

## 0. Update on GE

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**Reporting officer** Dr Kerry Grundy (Team Leader Futures Planning)

**Date** 07 April 2011

### ***Vision, Mission and Values***

*This agenda item, together with its recommendations, was written with the Whangarei District Council's Vision, Mission and Values in mind. It is felt that the recommendations, if adopted, would contribute to the Vision, Mission and Values, particularly to the values of customer first, innovation and excellence and visionary leadership.*

### **Local Government Act 2002 – The Four Well-Beings**

- Cultural:** *There are a range of cultural concerns over genetic engineering, and the recommended approach would help address those concerns.*
- Economic:** *There are definite economic implications with the potential release of GMOs to the environment, and the recommended approach will allow further scrutiny of those.*
- Environmental:** *There are potentially significant environmental impacts associated with the release of GMOs to the environment, and the recommended approach would assist in addressing those impacts*
- Social:** *There are important social considerations involved with the potential release of GMOs to the environment and the recommendations would help clarify those social issues.*

## 1. Introduction

In 2003, local government sought changes to the Hazardous Substance and New Organisms Act (HSNO) that would allow it to meet its responsibilities under other statutes, such as the Local Government Act (LGA) and the Resource Management Act (RMA), when dealing with genetically modified organisms (GMOs). At the same time, a range of community groups submitted in respect of the bill seeking various additional safeguards and protections.

The role local government should take in the regulation of GMOs was a focal point of submissions to the New Organisms and Other Matters Bill. Local Government New Zealand (LGNZ) and a number of local authorities presented submissions to Parliament contending that, at very least, there was a lack of clarity as to the roles and responsibilities of local government with respect to GM regulation. In particular, it was argued by LGNZ that the responsibilities placed on local government were not matched by provisions that would allow local government to influence GMO activities.

Parliament's Education and Science Select Committee reviewed these submissions and determined that no material change was required to the bill. The effect of the subsequent changes to HSNO was to pave the way for release of GMOs while leaving local government with no means to influence the assessment or management of GMOs at the national level. Local authorities would have no more influence on decisions by the national regulator, the Environmental Risk Management Authority (ERMA), than any other submitter or individual with respect to a particular application (beyond assured notification of the proposed activity).

In the absence of reforms being enacted to meet local government's concerns, and public disquiet remaining strong, the public has directed its dissatisfaction and anxieties over genetic modification to local government. Local authorities in the Northland and Auckland region have been subject to significant and continuous lobbying by their communities since the moratorium on general releases of GMOs to the environment was lifted in 2003. This has resulted in large numbers of submissions to Annual Plans, Long Term Council Community Plans (LTCCPs), and District Plans, together with petitions to councils, lobbying of councillors, and on-going communication with staff. This lobbying has not abated over time, but rather has increased and remains significant.

Local authorities in the Northland/Auckland region have responded to these community concerns by forming an Inter-council Working Party on GMO Risk Evaluation and Management Options (the Working Party). As the name suggests, the Working Party is charged with evaluating risks to local bodies and their communities

in the Northland/Auckland region from outdoor uses of genetic modification together with response options to those risks, including regulation of GMO land uses under the RMA. The Working Party is only concerned with outdoor uses of GMOs, including field trials and releases to the environment. It is not concerned with GMOs in laboratories, in hospitals, or medicine produced in laboratories or hospitals.

Prior to the re-organisation of local government in Auckland, the Working Party comprised Far North District Council (FNDC), Kaipara District Council (KDC), Rodney District Council (RDC), Whangarei District Council (WDC), Waitakere City Council (WCC), Northland Regional Council (NRC) and Auckland Regional Council (ARC). Auckland City Council (ACC) and North Shore City Council (NSCC) were observers on the Working Party. Following re-organisation in 2010, ARC, ACC, NSCC, WCC and RDC were disestablished and became part of the new Auckland Council, which is still represented on the Working Party.

## 2. Community Management of GMOs

As part of its investigations the Working Party commissioned a series of reports to investigate the nature and extent of risks local authorities could expect to face from outdoor activities involving GMOs and the response options to address those risks.

The first report (*Community Management of GMOs: Issues, Options and Partnership with Government*) examined the issue of whether local government had jurisdiction under the LGA and RMA to regulate GMOs. Based upon a legal opinion from Dr Royden Somerville QC, the report found that the HSNO Act does not preclude management of activities involving GMOs in the environment by local authorities under the RMA or the LGA. In other words, 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 HSNO Act. This position has subsequently been confirmed by both Crown Law and the Minister for the Environment.

The report also argued 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. There are a range of approaches to regulating such land uses, including total prohibition, selective prohibition, spatial management areas, or case specific regulation through scrutiny of discretionary or non-complying activities.

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 ERMA would provide a more direct means to achieving the desired outcomes sought by a community in regard to GMO land uses in its district or region. In addition, should HSNO be amended to put in place a strict liability regime holding the developers and/or users of GE technology liable for all subsequent damages, further amendment of the Act could be avoided.

The second report (*Community Management of GMOs II: Risks and Response Options*) examined in greater depth the risks to local government and their communities in Northland and Auckland posed by GMO releases to the environment. A series of risks to councils and their constituents were identified and can be classed under three general headings.

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'.

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, 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 an activity carried out in accordance with an approval from ERMA or from a general release. 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 (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 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 GMO land uses.

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 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 GMOs are most likely there for ever, irrespective of the consequences. In addition, once GMOs are released commercially, the district's/region's GE Free status is permanently lost, along with any marketing and branding advantages that GE Free status afforded.

### **3. Community Consultation/Colmar Brunton Poll**

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 GMO land uses 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 risks from GMO land uses to that agreed level.

All member councils on the Working Party (except NRC) agreed to jointly commission and fund a 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. Colmar Brunton carried out the poll in July and August 2009. The results of the telephone poll were finalised in early November 2009 and each of the councils participating in the survey received a report of results for its jurisdiction and the results were aggregated to regional levels, i.e. for the Auckland region and for the Northland region. The main points arising from the results 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, ERMA, is processing applications.
- (d) When questioned whether councils should set rules in addition to those set by ERMA, 40% of Auckland respondents supported this mechanism and 46% of Northland respondents were in support (49% in Whangarei). 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. Rural residents are more likely to favour prohibiting GMOs in both Northland and Auckland than are semi-rural or urban residents. Females are more likely to support local regulation than are males, and support is greatest amongst 18-39 year olds.
- (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. While the results showed an even stronger opinion against people being able to produce GM plants and animals simply if they choose to, views were less strongly divided over the economic impacts of GMOs. Across the Auckland region, residents believed GMOs would harm local food industries but that there would be economic benefits overall, while Northland respondents saw GMOs harming local food industries and not providing economic benefits.

The results of the telephone survey were received by WDC at the 19 December 2009 Council meeting along with a number of recommendations from the Working Party. The following resolutions were adopted by Council:

- (a) That the Convenor of the Working Party write to the Government to convey the Colmar Brunton findings indicating community concern in the Northland Peninsula 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, and request a formal response to address the social, economic, cultural and environmental risks associated with the field trialling and release of GMOs.
- (b) That all Working Party councils receive and review the Colmar Brunton findings for their respective jurisdictions, and for the Northland Peninsula, and consider making a direct high level political approach to Government seeking a formal response to local concerns regarding social, economic, cultural and environmental risks associated with the field trialling and release of GMOs.
- (c) That the Working Party continues the steps of investigation required to protect local community interests including preventing or minimising risk of social, economic, cultural or environmental harm. The investigation will include the option of making a community response through local regulation, including the formulation and analysis of potential rules for consideration at the regional and local level.

- (d) That the Working Party continues to monitor developments and precedents, including international precedents to help ensure that all councils are well positioned to respond to applications which may have significance for their communities.
- (e) That recommendations (a), (b), (c) and (d) above be reported to all Working Party councils for their consideration together with the Colmar Brunton findings.
- (f) That the Working Party acknowledge and thank Kerry Grundy Convenor of the Working Party, Simon Terry of Simon Terry and Associates, and Colmar Brunton for their work and contribution in support of the Working Party.

#### 4. Latest Developments

In respect to resolution (a) above, a letter was sent on 11 June 2010 from the Chairman of the Working Party to the Hon Nick Smith, Minister for the Environment, to convey the Colmar Brunton findings indicating community concern in the Northland Peninsula 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. See attachment 1.

A response was received from the Minister for the Environment on 5 August 2010. See attachment 2. 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 this action meets the relevant requirements of the Act. A short analysis of the Minister's response is provided in attachment 3.

In respect to resolution (b) above, All Working Party councils received and reviewed the Colmar Brunton findings for their respective jurisdictions, and for the Northland Peninsula as a whole. ARC and NRC both sent letters the Government seeking a formal response to local concerns regarding social, economic, cultural and environmental risks associated with the field trialling and release of GMOs. Both received responses similar to the response received by the Working Party, i.e. that no changes to national legislation are contemplated.

In respect to resolution (c) above, a report was commissioned from Simon Terry Associates and Mitchell Partnerships to further analyse and report on regulatory options under the RMA to manage GMOs at a local/regional level. This work is an extension of the analysis in the earlier report, *Community Management of GMOs II: Risks and Response Options*, taking into account the results of the Colmar Brunton poll. The report identifies a preferred response option for managing GMOs under the RMA should councils on the Working Party choose to pursue this option. In essence, the report recommends a regulatory approach through district/regional planning documents based upon strong precaution whilst retaining future opportunities. Under this 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. A copy of the report *Community Management of GMOs III: Recommended Response Option* is attached to these minutes (see attachment 4).

In respect to resolution (d) above, recent developments in the field of GE, particularly those of relevance to New Zealand have been monitored by the Working Party. GE forage grasses are potentially the most important to Northland/Auckland in the intermediate future. GE rye grass is presently being trialled in Australia with a view to releasing it in New Zealand. Once released, such plants would be difficult (if not impossible) to contain. GE pine trees are also being trialled in New Zealand (Rotorua). A recent application by Scion to extend these trials and include trialling of sterility technology has been granted by ERMA. Applications were also made to ERMA by AgResearch to extend trialling of the production of pharmaceuticals in mammalian milk. It appears that these applications have recently been withdrawn.

In respect to resolution (e) above, recommendations (a), (b), (c) and (d) have been reported to all Working Party councils along with the Colmar Brunton survey results. All councils on the Working Party received the recommendations and the survey results and agreed to proceed according to those recommendations (apart from NRC).



The Working Party met on 23 September 2010 to discuss the developments outlined above. The minutes of the meeting are provided as attachment 5. A robust discussion took place regarding the response from the Government to the Working Party letter and what actions the Working Party should recommend to member councils. There was general disappointment over the Government's response to the concerns of Northland/Auckland councils and their communities. However, a number of councils at the meeting expressed a desire to continue lobbying Central Government to change its stance.

The option of local/regional regulation of GMOs under the RMA was also discussed at some length. The general view was that this option should be pursued in addition to further lobbying of Government. The report from Simon Terry Associates and Mitchell Partnerships was discussed with respect to furthering this option. It was agreed that any further work on local/regional regulation of GMOs under the RMA would require a further mandate from member councils on the Working Party, along with a budgetary commitment. The new Auckland Council would also be requested to advise the Working Party of its new representatives on the Working Party. Subsequent to this discussion, the following resolutions were agreed to by the Working Party:

- (a) That the 5 August 2010 letter of reply from the Minister for the Environment to the Working Party; and the *Community Management of GMOs III* Report be received and referred to the Working Party councils for their consideration.
- (b) That a letter of reply be sent to the Minister for the Environment expressing dissatisfaction with the response and indicating that the Working Party has made recommendations to the Working Party councils to proceed with a regulatory response to address community risk and liability issues.
- (c) That the Working Party recommends to its member councils that the investigation of regulatory options to prevent or minimise risk of social, economic, cultural or environmental harm proceed and include development of specific plan objectives, policies and rules and accompanying Section 32 analysis, along with documentation for pre-plan change notification consultation.
- (d) That a memorandum of understanding be agreed between the Working Party councils to jointly fund and advance a consistent policy response through the RMA including response to legal challenge.
- (e) That the implementation of recommendations (c) and (d) be priced and that joint funding provision be sought from the Working Party councils for that purpose.
- (f) That Local Government New Zealand be advised of the progress of the Working Party in order to consider the implications for local government generally.
- (g) That the new Auckland Council be requested to advise the Working Party of its new representatives on the Working Party.
- (h) That the Working Party continues to monitor developments and precedents, including those internationally, to help ensure that Working Party councils are able to respond to GMO applications which may have significance for their communities.

## 5. Future Direction

Councils on the Working Party are now in a position to make a decision in principle as to the future direction they wish to pursue in regard to the management of outdoor uses of GMOs in Northland and Auckland regions. The Working Party believes there is sufficient information now to enable member councils to decide whether they should pursue a regulatory response under the RMA through their planning documents. Three significant reports have been produced to evaluate the risks from GMOs and examine options to address those risks. Feedback from the community has been obtained to gauge the level of risk the community is prepared to accept. The community has responded with a strong message that they are not prepared to carry the risks involved with the release of GMOs to the environment and it is the developers and users of this technology who should carry those risks. The community's preferred level of risk can only be achieved either by changes to national legislation or through local regulation. Lobbying of central government over the past eight years to amend HSNO to address community/council concerns including strict liability provisions has achieved little and further lobbying is unlikely to achieve more over the short term.

Given the risks and the response options available, together with feedback from the community through the Colmar Brunton poll, the Working Party has recommended to member councils that the investigation of regulatory options to prevent or minimise risk of social, economic, cultural or environmental harm proceed and include development of specific plan objectives, policies and rules and accompanying Section 32 analysis, along with documentation for pre-plan change notification consultation; that a memorandum of understanding be agreed between the Working Party councils to jointly fund and advance a consistent policy response through the RMA including response to legal challenge; and that these actions be priced and that

joint funding provision be sought from the Working Party councils for that purpose. The above actions would be implemented through a joint plan change to territorial authorities' district plans preferably supported, or directed, by policy in regional authorities' regional policy statements. The recommended response option outlined in the Simon Terry Associates/Mitchell Partnerships report would form the basis of the district plan change and regional policy statement provisions.

The WDC now needs to consider whether it wishes to proceed with the above recommendations. The cost to council of a joint district plan change will depend on the number of councils involved and whether the plan change is challenged through the courts. A ball park figure for a council initiated plan change is around \$50,000 plus processing costs. Defending a possible challenge to the plan change through the Environment Court could cost another \$50,000. One council proceeding alone would carry the entire cost. The cost shared between four councils would be around \$12,500 to \$25,000 each council depending on whether there was a challenge or not. These figures are indicative only. Should council decide in principle to proceed down this path, more detailed figures on costs and joint funding arrangements would need to be worked out and a memorandum of understanding agreed to by the participating councils.

At this point the positions of the other councils on the Working Party are unknown. The KDC will consider the matter on 27 April 2011 and the FNDC will discuss the issue on 12 May 2011. The NRC are considering including provisions in the regional policy statement as part of the current review of the policy statement. An indicative outcome of this review should be known when the draft policy statement is released in June 2011 and the final outcome confirmed in December 2011 when the policy statement is finalised. The position of the new Auckland Council is unknown at this point in time. The former Auckland councils on the Working Party no longer exist. These include former members RDC, WCC, ARC, and former observer councils NSCC and ACC. The new Auckland Council is yet to discuss its role on the Working Party and its position regarding GMOs. It will have to do so in the near future as the current review of the Auckland Regional Policy Statement includes GMOs as an issue, and the Hauraki Islands section of the Auckland District Plan contains provisions prohibiting GMOs. It is proposed to discuss the GE issue at a committee meeting of the Auckland Council some time in May 2011.

In short, there are four options for WDC to consider: 1) Do nothing and explain that position to the community and other councils on the Working Party, 2) Proceed with a district plan change unilaterally, 3) Proceed with a joint district plan change in collaboration with the Northland councils, i.e. KDC and FNDC and preferably in conjunction with provisions in the NRC's Regional Policy Statement supporting such a plan change, 4) proceed with a joint district plan change in collaboration with the Northland and Auckland councils, i.e. KDC, FNDC, NRC and the new Auckland Council. The first two options do not rely upon other councils' support, whilst the latter two options do. Option 3) relies upon support from the other Northland councils and option 4) relies upon support from both the Northland councils and the new Auckland council.

## 6. Conclusions

The collaborative approach to the GE issue undertaken by local authorities in the Northland and Auckland regions has been a cautious yet responsible way to proceed with this highly contentious 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 of 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 and LGA was most effective it would be best coordinated and implemented on a regional basis. Individual district or city councils could regulate unilaterally on aspects dealing with liability, such as compensation requirements, posting bonds for GMO releases, etc., but would have difficulty 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 and LGA if that system is agreed to by all (or most) local authorities in the region. For example, because of its unique geography, the Northland peninsula is especially well placed to undertake such a regional approach. Should all (or most) territorial authorities north of the Auckland urban area agree upon a common regulatory system it is possible that this could be successfully implemented, administered and enforced.

## Proposed Recommendations

1. That the update on GE be received.
2. That the 11 June 2010 letter from the Working Party to the Government, and the reply of 5 August 2010 from the Minister for the Environment, be received.
3. That the report from STA and Mitchell Partnerships, *Community Management of GMOs III: Recommended Response Option*, be received.
4. That the resolutions from the 23 September 2010 meeting of the Inter-council Working Party on GMO Risk Evaluation and Management Options be received.
5. That a decision be made on recommendations (c), (d) and (e) from the 23 September 2010 meeting of the Inter-council Working Party on GMO Risk Evaluation and Management Options (and as set out below) and direction be provided to the Working Party as to its future functions:
  - (c) *That the Working Party recommends to its member councils that the investigation of regulatory options to prevent or minimise risk of social, economic, cultural or environmental harm proceed and include development of specific plan objectives, policies and rules and accompanying Section 32 analysis, along with documentation for pre-plan change notification consultation.*
  - (d) *That a memorandum of understanding be agreed between the Working Party councils to jointly fund and advance a consistent policy response through the RMA including response to legal challenge.*
  - (e) *That the implementation of recommendations (c) and (d) be priced and that joint funding provision be sought from the Working Party councils for that purpose.*

### Attachments:

1. [Letter from the Working Party to Government](#).
2. [Letter from Minister of the Environment to Working Party](#)
3. [Short Analysis of Minister's of Environment's Response](#)
4. [Report from STA and Mitchell Partnerships - Community Management of GMOs III](#)
5. [Minutes of the Working Party 23 September 2010 Meeting](#)



## 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

Councils 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.<sup>1</sup> 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

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<sup>1</sup> 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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<sup>2</sup> 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>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:*

...

*• 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”<sup>6</sup>, 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.*

<sup>4</sup> 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.

<sup>5</sup> Recommendation 13.1 (Benefit assessment)

<sup>6</sup> 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.

<sup>7</sup> 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

<sup>8</sup> Report of the Royal Commission on Genetic Modification. 2001. Appendix 3, p. 153.

<sup>9</sup> 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

<sup>10</sup> *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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<sup>11</sup> 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".<sup>13</sup>

<sup>12</sup> 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/>.

<sup>13</sup> 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
<i>Unauthorised release</i> – 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
<i>Release conducted as Authorised by ERMA. Financial damage</i> results (eg returns lost due to GMO contamination)	None	Farmers and other affected parties
<i>Release conducted as Authorised by ERMA. Environmental damage</i> 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
<i>Release conducted as Authorised by ERMA. Damage to human health</i> 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
<i>Conditional Release not conducted as Authorised by ERMA</i> and breach of controls causes damage	Applicant liable under HSNO to extent harm caused by breach	Applicant liable for the greater of: <ul style="list-style-type: none"> <li>- up to \$10m,</li> <li>- 10% of turnover, or</li> <li>- three times value of the commercial gain,</li> </ul> to the extent funds are available. Affected parties must meet costs thereafter
<i>Unconditional Release, or Field Trial not conducted as Authorised by ERMA</i> , 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

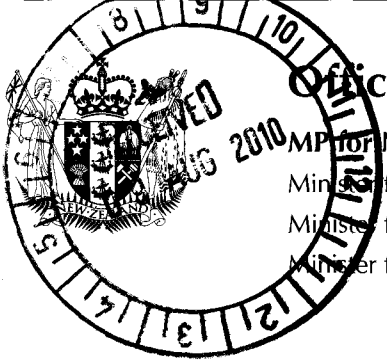
Colmar Brunton surveyed residents in each of the jurisdictions represented by the councils that are members of the Working Party – covering all of the Northland and Auckland regions. In most districts, a representative sample of 400 people was recruited. To compile regional results, additional districts 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.

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<sup>14</sup> 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.



# Office of Hon Dr Nick Smith

MP for Nelson

Minister for the Environment

Minister for Climate Change Issues

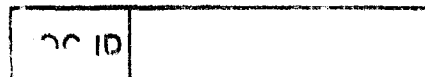
Minister for ACC

-5 AUG 2010

ENV 4961

Dr Kerry Grundy  
Inter-Council Working Party on GMO Risk Evaluation and Management Options  
Whangarei District Council  
Private Bag 9023  
WHANGAREI 0148

Dear Dr Grundy



Thank you for your letter of 11 June 2010 regarding public opinion towards genetically modified organisms (GMOs) in the Northland and Auckland regions. I appreciate the copy of the Colmar Brunton survey results, which you attached.

The government's position is that GMOs are most appropriately controlled by the Hazardous Substances and New Organisms Act 1996 (HSNO Act). Decisions on whether to approve a GMO are best undertaken by the independent, quasi-judicial body, the Environmental Risk Management Authority (ERMA). However, this does not preclude a council from restricting or preventing the use of GMOs in their region, provided that this action meets the relevant requirements of the Resource Management Act 1991 (RMA).

With regard to your first question, the government does not intend to amend the HSNO Act in respect of recognising council policy. The HSNO Act was amended in 2003 to require ERMA to notify any council that it considers is likely to have an interest in a particular application. Further, councils are able to make submissions to ERMA on publicly notified applications.

To address your second and third questions, I note the Inter-Council Working Party's continuing concern regarding the liability regime under the HSNO Act. Common law liability rules will not always effectively encourage precaution or provide for compensation. However, the same applies to a range of other activities. This was noted by the Royal Commission on Genetic Modification in 2001.

The HSNO Act contains civil liability provisions and pecuniary penalty provisions for breaches of the Act. It is considered that imposing statutory liability for all harm (where that harm that does not constitute a breach of the Act) could deter socially beneficial activities and consequently stifle innovation and economic growth. The government does not intend to amend the HSNO Act in respect of the liability regime at this time.

With regard to your fourth and ninth questions, the government considers that it is not appropriate to enter into indemnity deeds as part of a council's operation. The government also considers it inappropriate to interfere with potential judicial reviews regarding whether a council appropriately exercised its duty of care under the RMA and any compensation issues arising out of that action.

Your fifth and sixth questions refer to the application of caution and the HSNO Methodology Order 1998. ERMA consulted on a revised Methodology Order in late 2008. Public submissions were received on many aspects including the precautionary approach and particular requirements around GMOs. Any changes to the Methodology are still under consideration. It should be noted though that, as the Methodology Order is secondary legislation, it cannot override the primary Act - including section seven (which requires the precautionary approach.) There is no intention at this time to amend section seven of the HSNO Act.

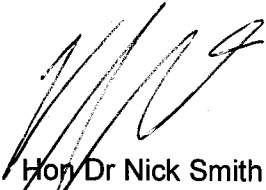
Your seventh question refers to regional exclusion zones for GMOs. The Royal Commission on Genetic Modification saw practical difficulties with implementing exclusion zones and recommended maintaining the management approaches under the HSNO Act. The government does not intend to amend the HSNO Act in this regard.

To address your eighth question, the government considers that the HSNO Act provides for comprehensive participation of Maori within the application and submission processes. Nga Kaihautu Tikanga Taiao, the Maori advisory committee to ERMA, specialises in engagement with Maori throughout the application process and on providing advice to ERMA regarding the Treaty of Waitangi.

I am confident that the HSNO Act regime provides appropriate control and management of genetic modification in New Zealand.

Once again thank you for sharing the survey results of your region's views on GMOs.

Yours sincerely



Hon Dr Nick Smith  
**Minister for the Environment**

### Short Analysis of Minister's Response to Working Party letter of 11 June 2010

**Question 1:** Will Government amend HSNO Act so that local authority concerns are given effect to in ERMA decisions on applications for release of GMOs into the environment?

Answer: No.

**Question 2:** Will Government amend HSNO Act to establish strict liability for all loss or damage caused by GMOs, irrespective of whether the party concerned is operating under an ERMA approval?

Answer: No.

**Question 3:** Will Government amend HSNO Act to ensure Central Government reimburses local authorities for clean-up costs of damages caused by a GMO release?

Answer: No.

**Question 4:** Will Government provide indemnity to local authorities against clean up costs, losses to third parties, and legal action against councils resulting from harm caused by a GMO release?

Answer: No.

**Question 5:** Will Government amend HSNO Act to make it mandatory to apply the precautionary principle when considering applications for GMO releases?

Answer: No. The Act already requires ERMA to "take into account the need for caution".

**Question 6:** Will Government change ERMA's decision-making methodology to allow for specified GMOs to be excluded from certain districts or areas?

Answer: Unlikely. The HSNO Methodology Order 1998 is currently being reviewed but it is unlikely to change to bring about this outcome.

**Question 7:** Will Government amend HSNO Act so that local authorities can establish exclusion zones for some or all GOMs?

Answer: No. Local authorities have this option under the Resource Management Act.

**Question 8:** Will Government amend HSNO Act to allow local authorities to regulate GMOs to take account of the views of tangata whenua?

Answer: No. The HSNO Act already allows for sufficient participation by Maori.

**Question 9:** Will Government agree to meet the costs to local government arising from a failure to exercise its duty of care under the RMA and/or LGA if damages arise from GMO releases?

Answer: No.

#### Brief Summation:

The response by the Minister for the Environment to the letter from the Working Party clearly shows that there is no intention by Central Government at this point in time to address the concerns raised by councils on the Working Party. None of the requests of the Working Party were agreed to. In particular no changes were agreed to in regard to liability provisions. In other words, if a GMO release is in accord with an ERMA approval and subsequent damage arises either to constituents or councils the costs of that damage will lie with the affected parties. However, the Minister does confirm that local authorities can restrict or prevent the use of GMOs in their respective district or region under the Resource Management Act provided that this action meets the relevant requirements of the RMA.



**Minutes of Meeting of the Inter-Council Working Party on GMO Risk  
Evaluation and Management Options  
23 September 2010, Forum North, Whangarei District Council**

Attendees:

Councillors

Cr Richard Alspach - Deputy Mayor - Kaipara District Council (KDC)

Cr Brent Morrissey – Auckland Regional Council (ARC)

Cr Craig Brown - Northland Regional Council (NRC)

Staff

Kerry Grundy – Chairperson - Whangarei District Council (WDC) - Team Leader Futures Planning

Lou-Ann Ballantyne – Far North District Council (FNDC) - Environmental Policy Manager

Janette Ibrahim – FNDC - Policy Planner

Max Smitheram – Rodney District Council (RDC) - Manager Sustainability and Natural Heritage

Jenny Fuller – ARC – Senior Policy Planner

Hristina Brogli – KDC – Policy Planner

Kathryn Ross – NRC – Regional Policy Senior Programme Manager

Elise Batelaan - WDC – State of Environment Coordinator

Simon Terry – Simon Terry Associates

Apologies:

Cr Sheryl Mai - WDC

Cr Grahame Powell - RDC

Cr Laurie Byers – FNDC

Cr Paul Mitchell - Waitakere City Council (WCC)

Eryn Shields - WCC - Principal Planner

Phill Grimshaw – FNDC - Economic Development and Maori Engagement Officer

Meeting commenced at 11.00 am.

1. Welcome to attendees and around the table introductions.
2. Update by the Chairperson. Actions arising from the minutes of the last meeting of the Working Party on 17 November 2009 were outlined. These included:
  - (a) Recommendation 6(a) from minutes of the last meeting: *That the Convenor of the Working Party write to the Government to convey the Colmar Brunton findings indicating community concern in the Northland Peninsula 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, and request a formal response to address the social, economic, cultural and environmental risks associated with the field trialling and release of genetically modified organisms (GMOs).*

A letter was sent on 11 June 2010 from the Chairman of the Working Party to the Hon Nick Smith, Minister for the Environment, to convey the Colmar Brunton findings indicating community concern in the Northland Peninsula 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 genetically modified organisms (GMOs). This letter is attached to the minutes.

A response was received from the Minister for the Environment on 5 August 2010. This letter is attached to the minutes. 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 Resource Management Act (RMA) provided that this action meets the relevant requirements of the RMA. A short analysis of the Minister's response is attached to the minutes.

- (b) Recommendation 6(b) from minutes of the last meeting. *That all Working Party councils receive and review the Colmar Brunton findings for their respective jurisdictions, and for the Northland Peninsula, and consider making a direct high level political approach to Government seeking a formal response to local concerns regarding social, economic, cultural and environmental risks associated with the field trialling and release of GMOs.*

All Working Party councils received and reviewed the Colmar Brunton findings for their respective jurisdictions, and for the Northland Peninsula as a whole. ARC and NRC both sent letters the Government seeking a formal response to local concerns regarding social, economic, cultural and environmental risks associated with the field trialling and release of GMOs. Both received responses similar to the response received by the Working Party, i.e. that no changes to national legislation are contemplated.

- (c) Recommendation 6(c) from minutes of the last meeting. *That the Working Party continue the steps of investigation required to protect local community interests including preventing or minimising risk of social, economic, cultural or environmental harm. The investigation will include the option of making a community response through local regulation, including the formulation and analysis of potential rules for consideration at the regional and local level.*

A report was commissioned from Simon Terry Associates and Mitchell Partnerships to further analyse and report on regulatory options under the Resource Management Act to manage GMOs at a local level. This work is an extension of the analysis in the earlier report *Community Management of GMOs II: Risks and Response Options* taking into account the results of the Colmar Brunton poll. The report identifies a preferred response option for managing

GMOs under the RMA should councils on the Working Party choose to pursue this option. A draft of the report was tabled at the meeting and discussed by the Working Party. A number of minor changes to the draft were requested. These changes have been incorporated into the final report. A copy of the final report is attached to these minutes.

- (d) Recommendation 6(d) from minutes of the last meeting: *That the Working Party continues to monitor developments and precedents, including international precedents to help ensure that all councils are well positioned to respond to applications which may have significance for their communities.*

Simon Terry updated the meeting on recent developments in the field of GE, particularly those of relevance to New Zealand. GE forage grasses are potentially the most important to Northland/Auckland in the intermediate future. GE rye grass is presently being trialled in Australia with a view to releasing it in New Zealand. Once released, such plants would be difficult (if not impossible) to contain. Some European retail chains are already labelling meat products on the basis of whether or not animals are fed on GM plants and three countries are considering compulsory labelling for this. GE pine trees are also being trialled. A recent application has been made to ERMA to extend these trials and include trialling of sterility technology. Applications have also been made by AgResearch to extend trialling of the production of pharmaceuticals in mammalian milk.

- (e) Recommendation 6(e) from minutes of the last meeting: *That recommendations (a), (b), (c) and (d) above be reported to all Working Party councils for their consideration together with the Colmar Brunton findings.*

Recommendations (a), (b), (c) and (d) from the minutes of the Working Party meeting on 17 November 2009 have been reported to all Working Party councils along with the Colmar Brunton survey results. All councils on the Working Party received the recommendations and the survey results and agreed to proceed according to those recommendations (apart from NRC).

3. A robust discussion took place regarding the response from the Government to the Working Party letter and what actions the Working Party should recommend to member councils. There was general disappointment over the Government's response to the concerns of Northland/Auckland councils and their communities. However, a number of councils at the meeting expressed a desire to continue lobbying Central Government to change its stance.

The option of local/regional regulation of GMOs under the RMA was also discussed at some length. The general view was that this option should be pursued in addition to further lobbying of Government. The report from Simon Terry Associates and Mitchell Partnerships was discussed with respect to furthering this option and a powerpoint presentation from Simon Terry on the contents of the report was received.

It was agreed that any further work on local/regional regulation of GMOs under the RMA would require a further mandate from member councils on the

Working Party, along with a budgetary commitment. The new Auckland Council would also be requested to advise the Working Party of its new representatives on the Working Party. It was agreed that Local Government New Zealand should be updated on the progress of the Working Party particularly in regard to implications for local government nationally.

4. As a consequence of the above discussion, the following resolutions were agreed to by the Working Party:
  - a) That the 5 August 2010 letter of reply from the Minister for the Environment to the Working Party; and the Community Management of GMOs III Report be received and referred to the Working Party councils for their consideration.
  - b) That a letter of reply be sent to the Minister for the Environment expressing dissatisfaction with the response and indicating that the Working Party has made recommendations to the Working Party councils to proceed with a regulatory response to address community risk and liability issues.
  - c) That the Working Party recommends to its member councils that the investigation of regulatory options to prevent or minimise risk of social, economic, cultural or environmental harm proceed and include development of specific plan objectives, policies and rules and accompanying Section 32 analysis, along with documentation for pre-plan change notification consultation.
  - d) That a memorandum of understanding be agreed between the Working Party councils to jointly fund and advance a consistent policy response through the Resource Management Act including response to legal challenge.
  - e) That the implementation of recommendations c) and d) be priced and that joint funding provision be sought from the Working Party councils for that purpose.
  - f) That Local Government New Zealand be advised of the progress of the Working Party in order to consider the implications for local government generally.
  - g) That the new Auckland Council be requested to advise the Working Party of its new representatives on the Working Party.
  - h) That the Working Party continues to monitor developments and precedents, including those internationally, to help ensure that Working Party councils are able to respond to GMO applications which may have significance for their communities.

The meeting closed at 1.30pm.