

3 November 2004

Chief Executive
Ministry for the Environment
PO Box 10362
WELLINGTON

Attention: Marilyn Bramley

Fax No: 917 7523

Dear Marilyn

Advice on potential for council liability arising from rules controlling GMOs
Our Ref: ENV006/154

1. We refer to your letter of 31 August 2004 in which you ask us to refine our previous advice of 8 August 2003 on the interface between the Hazardous Substances and New Organisms Act 1996 (“HSNO”), the Resource Management Act 1991 (“RMA”) and the Local Government Act 2002, as they relate to genetically modified organisms (“GMOs”).
2. In particular you ask our advice on the following questions:
 - 2.1 If a district council **does not** include rules in the district plan to control GMOs, what, if any, is the potential for liability for the council in respect of any environmental damage within the district arising from any GMOs that have been approved under HSNO by ERMA?
 - 2.2 If a district council **does** include rules in the district plan to control GMOs, what, if any, is the potential for liability for the council in respect of any environmental damage within the district arising from any GMOs that have been approved under HSNO by ERMA?
3. You have provided us with an example of a rule to control GMOs as proposed by the Far North District Council. Our comments on the Council’s potential liability, and on the rule in general are below.

Summary of our advice

4. There is no obligation on a district council to include rules in its district plan. Therefore if a council does not include rules to control GMOs, the council would not be liable for any environmental damage arising from a GMO.
5. A council has an obligation to enforce the rules in its district plan. If a GMO operator complies with those rules, but causes adverse effects which are not

controlled by the rules, the council cannot be held liable for any resulting damage. We do not consider that Parliament intended a council to be liable for any damage which occurs outside of any compliance of its rules – to do so would lead to unlimited liability for the council.

If a district council does not include rules in the district plan to control GMOs, what, if any, is the potential for liability for the council in respect of any environmental damage within the district arising from any GMOs that have been approved under HSNO by ERMA?

6. There is no obligation on a district council to include rules in its district plan. Section 76 of the RMA states that a council **may** include rules in its district plan, for the purpose of—
 - 6.1 carrying out its functions under the RMA; and
 - 6.2 achieving the objectives and policies of the plan.
7. Disregarding the question of whether or not a particular rule controlling GMOs could be justified in terms of s 32 of the RMA, if a council does not include rules in its district plan to control GMOs, the council will not be liable for any environmental damage. The presumption under the RMA is that a land use is allowed unless controlled. HSNO has been developed to cover GMOs. There is no requirement on the council to make rules (or provide other methods) to cover GMOs and their effect on the environment.
8. The GMO operator however could be liable for any financial damage, and may be subject to the enforcement provisions under the HSNO (such as infringement notices and compliance orders). The operator could also be subject to such provisions under the RMA by virtue of a breach of its general duty under s 17 of the RMA (i.e. the duty to avoid, remedy, or mitigate any adverse effect on the environment).

If a district council does include rules in the district plan to control GMOs, what, if any, is the potential for liability for the council in respect of any environmental damage within the district arising from any GMOs that have been approved under HSNO by ERMA?

9. Firstly, s 84 of the RMA states that a council must observe its own plan. A council also has a duty to enforce the observance of that plan. Therefore if financial damage resulted from a GMO operation being in breach of the rules in the district plan, and the council had failed to enforce those rules, there is the potential for liability in negligence against the council. We doubt, however, that a Court would make such a finding. Any person can apply for an enforcement order (s 316) or lay an information for an offence, so there is no specific responsibility on a local authority to bring such proceedings. As with the Police, there is a discretion about whether to prosecute or not.
10. The GMO operator would be liable for a breach of the rules and if a person who suffered financial damage sought a remedy for such damage, then failure to comply with planning rules may go to questions of negligence and/or nuisance i.e. lack of compliance will add to the evidence against the GMO operator.

11. If a GMO operator has complied with the GMO rule, but causes an adverse effect which is not controlled by that rule, we do not consider that the council would be liable for any resulting damage. In determining whether to include such a rule, the council must have undertaken a s32 evaluation as to whether, having regard to its efficiency and effectiveness, the rule is the most appropriate for achieving the objectives of the plan. If the council has satisfactorily assessed the rule in terms of s 32 and determined it to be the most appropriate way for achieving those objectives, the council's only obligation (but not a duty) is to enforce compliance of that rule, and the RMA in general. To extend the council's obligations further (i.e. to state that the council is liable for damage which occurs outside of any compliance of any rule) would result in a council's liability being infinite. If this was the case, the only way a council could avoid liability would be to prohibit an activity completely. We do not consider Parliament to have intended this, especially in light of comments made in two recent Environment Court cases.
12. In *Ngatiwai Trust Board v Whangarei District Council*¹, the Board sought the introduction of a rule that "any activity involving in (*sic*) genetic engineering" be listed as a prohibited activity. The Court concluded that there was undue uncertainty and vagueness given the lack of any definition of "genetic engineering" in the proposed plan. There was also no particular link between the objectives and policies of the plan and the proposed rule. The Court stated that those objectives and policies were not strong enough to underpin something as important as a prohibited activity rule. In that case, the key phrase in the relevant objective, "protection of the environment ...", did not point strongly enough to outright prohibition as a technique for implementation.
13. In *New Zealand Mineral Industry Association and Chief Executive of the Ministry of Economic Development v The Thames–Coromandel District Council*², the Court reviewed the correct approach to a "prohibited" status under the RMA, and concluded at paragraph 13 that "it should only be used when the activity in question should not be contemplated in the relevant place, under any circumstances". The Court stated at paragraph 12 that:
- "prohibiting* an activity is a legitimate planning tool, but one to be used sparingly and in a precisely targeted way ... It is, therefore, a distinct exception to the permissive, effects based, philosophy of the Act as a whole. It is not, we think, legitimate to use the *prohibited* status as a de facto, but more complex, version of a *non-complying* status. In other words, it is not legitimate to say that the term *prohibited* does not really mean *forbidden* but rather that while the activity could not be undertaken as the Plan stands, a Plan Change to permit it is, if not tacitly invited, certainly something that would be entertained".
14. The Court emphasised "the point that unless it can definitely be said that in no circumstances should mining ever be allowed on a given piece of land, a "prohibited" status is an inappropriate planning tool" (at paragraph 15).

¹ Environment Court, Whangarei, A057/2004, 28/4/04, Judge Newhook.

² Environment Court, W50/2004, 30/7/04, Thompson J.

15. Sufficient evidence would be needed to support a rule prohibiting GMOs as being an appropriate planning tool in the circumstances to achieve the purpose of the RMA and the objectives of the plan. However we reiterate the difficulty of providing such evidence when ERMA, under the HSNO, has already approved the field-testing or release of a GMO.

GMOs approved under HSNO by ERMA

16. Your two questions specifically refer to GMOs that have been approved by ERMA under the HSNO. We repeat our previous comments as to who would be responsible for any environmental damage arising from an ERMA approved GMO:

“27. ... If there are no specific statutory provisions that relate to this issue then the normal common law relating to tort will apply. If a person is claiming for environmental damage they will need to show nuisance, negligence or the *Rylands v Fletcher* situation. They will also need to show that there was damage which can be quantified in terms of financial loss.

28. If the crop was ERMA approved and the person complied with all the conditions imposed by ERMA then it is unlikely that a claim in negligence would succeed. That would be the most significant difference between an ERMA approved or not approved crop as far as obtaining damages is concerned. A claim in nuisance may be successful as may a claim in *Rylands v Fletcher*. Even if such claims could be proved then it would also need to be shown that there was environmental damage. If that damage was in the form of cross-pollination with a non-GMO crop there would still have to be shown that a loss did occur. If that cross pollination was with a native plant which was not commercially farmed then there would be no damage as far as the common law is concerned even though there may be “environmental damage” in that the genetic make-up of a particular species is altered.

29. I note that this question arises out of a concern that local authorities may be responsible. As local authorities would not be financially responsible for spray drift from one person’s private property to another or any other escape of a nuisance from one private property to another I have some difficulties in understanding why local authorities would consider that they are responsible. This would only occur if they were negligent or created the nuisance. The only possible scenario that one could consider is one where the conditions imposed by a local authority were not enforced.”

Rules

17. Before we comment on the Far North District Council’s example rule, we make the following comments on rules in general:

- 17.1 a rule may be specific or general in its application (s 76(4)), but it must be not be uncertain or vague (as confirmed most recently in the *Ngatiwai Trust Board* case);
- 17.2 any rule in a district plan must be for the purpose of carrying out the council's functions under the RMA, and for achieving the objectives and policies of the plan (s 76);
- 17.3 a rule "has to assist the territorial authority to carry out its function of control of actual and potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function ..." (*Nugent Consultants limited v Auckland City Council* [1996] NZRMA 451).

Far North District Council

- 18. The Far North District Council has suggested including a rule in its district plan which requires all operators of outdoor applications of GMOs:
 - 18.1 to be strictly liable for any harm caused; and
 - 18.2 to post a bond (in line with predefined financial assurance requirements set after the council took proper advice).
- 19. Our comments are as follows:
 - 19.1 Section 341 of the RMA makes the majority of offences under the RMA strict liability offences. A rule cannot seek to alter this provision in any way.
 - 19.2 Furthermore the example rule requires strict liability for "any harm" caused. What "harm" is the council referring to – for example, environmental, financial, social or other harm? The RMA does not define harm. The HSNO states that "serious harm" has the same meaning as in the First Schedule to the Health and Safety in Employment Act 1992 (which relates to a person's health). The use of this term creates undue uncertainty and vagueness in terms of the rule's application.
 - 19.3 Section 108(2)(b) and 108A entitle a council to impose conditions on a resource consent, requiring provision of a bond. Such a bond may be given for the performance of any conditions as the council considers appropriate, including a condition relating to the alteration or removal of structures, a condition relating to remedial, restoration, or maintenance work, or a condition providing for ongoing monitoring of long-term effects. The example rule only states that all operators of outdoor applications of GMOs are to post a bond. There is no link to the performance of any conditions. It does not provide any justification as to why a bond should be posted and how that will achieve the purpose of the RMA or any objectives of the district plan.
 - 19.4 The proposed rule cannot be said to be for the purpose of carrying out the council's functions under the RMA. It does not clearly link the outdoor applications of GMOs to the effects on the environment.
 - 19.5 In terms of the Council's potential liability, our comments above apply.

20. We note that we have not viewed the Far North District Council's plan and therefore are unable to comment on whether the rule achieves the objectives and policies of that plan. A s 32 analysis would need to be undertaken by the Council.

Yours sincerely

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