

## **Managing Risks Associated with the Outdoor Use of Genetically Modified Organisms Proposed Plan Change, Section 32 Report, and Legal Opinion**

**Cover Note by Dr Kerry Grundy**

**Convener of the Inter-council Working Party on GMO Risk Evaluation and Management Options**

The Inter-council Working Party on GMO Risk Evaluation and Management Options (the Working Party) comprises Auckland Council, Far North District Council, Kaipara District Council and Whangarei District Council. Northland Regional Council is a member but did not take part in the present initiative.

At its meeting on 10 February 2012 the Working Party passed the following resolutions:

- (e) *That the Working Party proceeds consistent with the resolutions of the participating Working Party councils, including:*
  - (i) *The preparation of a section 32 report including draft provisions for a possible joint district/unitary plan change.*
  - (ii) *That the cost of (i) be identified as a basis for joint funding provision by the participating councils prior to work commencing on (i).*
- (f) *That funding of resolution (e) be implemented based on an equitable and practical model taking into account changes in council representation on the Working Party, noting that funding will be subject to the respective councils' LTP confirmation.*
- (g) *That the section 32 report and draft plan provisions, once completed, be referred to the participating member councils on the Working Party for their determination of the next steps and, subject to that determination, a memorandum of understanding between the councils to jointly manage any further statutory process be prepared.*

In accordance with these resolutions, a Proposal and Costings for Services was obtained for the section 32 and draft plan provisions work stream. In addition, a funding model was agreed to by councils on the Working Party. A contract was entered into with the preferred providers, a consortium consisting of Mitchell Partnerships, Simon Terry Associates and Duenorth Ltd. The consortium was chosen to provide these services because of their extensive prior involvement with the Working Party and their familiarity with the complex issues involved. Dr Royden Somerville QC was instructed to provide legal advice with respect to the substance and process of formulating the draft plan provisions and accompanying section 32 analysis. He was also instructed to provide a legal review (opinion) of the completed work to ensure and/or ascertain the robustness of the provisions and section 32 report to withstand legal challenge.

The completed draft district/unitary plan provisions are provided with this covering note. The section 32 report is also provided, along with supporting documentation in a separate volume. Three legal opinions provided by Dr Royden Somerville QC during the investigations of the Working Party are also provided with the covering note. As required under section 32(5) of the RMA, the report represents a summary of the evaluation and analysis required under section 32(1), (3) and (4). Volume 2 – supporting documentation to the section 32 report – provides that in-depth evaluation/analysis and should be considered an essential part of the section 32 evaluation along with the section 32 report.

### **Supporting Documentation**

In response to on-going community concerns over field trials and potential releases of GMOs in Northland/Auckland the Inter-council Working Party on GMO Risk Evaluation and Management Options was formed in 2003. The Working Party commissioned a series of reports to investigate the nature and extent of risks local authorities faced from outdoor activities involving GMOs and response options to those risks.

The first report (*Community Management of GMOs: Issues, Options and Partnership with Government, 2004*) examined the issue of whether local government had jurisdiction under the Local Government Act (LGA) and/or RMA to regulate GMOs. Based upon a legal opinion from Dr Royden Somerville QC, the report found local authorities do have jurisdiction to manage land uses involving GMOs in the environment under the RMA and LGA over and above the regulation prescribed nationally under the Hazardous Substances and

New Organisms Act (HSNO) Act, if such regulation meets the requirements of the RMA, including a section 32 evaluation. This position has been confirmed by both Crown Law and Ministers for the Environment.

The report concluded that provisions in planning documents formulated under the RMA would be the most appropriate mechanism to regulate activities involving GMOs in the environment at a local or regional level.

The report also found that amendment of the HSNO Act to allow territorial and regional authorities to set local and/or regional controls over and above those set nationally by the Environmental Protection Authority (EPA) would provide a more direct means to achieving the desired outcomes sought by a community in regard to GMO uses in its district or region. In addition, should HSNO be amended to put in place a strict liability regime holding the users of GE technology liable for all subsequent damages, this would address one of the main concerns expressed by the community.

As a consequence of the findings of the first report, the Working Party adopted two strategies to address local government and community concerns over the outdoor use of GMOs. First, to lobby Central Government to amend the HSNO Act to allow for greater local government control over GMO uses at a local or regional level, and/or to improve the liability provisions in the HSNO Act to provide a strict liability regime for potential environmental and economic damage. Second, investigate options for regulating the outdoor use of GMOs at a district/regional level under the RMA concurrent with national regulation under HSNO.

In line with the first strategy, a letter was sent by the Working Party to the then Labour Government in 2006 outlining local government and community concerns over the outdoor use of GMOs and requesting the Government to amend the HSNO Act to address those concerns, particularly the lack of liability for potential economic and environmental harm. A response was received by the then Minister for the Environment, the Hon. David Benson-Pope, rejecting those requests. However, the Minister did confirm that local authorities could regulate GMO land uses under the RMA if such regulation met the purpose of the Act and was consistent with the Act's other requirements (these letters are included in the volume of supporting documents to the section 32 report).

The second report commissioned by the Working Party (*Community Management of GMOs II: Risks and Response Options, 2005*) examined in greater depth the risks to local government and their communities in Northland and Auckland posed by the outdoor use of GMOs. A series of risks to councils and their constituents were identified and described. These risks can be classed under three general headings: environmental, economic and socio-cultural, and are described in detail in the report.

Against these risks, important deficiencies in the national level regulation of GMOs were identified. A key gap is that there is no liability under HSNO for damage arising as a result of a GMO activity carried out in accordance with an approval from the EPA. 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 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 (producers, communities and local authorities).

Another important deficiency is that HSNO makes the exercise of precaution a matter for the EPA's discretion. Precaution is an option, not a requirement. The EPA is only required to *consider* the need for caution. This results in a lack of surety of outcome for local government and their communities in regard to the level of precaution the EPA will adopt and apply to its decision making.

The report then proceeds to outline and evaluate various options that are available under the RMA to address the above risks. All options (apart from the do-nothing option) involve inserting provisions in territorial authority district plans or in regional policy statements or regional plans to address in differing ways the potential risks arising from outdoor uses of GMOs.

Firstly, the liability issues could be addressed by way of performance standards in plans or conditions attached to resource consents that require financial accountability for environmental damage and avoidance of economic loss. Consent conditions may be able to be used to recover financial losses. The use of bonds to cover potential damage is also available under the RMA and could be made mandatory in planning documents.

Secondly, the risks posed by different classes of GMOs could be addressed by designating different GMO land uses as either discretionary or prohibited activities in planning documents. The report outlines four options including making all GMO land uses discretionary activities, prohibiting all GMO land uses, along with two different combinations of discretionary and prohibited activities.

The report emphasises that decisions to prohibit GMO land uses are reversible. That is, if particular GMO land uses were shown in the future to be advantageous to the district or region whilst not imposing substantial costs or risks those land uses could be removed from the prohibited status and deemed to be permitted or discretionary activities. On the other hand, decisions to allow GMO land uses are by and large irreversible. Once released to the environment many GMOs are most likely to be there for ever. In addition, once GMOs are released commercially, the district's/region's GE Free status is likely to be permanently lost, along with any marketing and branding advantages that GE Free status afforded.

Finally, the report recommended a joint community consultation programme as the next stage in the GE initiative. Because communities, along with councils, are the ultimate risk bearers of outdoor uses of GMOs it was argued that it is a reasonable expectation to consult with them on the level of risk they are prepared to carry. In this way, councils and their communities can arrive at an acceptable level of risk they are prepared to carry, along with an appropriate management system to lower the risks from GMOs to that agreed level.

All member councils on the Working Party (except Northland Regional Council) agreed to jointly commission and fund a comprehensive telephone survey designed to canvas community views on the management of GMOs and gauge the level of support for local/regional regulation under the RMA, along with preferred regulatory options. Colmar Brunton carried out the poll in July and August 2009 (the aggregated regional results are included in the volume of supporting documents to the section 32 report). The main points arising from the results of the survey are as follows:

- (a) Two thirds or more of the residents polled want local or regional councils to have a role in regulating GMOs in their areas, either by setting local rules or by a change of legislation at the national level. Support in the Auckland region averaged 68% and 74% in Northland.
- (b) Around two thirds of the respondents also favoured 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 (Auckland 64%, Northland 67%).
- (c) The survey indicated that around half the residents (Auckland 44% and Northland 53%) 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 the national regulator, the EPA, is processing applications.
- (d) When questioned whether councils should set rules in addition to those set by the EPA, 40% of Auckland respondents supported this mechanism and 46% of Northland respondents were in support. Amongst those respondents who support their council setting rules, total prohibition is the most favoured level of regulation, with strict liability provisions the next most favoured, and prohibiting only GMOs for food production the third favoured.
- (e) All communities strongly favour making users of GMOs legally responsible for any economic or environmental harm that may result. Support for regulation to make users of GMOs strictly liable for any harm caused ranged from 63% to 72% for individual councils.
- (f) Support for local regulation is strongest amongst Maori, particularly in the Northland region. It is also strongest amongst semi-rural and rural residents while urban views vary by region.
- (g) The poll also found that there is clear support from the Auckland and Northland communities for only producing food that is GM free but strong support for leaving options open for GM plants and animals in the future.

Following the Colmar Brunton survey, a further report was commissioned by the Working Party to analyse and report on a preferred regulatory option under the RMA to manage GMOs at a local/regional level (*Community Management of GMOs III: Recommended Response Option, 2010*). This work is an extension of the analysis in the earlier reports taking into account the results of the Colmar Brunton survey. The report identifies a preferred response option for managing GMOs under the RMA should councils on the Working Party choose to pursue this path. In essence, the report recommends a regulatory approach through district/regional planning documents based upon strong precaution whilst retaining future opportunities.

Under the proposed regime, field trials would be designated discretionary activities whilst commercial releases to the environment would be prohibited activities. This distinction relates to the lower level of risk posed by field trials versus releases to the environment. If, at some time in the future particular GMOs were shown to be beneficial to the district or region and the risks acceptable, the prohibitive status could be changed to discretionary. Discretionary approvals could also have conditions attached requiring strict liability and/or bonds for potential costs, along with monitoring requirements.

In addition, and in line with the alternate strategy adopted by the Working Party to address local government and community concerns over outdoor uses of GMOs, a letter was sent on 11 June 2010 from the Chairman of the Working Party to the National Government, to convey the Colmar Brunton findings indicating community concern in the Northland/Auckland region that current national regulation is deficient (particularly in regard to liability) and does not adequately provide for local community involvement in decisions which affect their areas. A formal response to a number of specific questions was requested concerning the social, economic, cultural and environmental risks associated with the field trialling and release of GMOs and amendment of HSNO was requested to address those risks.

A response was received from the then Minister for the Environment, the Hon. Nick Smith, on 5 August 2010. In short, the response from the Minister clearly indicates that there is no intention by Central Government to address the concerns raised by councils on the Working Party. None of the reform proposals put forward by the Working Party were agreed to. In particular no changes were agreed to in regard to liability provisions. However, the Minister did confirm that local authorities can restrict or prevent the use of GMOs in their respective district or region under the RMA provided that such action meets the relevant requirements of the Act, including a section 32 evaluation (these letters are included in the volume of supporting documents to the section 32 report).

### **Section 32 Report**

When considering possible district/unitary plan provisions, this earlier work was brought together and configured to meet the requirements of section 32 of the RMA. Section 32 – Consideration of alternatives, benefits and costs - requires a local authority to undertake an evaluation of proposed provisions when formulating a planning document, or a change to a planning document, under the RMA. Essentially, the evaluation is to determine whether the proposed objectives are the most appropriate to achieve the purpose of the Act – the sustainable management of natural and physical resources – as set out in section 5, Part II of the Act, and whether the policies, rules or other methods are the most appropriate, efficient and effective for achieving the objectives. This may involve consideration of alternative methods to those proposed. The evaluation is also required to take into account the costs and benefits of the proposed provisions and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.

As described above, the Working Party has carried out a thorough evaluation of the necessity for regulation of GMOs at a district and/or regional level in concert with national regulation over an extended period of 10 years. The section 32 analysis and report shows that the provisions outlined in the proposed plan change do meet the purpose of the RMA and are the most appropriate to achieve that purpose, that the benefits of the proposed provisions outweigh the costs, and the risks of not acting are greater than the risks of acting.

In particular, councils and constituents avoid the risk of incurring substantial financial costs while the cost of the plan change and any contingent costs (including subsequent plan amendment) together would be considerably less than the cost of even one of the minor GM contamination events that have occurred in New Zealand to date. Significant incidents involving GM contamination of non-GM crops or unwanted GMOs

that cause environmental harm would each impose costs measured in millions of dollars. There is no adequate liability law to protect against such costs resulting from releases of GMOs that comply with EPA regulations so avoiding or reducing the risk is consistent with councils exercising their duty of care for potentially affected constituents and for prudent financial management.

The administrative costs involved in establishing the plan change are in effect the cost of avoiding these risks. While the prospect of any particular event occurring would be difficult to attach a probability to, the differential between the risks and the remedy is so large that the cost can be viewed as an insurance policy premium. In addition, costs on a par with a plan change, if not actually a plan change of some form, may in any case prove difficult to avoid if a community is strongly minded to seek a precautionary approach or insists the council monitors any future outdoor uses of GMOs in its jurisdiction. These costs would accrue to individual councils while the cost of a plan change can be shared with other councils on the Working Party.

The section 32 evaluation confirmed there are significant risks to local government and their communities from outdoor use of GMOs, including environmental, economic and socio-cultural risks. These risks are difficult to quantify through normal risk analysis given the uncertainty (including scientific uncertainty) and lack of information about those risks. Genetic modification is a relatively new and fast developing technology. There is a lack of scientific agreement on the long term effects of releasing GMOs into the environment and a lack of information on long term environmental consequences. There is uncertainty and disagreement as to the short and long term economic benefits and dis-benefits from GMO crops and animals. And there are different cultural views as to the appropriateness of GM technology and GMOs. The views of Maori are particularly important in this respect.

In addition, the potential adverse effects of releasing GMOs into the environment could be significant – including possible major (and long term) harm. Moreover, these effects could be irreversible. Once released to the environment it is, in most instances, impossible to eradicate such organisms. They are, in effect, there for ever, whatever the consequences.

Given the above circumstances, along with community preferences expressed in the Colmar Brunton survey and in public submissions to, and lobbying of, councils in Northland/Auckland, the section 32 analysis and report have concluded that a strong precautionary approach to the release of GMOs to the environment is warranted. Such an approach is legitimised by, and indeed inherent to, the RMA, particularly section 32(4)(b), which requires a section 32 evaluation to take into account 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, and section 3 – the meaning of effect – which provides for any future effect and any potential effect of low probability which has a high potential impact.

To this end, the section 32 evaluation and report support the prohibition of releases of GMOs to the environment and the requirement for consent as a discretionary activity for GMO field trials. The section 32 analysis also supports provisions that set strict liability rules for all potential economic and environmental harm and the requirement for bonds and proof of financial fitness. However, the section 32 evaluation and report acknowledge the desirability of keeping future options open, and thus support an adaptive risk management approach that would enable on-going review of prohibiting the release of GMOs, and the change of activity status to discretionary should new information come available, or scientific consensus be achieved, that shows that the benefits of releasing a particular GMO, or class of GMOs, outweigh the risks for the Northland/Auckland region.

Such a precautionary approach to risk management is supported by the courts. In particular, *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* (CA285/05 2007) examined the appropriate use of the prohibited activity status in planning documents. In this case the Court of Appeal overturned lower court decisions and held that local authorities do not need to consider that an activity be forbidden outright, with no contemplation of any change or exemption, before prohibited activity status is appropriate. Instead, a local authority can use the prohibited activity status for activities for which, having undertaken the processes required by the RMA, it could rationally conclude that prohibited activity status was the most appropriate status. The court accepted as valid, several examples of this. The Court judged the most significant of these to be when a planning authority has insufficient information about an

activity and wishes to take a precautionary approach, even though it does not rule out the possibility of that activity being permitted in the future when further information may become available. It stated:

*“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, 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.”*

### **Draft District/Unitary Plan Provisions**

The draft plan provisions are in the form of a plan change to councils' RMA planning documents. The provisions are in a generic form that can be adapted to each council's particular plan should it choose to undertake such a plan change. The provisions relate to land uses and to use of coastal waters. Land use provisions can be incorporated into territorial authorities' district plans whilst provisions relating to both land uses and water uses can be incorporated into Auckland Council's unitary plan. The plan provisions relate only to outdoor uses of GMO - either releases to the environment or outdoor field trials. They do not include the use of GMOs in contained facilities, such as hospitals, universities, or research institutions, nor to medicines or food products that do not contain viable GMOs.

As determined by the section 32 analysis, the plan provisions are based upon a precautionary approach to the outdoor use of GMOs with the level of precaution related to the level of risk arising from the particular use in question. A precautionary approach, based upon the precautionary principle that has evolved globally, is an adaptive approach to risk management that requires decision makers to exercise caution, including the prohibition or postponement of an activity, when faced with uncertainty (including scientific uncertainty) and insufficient information, particularly in situations of high potential costs and irreversibility.

Based upon such an approach, the plan provisions provide for veterinary vaccines as permitted activities under the RMA (i.e. they require no planning permission), outdoor field trials as discretionary activities (i.e. they require a consent from council), and releases to the environment as prohibited activities (i.e. no consent can be applied for or granted). This classification is based upon a hierarchy of risks, from negligible for permitted activities through to high risk for prohibited activities. Discretionary activities (outdoor field trials) are subject to development and performance standards, including the requirement for bonds to cover possible economic or environmental damage and on-going monitoring requirements.

To avoid foreclosure of potential opportunities associated with a GMO development that could benefit the district or region, there is the ability to review a particular GMO activity if it were to become evident during the field trial stage or in light of other new information that a particular GMO activity would be of net benefit to the district or region and that potential risks can be managed to the satisfaction of council and the community. A council or a GMO developer can initiate a plan change to alter the status of a GMO activity from prohibited to discretionary. A change to discretionary status for a particular GMO or class of GMOs would then be subject to the prescribed development and performance standards set out in the plan change, particularly the liability and monitoring provisions.

By adopting this approach, the planning provisions in the draft plan change address community preferences for a strong precautionary approach to the outdoor use of GMOs based upon a level of risk the community, as the ultimate risk bearers, has indicated it is prepared to carry, whilst at the same time keeping future opportunities open should new information on costs and/or benefits become available. These provisions arose from, and are supported by, the section 32 evaluation and accompanying section 32 report.

The proposed plan change is supplementary and not duplicative of the HSNO Act as the provisions are precisely targeted to fill identified gaps in the national regulatory regime (such as the lack of robust liability provisions and a mandatory precautionary approach), and set standards to ensure community determined outcomes are achieved. They are the most efficient option for a council to address the significant resource management issue before it, and are also consistent with the recently revised purpose statement of the LGA.

The main benefits from, and support for, regulatory action by local authorities in addition to national regulation include, but are not limited to, the following:

- (a) An assured, community determined level of risk at the local/regional level compared to lack of surety at the national level. The Northland/Auckland communities (as the ultimate risk bearers) have indicated that they want a strong precautionary approach to the risks from GMOs as opposed to HSNO's weaker requirement for the EPA to *consider* the necessity for caution. This applies to all risks, including environmental, economic, social and cultural.
- (b) The avoidance of potential major financial exposure for constituents and councils from possible GM contamination and/or eradication or control of unwanted GMOs, whilst retaining opportunities to benefit from GMOs in the future should such opportunities arise. This can be achieved at very low relative costs to councils compared to the potentially significant costs that councils and constituents could face.
- (c) A strict liability regime, including bond and financial fitness rules, that provides (to the extent possible) for users of GMOs to pay the cost of any damages (environmental and economic) resulting from that usage (which HSNO does not impose). Linked to this is a duty of care to existing conventional and organic farmers that their social and economic well being will not be adversely affected by the introduction of GMOs, e.g. widespread contamination of non-GMO crops such as has occurred overseas.
- (d) Local and regional marketing and branding advantages, based at least in part on the GE Free status of the area, in order to seek price premiums for agricultural production and underpin tourism activities. Northland/Auckland is not a region of large scale food commodity production nor does it have a future in large scale commodity production. Its future lies in quality products aimed at the top end of the market with associated premium prices. At present GM food products do not command a price premium – rather they can result in a reduction in price – in the global market.
- (e) A policy position that is representative of the strong cultural concerns of Maori regarding GMOs indicated in iwi and hapu resource management and environmental documents and in other forums, including submissions from Maori on Northland/Auckland planning documents. Given the high proportion of Maori in the Northland/Auckland region, this is of greater significance than nationally.

## Legal Opinions

The Working Party commissioned one of New Zealand's leading resource management legal experts, Dr Royden Somerville QC, to provide legal advice during its investigations into the risks and management options relating to the outdoor use of GMOs in the Northland/Auckland region. It also obtained three legal opinions (reviews) from Dr Somerville at various points during the course of those investigations.

The first of these opinions, *Interim Opinion on Land Use Controls and GMOs 2004*, examined three questions: One, do local authorities have jurisdiction to impose land use controls to manage risks involving GMOs? Two, if so, how do they develop and implement such controls incorporating a precautionary approach? Three, could such controls be successfully challenged in the Environment Court or High Court? Dr Somerville made the following findings (amongst others):

1. Pursuant to the RMA, local authorities have 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/region.
2. 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.
3. 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 local authorities.
4. 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 local authorities.
5. The Environment Court is able to consider whether the objectives, policies, and methods developed by the local authority are valid pursuant to the relevant provisions of the RMA on a plan reference.

6. Therefore, the evaluation carried out under section 32 by the local authority 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 the EPA pursuant to the HSNO Act.

Dr Somerville's second opinion, *Opinion on Land Use Controls and GMOs 2005*, examined the second report commissioned by the Working Party, *Community Management of GMOs II: Risks and Response Options*, and assessed its robustness as a basis for developing specific draft plan provisions to manage the outdoor use of GMOs. He made the following findings (amongst others):

1. The report contains sufficient information to undertake the development of plan provisions. 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 for GMO-related activities. It also highlights the ability to include financial instruments in a plan as an efficient and effective risk management method.
2. Subject to a 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 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 pursuant to the RMA.
3. The way the work 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 council were to proceed to consult with the community and develop objectives and policies for inclusion into its 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/region.

In his final opinion, following the community consultation undertaken by the Working Party, Dr Somerville examined the proposed draft district/unitary plan provisions and accompanying section 32 evaluation and report as to their robustness and ability to withstand legal challenge (*Outdoor Use of Genetically Modified Organisms (GMOs) 2013*). He made the following findings (amongst others):

1. The plan provisions commissioned by the Inter-council working party on GMO risk evaluation and management options 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.
2. 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.
3. 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 EPA can utilise during the field trials contained in the HSNO Act.
4. The RMA allows for additional controls to those provided for by HSNO in order to address environmental risks in respect of field trials. 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.
5. 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.
6. 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 in *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development*. The Court was addressing the situation where a planning authority had insufficient information about a proposed activity and wished to

take a precautionary approach and prohibit the activity even though it did not rule out the possibility of that activity being permitted in the future. The Court recorded the view that there may be a number of occasions when prohibited activity status may be justified. Two occasions which appear to be relevant are set out at paragraphs [34](a) and (d):

*(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.*

*(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;*

## **Conclusions**

The collaborative approach to the issue of GMOs in the environment undertaken by local authorities in the Northland and Auckland regions has been a cautious yet responsible way to proceed with this contentious and complex issue. It is an excellent example of local government working together to address common concerns raised by their respective communities. It has also been a fiscally responsible approach to adopt. By sharing the costs of research and possible regulation amongst all local authorities in the Northland/Auckland region, the cost to individual councils and to ratepayers has been minimised.

The rationale for the collaborative approach was three-fold. Firstly, a collaborative approach would assist in lobbying Central Government to amend the HSNO Act. Secondly, it would lower costs, both for research and for future plan changes if that was the course of action agreed to. Lastly, to ensure regulation by local authorities under the RMA was most effective it would be best coordinated and implemented on a regional basis. Individual councils could regulate unilaterally on aspects dealing with liability, such as compensation requirements, posting bonds for GMO activities, etc., and requirements for monitoring, but could face more challenges (depending on particular GMOs) enforcing GMO exclusion zones, for example.

On a regional basis, however, there is a realistic possibility of setting in place a comprehensive system of management under the RMA if that system is agreed to by all (or most) local authorities in the region. For example, because of its unique geography, the Northern Peninsula is especially well placed to undertake such a regional approach. Should all (or most) local authorities north of the Auckland City southern boundary agree upon a common regulatory system it is possible that this could be successfully implemented, administered and enforced under the provisions of the RMA and LGA.

The accompanying documentation, including the Proposed Plan Change to the District/Unitary Plan, Section 32 Report, Supporting Documentation to the Section 32 Report, and Legal Opinions by Dr Royden Somerville QC provide a robust and comprehensive examination of the issue of GMOs in the environment, including both the risks arising from the outdoor use of GMOs and options to manage those risks. The documentation provides councils on the Inter-council Working Party on GMO Risk Evaluation and Management Options with sufficient information to make an informed decision over management options for outdoor uses of GMOs and sufficient analysis and support to proceed with a change to district and/or unitary plans to manage GMOs should councils decide to undertake such an approach.