have a role in the regulation of GMOs.

These changes can be secured by local government under the RMA or through central government amending HSNO. The Working Party seeks an understanding of the Government's position on such changes to HSNO, particularly those described in the following questions.

Councils clearly do not wish to duplicate Government reforms that would address community concerns so it is hoped that this prior consultation will identify those measures the Government intends to act on independently. To this end, the Working Party would appreciate it if you would answer each of the questions below that address key issues before it.

### **Questions:**

Please note that some of the questions below canvas responses that are to an extent alternatives such that it is unlikely to be optimal to pursue all of these together.<sup>2</sup>

### 1. Amending HSNO for ERMA to Recognise Local Government Policy

Is the Government willing to amend HSNO to provide for the following: (Note that while it is recognised any such change would likely be at a time ERMA was subsumed into the new Environmental Protection Authority (EPA), the current decision-making authority, ERMA, is referred to in this and subsequent questions for simplicity.)

- a) ERMA would be required to recognise in its decisions, the policy statements on GMO activities issued by local authorities. That is, if a local body issued a conforming policy statement, ERMA could only authorise a release within that local authority's jurisdiction if conditions were placed on the approval that gave full effect to the authority's current policy.
- b) If a local authority makes a submission to ERMA with respect to a particular application before it, the local authority may stipulate conditions to attach to an approval granted by ERMA that is applicable within that authority's district.

The rationale for this amendment to HSNO is to provide a simpler means for local government to achieve the same regulatory effect as is currently available to it under the RMA. It would provide a simpler means of achieving the form of outcome supported by two thirds or more of the residents in each Northland/Auckland jurisdiction, while also giving greater certainty to ERMA applicants.

It is recognised that procedures would need to be developed to ensure that local authorities notified ERMA of policies described in (a), and that both these and conditions put forward under (b) would need to be of a form consistent with ERMA's powers and responsibilities.

The specific question we seek an answer to is, pre-supposing satisfactory arrangements in respect of such detail, is the Government willing in principle to make such an amendment to HSNO to apply to GMO outdoor activities?

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A very similar set of questions was put to the previous administration in 2006. We believe it is important to put these questions again not just because the current administration may well have different policies but also because of the experience gained in assessing GM trials and the economic prospects of GM in the interim.

#### 2. Strict Liability Under HSNO

The Crown Law opinion<sup>3</sup> on GMO matters that the Ministry for the Environment (MFE) often relies on considered only one type of financial risk that GMO activities present to communities – that of a council's legal liability for environmental damage. Among the risks not considered was the risk of councils facing environmental cleanup costs and constituents facing losses from GM contamination. This was in spite of the Far North District Council having sought to have these issues included in Crown Law's terms of reference when the Ministry was consulting on its scope.

The recent poll found strong support for those undertaking GMO activities in the outdoors to be held strictly liable for any harm caused. Is the Government willing to amend HSNO such that a party is liable in damages for any loss or damage caused by any act or omission resulting from an outdoor GMO activity, irrespective of whether that party is operating under an ERMA approval?

### 3. Reimbursement of Councils for GMO Cleanup Costs

At present, no Government agency is obliged to eradicate or control a GMO that is approved for some form of outdoor use by ERMA and subsequently causes harm. This results in a financial exposure for local government if central government elects not to undertake control measures.

Is the Government willing to amend HSNO such that if central government elects not to undertake control measures on a GMO that has been released and causes demonstrable adverse effects, the Government will reimburse local authorities for actual and reasonable cleanup measures that are required?

### 4. Government Indemnity for Councils

Is the Government, in principle, willing to enter into an indemnity deed with any local authority seeking this, such that the deed would provide for reimbursement to councils and/or their constituents as a result of any or all of the following:

- a) The need to clean up after a GMO activity approved by ERMA, but which nonetheless has caused environmental damage beyond the site of the authorised activity;
- b) Directly attributable financial losses to third parties resulting from GMO outdoor activities; and
- c) Legal actions taken against councils directly as a result of GMO outdoor activities?

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<sup>&</sup>lt;sup>3</sup> Crown Law opinion of 8 August 2003, provided to Ministry for the Environment.

### 5. Making Precaution Mandatory for ERMA

In its present form, HSNO s7 states:

"All persons exercising functions, powers, and duties under this Act, ... shall **take into account the need for caution** in managing adverse effects where there is scientific and technical uncertainty about those effects." [Emphasis added]

Is the Government willing to amend HSNO to make it mandatory for ERMA to observe the precautionary principle when exercising functions, powers, and duties, rather than leaving this as a matter of discretion<sup>4</sup> for ERMA?

### **6.** Excluding Specific GM Crops from a District

The Royal Commission on Genetic Modification recommended:<sup>5</sup>

that the methodology for implementing section 6(e) of the Hazardous Substances and New Organisms Act 1996 be made more specific to:

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• 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.

While the Government's response to the Commission's report noted "that individual producers will be able to produce to standards of their choice, additional to any controls imposed by ERMA, as their specific markets demand", in light of experience gained since 2003 with GMO contamination, would the Government support the change to ERMA's decision-making methodology to include that recommended by the Royal Commission as noted above?

#### 7. **Regional Exclusion Zones**

The Royal Commission on Genetic Modification also raised the possibility of regional genetic modification-free zones and stated that such a proposal might be achievable under the RMA:<sup>7</sup>

Genetically modified and non-genetically modified crops might be permitted or prohibited on a crop-by-crop and region-by region basis.

Note that ERMA stated in 2002 that: "The wording in the Act is very permissive, such that the Authority would be acting lawfully in deciding that caution was not warranted, provided it explained why. In practice, the Authority has generally exercised caution". ERMA, *Approach to Risk*, December 2002, p 3.

Recommendation 13.1 (Benefit assessment)

Cabinet Policy Committee Minute, Government Response to the Royal Commission on Genetic Modification: Report on Managing the Effects of GM Organisms and Co-existence in Primary Production: Paper 1: Overview, POL Min (03) 8/6, 9 April 2003, p 2.

Report of the Royal Commission on Genetic Modification, 2001, Report and Recommendations, p. 337-338.

This would require a genetically modified crop to be designated as a different use from a non-genetically modified crop of the same species... It may also be that over a period of time an aggregation of genetic modification or non-genetic modification uses became characteristic of particular regions and that identifiable regional differences emerged. These distinctions in land use might be written into regional or district plans....

- a) Does the Government recognise advantages to establishing exclusion zones for some or all GMOs, both to protect existing non-genetically modified produce from actual or perceived contamination, and to protect and enhance market positions developed by non-GM producers, including those relating to tourism?
- b) Is the Government willing to amend HSNO to enable local government to more readily establish exclusion zones for some or all GMOs under that Act? Alternatively, does Government support local authorities establishing such exclusion zones under the RMA?

### 8. Local or Regional Management for Cultural Objectives

The submissions by Maori, both oral and written, received through the Maori consultation programme of workshops and hui conducted as part of the Royal Commission on Genetic Modification were overwhelmingly opposed to genetic modification.<sup>8</sup>

Given the strong resistance to genetic modification from tangata whenua, what scope does the Government envisage for local authorities to exercise local or regional regulation of outdoor GMO activities to take account of the views of tangata whenua?

- a) Is the Government willing to amend HSNO to enable this?
- b) Alternatively, does the Government see regulation under the RMA as an appropriate mechanism for exercising local and/or regional management of GMO activities for cultural reasons?

### 9. Council's Duty of Care and Compensation for Costs

Dr Royden Somerville QC, maintained in his legal opinion<sup>9</sup> that both the Local Government Act 2002 (LGA) and the RMA impose a 'duty of care' on local authorities when making decisions that affect their constituents. Failure to exercise that duty of care may have adverse consequences for a local authority. For example, Dr Somerville stated:

"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

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Report of the Royal Commission on Genetic Modification. 2001. Appendix 3, p. 153.

Opinion on land use controls and GMOs, 31 March 2005, p.4-5.

the High Court for the way in which it exercises any discretion it has to act or not to act". ... "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".

Will the Government agree to meet the costs faced by any council that:

- a) Is subject to a successful judicial review for not exercising its duty of care under the RMA or LGA if it did not intervene to manage the effects of GMO land uses under the RMA and/or LGA and suffered costs as a result? or
- b) Suffered claims against it for damage occurring as a result of not exercising its duty of care under the RMA or LGA in the management of effects of GMO land uses under the RMA and/or LGA?

The Working Party sincerely appreciates your willingness to consider these questions and if there are any matters on which you would like clarification, please direct enquires to me in the first instance.

Yours sincerely

Dr Kerry Grundy Chairman Inter-council Working Party on GMO Risk Evaluation and Management Options Whangarei District Council Private Bag 9023, Whangarei 09 430 4200

# Appendix 1: Risks and Deficiencies in National Regulatory Regime

### **Nature and Scope of Risks**

A series of risks to councils and their constituents were identified in reports commissioned by the Working Party and can be classed under three general headings.<sup>10</sup>

#### Environmental risks include:

- Adverse effects on non-target species, including indigenous flora and fauna;
- GM plants becoming invasive and disrupting ecosystems;
- Altered genes transferring to other organisms; and
- Development of herbicide or pesticide resistance creating 'super-weeds' or 'super-pests'.

The more complex GMOs pose additional risks simply because past experience provides little basis for predicting their effects.

#### Economic risks include:

- Loss of income (and/or legal action) through contamination (or even perceived contamination) of non-GMO food products triggering market rejection of produce;
- Negative effects on marketing and branding opportunities, including damage to regional marketing initiatives such as the 'Naturally Northland' brand, and damage to tourism;
- Costs associated with environmental damage, such as cleanup costs for invasive weeds and pests in reserves, parks, and open space.

#### Socio-cultural risks include:

- Effects on Maori cultural beliefs (the concepts of whakapapa, mauri, tikanga, and kaitiakitanga, for example);
- Ethical concerns, such as mixing genes from different species and use of human genes;
- Effects or perceived effects on human health of food derived from GMOs.

Against these risks, there are important deficiencies in the national level regulation of GMOs. A key gap is that there is no liability under HSNO for damage arising as a result of an activity carried out in accordance with an approval from ERMA. Common law actions will very rarely be an effective remedy so affected parties will tend to bear any losses arising from unexpected events and ineffective regulation of GMOs. While economic damage resulting from GM contamination will in the first instance fall on individual constituents, such damage can occur across wide groupings of producers and thus become a community concern. Councils may also be exposed to damage and financial costs.

Further, there is no requirement under HSNO for applicants to prove financial fitness and no requirement for bonds to be posted in order to recover costs should damage

Community Management of GMOs: Risks and Response Options, 2005. Report for WDC, FNDC, KDC, RDC and WCC. Simon Terry Associates and Mitchell Partnerships.

occur. In consequence, parties who may cause damage but do not have sufficient resources to cover resulting costs are not held financially accountable and, once again, costs will tend to fall on affected parties (private persons, communities and local authorities).

Another important deficiency is that HSNO makes the exercise of precaution a matter for ERMA's discretion. Precaution is an option, not a requirement. This results in a lack of surety of outcome for local government on two levels:

- Whether ERMA will agree with and act at all on specific concerns that may be held by a council and its community; and
- Whether, for the risks ERMA concurs need addressing, it will exercise the same degree of caution as would a council and its community.

The reports prepared for the Working Party identified a range of response options that could be put in place through changes to each council's district plan. Northland and Auckland councils have developed general policies through their long term council community plans to guide their assessment, generally requiring precaution with respect to the management of GMO risks and many stating that liability concerns are to be resolved before any GMO release occurs.<sup>11</sup>

#### **Economic Risks and Liability**

Those who develop or use GMOs have the potential to generate economic risks that extend well beyond their own operations. While they are the only ones bearing losses arising from failure of the end product to sell or if it carries a defect, GMOs have a well demonstrated ability to cause economic harm far beyond the entities that undertake the original land use. Such impacts on third parties are termed "spillover" effects. A major source of risk in this regard is that cultivation of GM crops will cause economic damage through contamination of non-GM crops. This can take place physically or arise as a result of market perceptions.

Physical Contamination: At its simplest, this can be contamination of a single crop or a single company's production. In New Zealand, the Gisborne-based company Sunrise Coast experienced this in August 2003 when corn it grew for processing into a product for the Japanese market was rejected. Routine testing by the Japanese pizza maker that was to purchase the product showed trace contamination of 0.05%. This resulted in rejection of the entire line and the company estimates its losses were close to \$500,000. In the US, a judgment against Bayer in April 2010 saw it ordered to pay damages of \$2 million to two farmers that had their rice crops contaminated with Bayer's LibertyLink rice. This is the first of more than 1,000 cases being taken by affected farmers and seems set to rival the StarLink corn contamination incident that cost Adventis around \$1 billion. An estimate of the financial harm caused by Bayer's LibertyLink rice has put total costs at between \$741 million and \$1.3 billion.

Perceived Contamination: Perceptions of contamination can be as damaging as contamination itself. This form of market rejection need not be based on doubt about

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Policies in place as of 2006 were detailed in *Community Management of GMOs: Risks and Response Options*, 2005, pages 1 to 3.

the adequacy of segregation systems. It may be made by market gatekeepers (wholesale buyers) who simply perceive damage to a country image (Brand New Zealand), a regional brand (Naturally Northland), or a particular exporter's brand. It may equally be as a result of end use consumers making such a judgement. Heinz Watties has stated: "The implications for any GM contamination, real or perceived, anywhere in our supply chain, or even just anywhere in NZ, are potentially damaging for all of our business, such is the level of sensitivity of many of our customers to this issue."

Market research undertaken for the New Zealand Government by the National Research Bureau in 2003 attempted to measure the extent to which GM products could tarnish conventional foods merely by association and surveyed consumers in the UK, US and Australia. Asked whether they would buy New Zealand fruit and dairy products that were not themselves GM, between 20% and 30% said they would cease to purchase, irrespective of price, if New Zealand was at that time growing related GM products. <sup>12</sup>

The absence of any remedy for financial harm suffered by a constituent or a council trading activity if no ERMA condition has been breached is a serious gap in the HSNO regulatory framework. Conventional farmers who incur financial losses as a result of GMO contamination could launch a common law action but MfE acknowledges these mechanisms are generally "inappropriate" and "have failed to manage pollution". To better describe which entities carry liability in which circumstances, the table on the following page sets out a series of scenarios.

#### **Recent Field Trial Experience**

The reliance that can be placed on ERMA to shield non-GM producers and other affected parties from harm has been significantly eroded by recent field trial incidents. All field trials in operation in recent years have been under the auspices of CRIs and the greatest number by Crop and Food (now part of the new CRI, Plant and Food).

The most serious incident was in early 2009 when Crop and Food's Brassica trial was halted after GM trial plants were found to be flowering in an open field. ERMA control number 1.8 for the trial stated: "Brassica oleracea plants shall be prevented from producing open flowers in the field test site". This is to avoid GM pollen potentially mixing with conventional varieties of cabbage, leek and kale. The discovery of plants flowering led to a confidential internal report that stated: "This discovery has further reinforced our dissatisfaction with the way this trial has been conducted and justifies the immediate application to cancel the approval of the Operator ... [and] suspension of all GM field trials". 13

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MfE (2003) Economic Risks and Opportunities from the Release of Genetically Modified Organisms in New Zealand, http://www.mfe.govt.nz/publications/organisms/economic-impact-apr03/.

Stevens P, Ashby N, Griffin W, Lewis D, Ferguson I., *Internal review of procedures in relation to HSNO Act approval controls: ERMA Approval GMF06001 Bt Brassica Field Test*, January 2009, p 8.

# **Liability Scenarios**

In order to clarify the extent to which liability is allocated (or not allocated) for harm resulting from GMO activities, the following identifies a series of scenario events, any parties that are strictly liable, and the ultimate risk bearers.

Scenario Event	Parties Strictly Liable	Ultimate Risk Bearer
Unauthorised release – not ERMA approved (eg through imported seed contamination)	If unintended release, MAF tends to pick up most costs under Biosecurity Act, though the agent responsible also incurs costs. (If a deliberate release, agent faces all costs if can be identified)	Crown
Release conducted as Authorised by ERMA. Financial damage results (eg returns lost due to GMO contamination)	None	Farmers and other affected parties
Release conducted as Authorised by ERMA. Environmental damage results (eg superweeds needing to be controlled)	No liability under HSNO. Applicant may face RMA enforcement order for cleanup costs	Councils, farmers and other affected parties for financial losses beyond cleanup costs. If cleanup costs are not met (eg through the agent being unable to pay) affected parties may also carry these
Release conducted as Authorised by ERMA Damage to human health results (eg contamination of food crop by pharma crop)	No liability under HSNO	Farmers, food purchasers and other affected parties, including the Crown to the extent claims are accepted by ACC
Conditional Release not conducted as Authorised by ERMA and breach of controls causes damage	Applicant liable under HSNO to extent harm caused by breach	Applicant liable for the greater of: - up to \$10m, - 10% of turnover, or - three times value of the commercial gain, to the extent funds are available. Affected parties must meet costs thereafter
Unconditional Release, or Field Trial not conducted as Authorised by ERMA, and causes damage	No liability under HSNO	Councils, farmers and/or other affected parties for financial losses beyond cleanup costs.

# **Appendix 2: Colmar Brunton Research Reports**

Colmar Brunton surveyed residents in each of the jurisdictions represented by the councils that are members of the Working Party – covering all of the Northland and Auckland regions. In most districts, a representative sample of 400 people was recruited. To compile regional results, additional districts were polled in the Auckland area and results were weighted by population (unless otherwise specified). <sup>14</sup>

In total, the sample covers over a third of the population of New Zealand and represents the first detailed investigation of attitudes to GMOs at the local level and to options for addressing risks. Colmar Brunton was asked to design the survey in a way that would minimise the opportunity for bias and care was taken to consider different ways of structuring the questions to best draw out the opinions of residents and test specific proposals for reform.

Attached are the aggregated survey results for the Northland and Auckland regions. These provide an overview of the more detailed district results that are also available on request.

The councils that funded the survey through the Working Party are: Whangarei, Far North, Kaipara and Rodney District Councils, Waitakere City Council, and Auckland Regional Council.