Draft first set of National Planning Standards

SUBMISSION FORM

The Government is seeking views on the draft first set of National Planning Standards.


Submissions close at 5:00 pm on Friday 17 August 2018.

Making a submission

You can provide feedback in three ways:

1. Use the online submission form available at http://www.mfe.govt.nz/consultation/draft-national-planning-standards. This is our preferred way to receive submissions.

2. Complete this submission form and send it to us by email or post.

3. Write your own submission and send it to us by email or post.

Publishing and releasing submissions

All or part of any written submission (including names of submitters) will be published on the Ministry for the Environment’s website www.mfe.govt.nz. Unless you clearly specify otherwise in your submission, we will consider that you have consented both your submission and your name being posted to the Ministry’s website.

Contents of submissions may be released to the public under the Official Information Act 1982 following requests to the Ministry for the Environment. Please advise if you have any objection to the release of any information contained in a submission and, in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information. We will take into account all such objections when responding to requests for copies of, and information on, submissions under the Official Information Act.

The Privacy Act 1993 applies certain principles about the collection, use and disclosure of information about individuals by various agencies, including the Ministry for the Environment. It governs access by individuals to information about themselves held by agencies. Any personal information you supply to the Ministry in the course of making a submission will be used by the Ministry only in relation to the matters covered by this consultation. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that the Ministry may publish.
**Submission form**

The questions below are a guide only and all comments are welcome. You do not have to answer all of the questions. To ensure your point of view is clearly understood, please explain your rationale and provide supporting evidence where appropriate. The structure of this form is in line with the draft first set of national planning standards as shown in the overview section tables 1 and 2.

**Contact information**

<table>
<thead>
<tr>
<th>Name*</th>
<th>Marion Thomson</th>
</tr>
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<tbody>
<tr>
<td>Organisation (if applicable)</td>
<td>Soil and Health Association of New Zealand</td>
</tr>
<tr>
<td>Address</td>
<td></td>
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<td>Phone</td>
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</table>

* Questions marked with an asterisk are mandatory.

**Draft first set of National Planning Standards**

1. Do you support the draft first set of National Planning Standards?
   - ☒ Yes
   - □ No

Click here to enter text.

2. S-RPS: Regional policy statement structure standard

Click here to enter text.
a. Parts 3 and 4 – Core policy statement provisions

S&H are interested in Part 4 – Themes – Environmental Risk. It is noted that this section does not provide any guidance on content. It is suggested that this be amended to clarify that this section covers:

• Hazardous substances and contaminated sites
• Natural hazards
• Genetically modified organisms

The reasons for this request are explained more fully in the attached letter on behalf of S&H dated 17 August 2018.

b. Part 5 – Evaluation and Monitoring

Click here to enter text.

3. S-RP: Regional plan structure standard

Click here to enter text.

a. Parts 3, 4 and 5 – Core plan provisions

S&H are interested in Part 4 – Themes – Environmental Risk. It is noted that this section does not provide any guidance on content. It is suggested that this be amended to clarify that this section covers:

• Hazardous substances and contaminated sites
• Natural hazards
• Genetically modified organisms

The reasons for this request are explained more fully in the attached letter on behalf of S&H dated 17 August 2018.

b. Part 6 – Evaluation and Monitoring

Click here to enter text.

4. S-DP: District plan structure standard

S&H are interested in Part 4 – District Wide Matters – Environmental Risk. It is requested that ‘Genetically modified organisms’ is added in as a sub heading in this section. The reasons for this request are explained more fully in the attached letter on behalf of S&H dated 17 August 2018.

5. S-CP: Combined plan structure standard

S&H are interested in Part 4 – Region Wide Matters (also includes some district matters) – Environmental Risk. It is requested that ‘Genetically modified organisms’ is added in as a sub heading in this section. The reasons for this request are explained more fully in the attached letter on behalf of S&H dated 17 August 2018.

6. S-IGP: Introduction and general provisions standard – Part 1 of all plans and policy statements

Click here to enter text.

a. Introduction chapter

Click here to enter text.

b. How plan works chapter

Click here to enter text.

c. Interpretation

Click here to enter text.

d. Plan integration

Click here to enter text.

e. Formation of standards with tangata whenua
f. National direction

7. S-TW: Tangata whenua structure standard – Part 2 of all plans and policy statements
   a. Recognition of iwi/hapū chapter
      Click here to enter text.
   b. Tangata whenua local-authority relationships chapter
      Click here to enter text.
   c. Iwi and hapū planning documents chapter
      Click here to enter text.
   d. Consultation chapter
      Click here to enter text.
   e. Use of te reo Māori
      Click here to enter text.

8. S-SD: Strategic direction structure standard – Part 3 of District plans
   Click here to enter text.

9. S-DWM: District wide matters standard – Part 4 of District plans
   Click here to enter text.
   a. Natural Environment Values Chapter
      Click here to enter text.
   b. Environmental Risks Chapter
      S&H are interested in the Environmental Risks Chapter S-ER. They request that a new section is inserted below Section 13 as follows:

      “If the following matters are to be addressed in the plan, they should be located in the Genetically Modified Organisms section:
      a. any provision required to manage environmental impacts of genetically modified organism use where this is not covered by other legislation or regulation.”

      The reasons for this request are explained more fully in the attached letter on behalf of S&H dated 17 August 2018
   c. Community Values Chapter
      Click here to enter text.
   d. Infrastructure and Energy Chapter
      Click here to enter text.
   e. Subdivisions Chapter
      Click here to enter text.
   f. General District Wide Matters Chapter
      Click here to enter text.

10. S-ASM: Draft area specific matters standard – Part 5 of District plans, Part 6 – Combined plans
    Click here to enter text.
a. Zone framework (individual and range)
   Click here to enter text.

b. Purpose statements
   Click here to enter text.

c. Additional special purpose zones and criteria
   Click here to enter text.

d. Precincts chapter
   Click here to enter text.

e. Development areas chapter
   Click here to enter text.

f. Designations chapter
   Click here to enter text.

11. S-SAM: Schedules, appendices and maps standard – Part 6 – Regional policy statements, Part 7 – Regional plans, Part 6 – District plans, Part 8 – Combined plans
   Click here to enter text.

12. F-1: Electronic accessibility and functionality standard
   Click here to enter text.

   a. Standard baseline requirements
      Click here to enter text.

   b. Level 5 requirements
      Click here to enter text.

13. F-2: Mapping standard
   Click here to enter text.

   a. Zone colour palette
      Click here to enter text.

   b. Symbology
      Click here to enter text.

14. F-3: Spatial planning tools (Regional) standard
   Click here to enter text.

   a. Range of tools
      Click here to enter text.

   b. Zone
      Click here to enter text.

   c. Overlay
      Click here to enter text.

   d. Specific control
e. FMU
   Click here to enter text.

f. Airshed
   Click here to enter text.

g. Area
   Click here to enter text.

15. F-4: Spatial planning tools (District) standard
   Click here to enter text.
   a. Range of tools
      Click here to enter text.
   b. Zone
      Click here to enter text.
   c. Overlay
      Click here to enter text.
   d. Precinct
      Click here to enter text.
   e. Specific control
      Click here to enter text.
   f. Development areas
      Click here to enter text.
   g. Designation

16. F-5: Chapter Form standard
   Click here to enter text.
   a. Chapter form
      Click here to enter text.
   b. Rules
      Click here to enter text.
   c. Rule tables
      Click here to enter text.

17. F-6: Status of rules and other text and numbering form standard
   Click here to enter text.
   a. Status of rules and other text
      Click here to enter text.
   b. Numbering
      Click here to enter text.

18. CM-1: Definitions standard
S&H have some suggested additional definitions that relate to Genetically Modified Organisms (GMOs). The requested definitions and the reasons for this request are explained more fully in the attached letter on behalf of S&H dated 17 August 2018.

a. Individual definition
   Click here to enter text.

b. Additional definitions
   Click here to enter text.

19. CM-2: Draft noise and vibration metrics standard
   Click here to enter text.
    a. Technical support
       Click here to enter text.

20. Implementation
    Click here to enter text.
     a. ePlanning implementation
        Click here to enter text.
     b. Timing
        Click here to enter text.
     c. Support
        Click here to enter text.
     d. District plan structure guidance
        Click here to enter text.
     e. Regional policy statement and regional plan structure guidance
        Click here to enter text.
     f. District plan spatial planning tools and zone framework guidance
        Click here to enter text.
     g. Regional plan and policy statement spatial tools guidance
        Click here to enter text.
     h. Chapter form and status of rule and other text numbering guidance
        Click here to enter text.
     i. Additional guidance materials required
        Click here to enter text.

21. Future content for standards
    a. Utilities provisions
       Click here to enter text.
Other comments

22. Do you have any further comments you wish to make about the Government’s proposal?

Click here to enter text.

Releasing submissions

Your submission may be released under the Official Information Act 1982 and will be published on the Ministry’s website. Unless you clearly specify otherwise in your submission, we will consider that you have consented to both your submission and your name being posted on the Ministry’s website.

Please check this box if you would like your name, address, and any personal details withheld.

Note that the name, email, and submitter type fields are mandatory for you to make your submission.

When your submission is complete

If you are emailing your submission, send it to PlanningStandards@mfe.govt.nz as a:

- PDF
- Microsoft Word document.

If you are posting your submission, send it to National Planning Standards, Ministry for the Environment, PO Box 10362, Wellington 6143.

Submissions close at 5:00 pm on Friday 17 August 2018.
17 August 2018

National Planning Standards Team
Ministry for the Environment
PO Box 10362
Wellington 6143

By e-mail: planningstandards@mfe.govt.nz

Re: Submission by Soil & Health Association of New Zealand Inc. on the Draft National Planning Standards

Soil & Health Association of New Zealand Inc (Soil & Health) would like to thank the Ministry for the Environment for the opportunity to comment on the draft Standards. This letter has been prepared in support of the information included under the official submission form.

The following documents are appended to this letter for ease of reference:

- **Appendix A**: Example definitions relevant to Genetically Modified Organisms provisions (from Auckland Unitary Plan (Operative in Part) and the Genetically Modified Chapter of the Auckland Unitary Plan;¹

- **Appendix B**: Joint section 32 report on proposed GMO provisions in January 2013, prepared by Auckland Council, Far North District Council, Kaipara District Council and Whangarei District Council; and

- **Appendix C**: Selected caselaw Federated Farmers of New Zealand Inc v Northland Regional Council [2015] 18 ELRNZ 603 appeal declined in Federated Farmers of New Zealand Inc v Northland Regional Council [2015] NZHC 2036 (Federated Farmers’ appeal to the Court of Appeal was withdrawn).

**Soil & Health Association of New Zealand Inc.**

Soil & Health was founded in 1941. It has the largest membership supporting organic food and farming practices in New Zealand (approx. 2842) and is one of the eldest present-day organic organisations in the world.

¹ The two appeals against the GMO definitions and provisions were resolved, and this part of the Auckland Unitary Plan is now operative.
Soil & Health promotes organic farming and works on many issues surrounding health, safe food, pesticides, genetic engineering, sustainable development and organic food production. The membership includes home gardeners and consumers, commercial growers and farmers, processors, retailers, restauranteurs, and health practitioners. Education and promotion of the use of compost to home gardeners and commercial farmers has been one of the organisations the core activities since its inception.

In 1942 the first issue of the Compost Club Magazine was printed, which over the years evolved into New Zealand’s leading organic magazine, Organic NZ. This authoritative magazine is read by members and sold in retail outlets.

Publishing Organic NZ is a primary function, but the Association also engages in a range of work on behalf of its members and the public including supporting the development of research into organics; promoting organic production methods; working to curb pesticide and chemical use; and supporting local and national initiatives to reduce chemical contamination.

GMO activities have been of concern to Soil & Health, and its members, since the technology was developed in the 1980s. Organic NZ has published numerous articles about GMOs since the early 1990s concerning transgenic technology and related studies.

The magazine keeps members and readers up to date on of research concerning the use of genetically engineered crops, addressing such things such as increased herbicide use and the use of increasingly stronger and toxic herbicides. Among the regular articles published in Organic NZ on GMOs are those contributed by the group of Physicians and Scientists for Global Responsibility, which have been written and/or peer reviewed by scientists with expertise in the field.

Soil & Health’s membership has consistently called for action to prevent or restrain using this technology freely in the environment, unless, or until, it can be proven to be safe, healthy and beneficial for people and the environment, and to ensure users of the technology take fiscal responsibility for any negative consequences.

Soil & Health has also pointed out the gaps in reliance on regulation under the HSNO Act alone and the desirability of an integrated approach under the RMA which has been confirmed in caselaw. Soil & Health has been a party to those cases. Soil & Health strongly supports a precautionary approach to the outdoor use of GMOs under the RMA.
Current GMO provisions in New Zealand RMA plans

Judicial confirmation of local authority jurisdiction to regulate GMOs under the RMA is relatively recent. A nationwide review of regional policy statements and district and regional plans indicates that:

(a) Most RMA planning documents currently are silent on GMO use;

(b) A small number of planning documents incorrectly imply GMO management is solely a function of the Environmental Protection Authority managed under the HSNO Act (e.g. Taranaki Regional Air Plan); and

(c) There are six authorities who have included GMO provisions in their RMA planning documents include:
   - Bay of Plenty Regional Council (Bay of Plenty Regional Policy Statement);
   - Northland Regional Council (Northland Regional Policy Statement);
   - Auckland Council (Auckland Unitary Plan);
   - Far North District Council (Far North District Plan);
   - Whangarei District Council (Whangarei District Plan); and
   - Hastings District Council (Hastings District Plan).

The GMO provisions included in the Auckland Unitary Plan (Operative in Part), the Whangarei District Plan and the Far North District Plan (both operative) are relatively consistent, aside from minor formatting changes to fit the structure of each individual plan.

This consistency is the result of an inter-council working party set up in 2003 to respond to community concerns about GMO use, which culminated in the preparation of a joint section 32 report on proposed GMO provisions in January 2013, prepared by Auckland Council, Far North District Council, Kaipara District Council and Whangarei District Council.

The Section 32 Report contains a set of example GMO provisions (including definitions), which were used as the basis for subsequent GMO plan changes introduced by each council set out at Appendix B.

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2 Federated Farmers of New Zealand Inc v Northland Regional Council [2015] 18 ELRNZ 603 appeal declined in Federated Farmers of New Zealand Inc v Northland Regional Council [2015] NZHC 2036 (leave to appeal to Court of Appeal declined).

3Sight was engaged by S&H to undertake a review of regional and district plans across the country to identify how many RMA plans contain GMO provisions (or how many councils are in the process of introducing GMO provisions). This investigation was undertaken in July 2018.

4 Note that Kaipara District Council has yet to introduce a GMO plan change in line with the other Northland councils.
Suggested amendments for the current draft Standards

Soil & Health is aware that this iteration of the Standards is focusing on standardising RMA plan structure and format to aid in plan navigation and comprehension. However, there is an opportunity to introduce references to GMOs as both a matter which territorial and local authorities may consider as a relevant and valid RMA issue in their planning documents and provide standardised planning definitions for terms relevant to GMOs. Soil & Health are of the view that standardised definitions for GMO Chapters is consistent with the intention and goals of standardisation expressed in s588 RMA.

There are two areas where the current Standards could be altered to include references to GMO provisions.

Definitions

Standard GMO definitions have been developed and tested by the Auckland and Northland councils and Soil & Health supports the inclusion of these defined terms in the Standards. Including these definitions in CM-1: Draft Definitions Standard will ensure that at the very least territorial authorities are using the same terminology nationwide when drafting GMO provisions. The suggested definitions are as follows (consistent with definitions adopted by the Inter-Council Working Party):

<table>
<thead>
<tr>
<th>Adaptive management approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>A systematic, iterative process of decision making in the face of uncertainty, with an aim of reducing uncertainty over time through system monitoring and changes to management in response to the results of monitoring. This does not apply to genetically modified products that are not viable and are no longer genetically modified organisms, or products that are dominantly non-genetically modified but contain nonviable genetically modified ingredients, such as processed foods.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Genetically modified organism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unless expressly provided otherwise by regulations, any organism in which any of the genes or other genetic material:</td>
</tr>
</tbody>
</table>

• have been modified by in vitro techniques; or
• are inherited or otherwise derived, through any number of replications, from any genes or other genetic material which has been modified by in vitro techniques. |
**Genetically modified veterinary vaccine**
A veterinary vaccine that is a genetically modified organism as defined in this Plan.

**Genetically modified organism field trials**
The carrying out of outdoor trials, on the effects of the organism under conditions similar to those of the environment into which the organism is likely to be released, but from which the organism, or any heritable material arising from it, could be retrieved or destroyed at the end of the trials.

**Genetically modified organism release**
To allow the organism to move within New Zealand free of any restrictions other than those imposed in accordance with the Biosecurity Act 1993 or the Conservation Act 1987. A release may be without conditions under section 34 of the Hazardous Substances and New Organisms Act 1996 or subject to conditions set out in section 38A of Hazardous Substances and New Organisms Act 1996.

**Viable genetically modified veterinary vaccine**
A genetically modified veterinary vaccine that could survive or replicate in the environment or be transmitted from the inoculated recipient.

**Environmental Risk**
The Standards propose the introduction of an 'Environmental Risk' section into the structure of regional policy statements, regional plans, district plans and combined plans. Although these sections provide very little guidance as to what the content of these sections should be, there is an opportunity to clarify that the appropriate place to insert future GMO provisions is in the Environmental Risk section of RMA plans. It is noted that Section E37 of the Environmental Risk section of the Auckland Unitary Plan (Operative in Part) contains Auckland's GMO provisions, so the inclusion of GMO provisions in the Environmental Risk section of the Standards would be consistent with this approach.
The table below outlines the sections of the Standards where references to GMO provisions could be included:

<table>
<thead>
<tr>
<th>Section of the Standards</th>
<th>Suggested amendment</th>
</tr>
</thead>
</table>
| S-RPS: Draft Regional Policy Statement Structure Standard | It is noted that this section does not provide any guidance on content. It is suggested that this be amended to clarify that this section covers:  
  - Hazardous substances and contaminated sites  
  - Natural hazards  
  - Genetically modified organisms |
| Part 4 – Themes Environmental Risk | |
| S-RP: Draft Regional Plan Structure Standard | It is noted that this section does not provide any guidance on content. It is suggested that this be amended to clarify that this section covers:  
  - Hazardous substances and contaminated sites  
  - Natural hazards  
  - Genetically modified organisms |
<p>| Part 4 – Themes Environmental Risk | |
| S-DP: Draft District Plan Structure Standard | It is requested that ‘Genetically modified organisms’ is added in as a sub heading in this section. |
| Part 4 – District Wide Matters Environmental Risk | |
| S-CP: Draft Combined Plan Structure Standard | It is requested that ‘Genetically modified organisms’ is added in as a sub heading in this section. |
| Part 4 – Region Wide Matters (also includes some district matters) Environmental Risk | |</p>
<table>
<thead>
<tr>
<th>Section of the Standards</th>
<th>Suggested amendment</th>
</tr>
</thead>
</table>
| S-DWM: Draft District Wide Matters Standard (Environmental Risks Chapter S-ER) | New section (below Section 13): If the following matters are to be addressed in the plan, they should be located in the Genetically Modified Organisms section:  
  a. any provision required to manage environmental impacts of genetically modified organism use where this is not covered by other legislation or regulation |

Yours sincerely

[Signature]

Pherne Tancock
Barrister
APPENDICES

TO SOIL & HEALTH ASSOCIATION NEW ZEALAND

SUBMISSION
APPENDIX A

AUCKLAND UNITARY PLAN DEFINITIONS

Adaptive management approach

A systematic, iterative process of decision making in the face of uncertainty, with an aim of reducing uncertainty over time through system monitoring and changes to management in response to the results of monitoring.

Genetically modified organism

Unless expressly provided otherwise by regulations, any organism in which any of the genes or other genetic material:

- have been modified by in vitro techniques; or
- are inherited or otherwise derived, through any number of replications, from any genes or other genetic material which has been modified by in vitro techniques.

This does not apply to genetically modified products that are not viable and are no longer genetically modified organisms, or products that are dominantly non-genetically modified but contain nonviable genetically modified ingredients, such as processed foods.

Genetically modified veterinary vaccine

A veterinary vaccine that is a genetically modified organism as defined in this Plan.

Genetically modified organism field trials

The carrying out of outdoor trials, on the effects of the organism under conditions similar to those of the environment into which the organism is likely to be released, but from which the organism, or any heritable material arising from it, could be retrieved or destroyed at the end of the trials.

Genetically modified organism release

To allow the organism to move within New Zealand free of any restrictions other than those imposed in accordance with the Biosecurity Act 1993 or the Conservation Act 1987. A release may be without conditions under section 34 of the Hazardous Substances and New Organisms Act 1996 or subject to conditions set out in section 38A of Hazardous Substances and New Organisms Act 1996.

Genetically modified medical applications

The manufacture, trialling or use of viable and/or non-viable genetically modified organisms for medical purposes recognized as medicines under the Medicines Act 1981 and approved as safe to use by the Ministry of Health, including EPA approved releases, except for the outdoor cultivation of pharmaceutical producing organisms.
E37. Genetically modified organisms

E37.1. Background

The outdoor use of genetically modified organisms has the potential to cause adverse effects on the environment, the economy and social and cultural wellbeing. The objectives and policies seek to protect the community and receiving environment from risks associated with genetically modified organisms. The application of a precautionary approach to the outdoor use, storage, cultivation, harvesting, processing or transportation of genetically modified organisms in Auckland means that:

- the outdoor release of a genetically modified organism is prohibited (this is to avoid the risk that significant adverse environmental effects will arise, including adverse effects on the economy, community and/or Mana Whenua resources and cultural heritage values); and

- outdoor field trialling of a genetically modified organism (with prior approval of the Environmental Protection Authority (EPA)) is a discretionary activity.

Pastoral farming, dairying, horticulture and forestry are important land uses in Auckland and are significant contributors to the local and regional economy. Aquaculture is also a growing primary industry in New Zealand. Therefore there is a range of outdoor genetically modified organisms that genetically modified organism developers could consider using in Auckland, including genetically modified food crops, trees, animals, aquaculture products and pharmaceutical crops. The potential for adverse effects, including accidental contamination, resulting from the outdoor use of genetically modified organisms poses a risk to the community and environment. By specifying classes of genetically modified organisms and applying standards to the outdoor use of genetically modified organisms, the risks associated with their use, storage, cultivation, harvesting, processing or transportation can be reduced.

Within Auckland, this will involve managing and limiting the outdoor use of genetically modified organisms. Further, rules and controls will be used to mitigate any adverse effects associated with contamination by genetically modified organisms beyond the subject site, thereby reducing the risks to the community, environment and economy. Accidental or unintentional migration of genetically modified organisms that result in genetically modified organism contamination and subsequent clean up and remediation can be expensive. The Council therefore requires a genetically modified organism consent holder to meet all potential costs associated with the activity and will secure long term financial accountability through appropriate standards and bonding requirements.

The Environmental Protection Authority is not obliged to set monitoring requirements as part of its approval process, and can only require monitoring where it is relevant to assessing environmental risk. Under section 35 of the Resource Management Act 1991, the Council has a duty to monitor, which can be expensive. Requiring a genetically modified organism consent holder to meet the costs of monitoring, via consent conditions, ensures the costs are met by the consent holder, rather than the community.
The resource consent status indicates the levels of risk considered acceptable by the community for that particular genetically modified organism activity and class.

Genetically modified medical applications involving the use of viable and/or non-viable genetically modified organisms (including EPA approved releases, vaccines and medical research) are permitted under this Plan. Genetically modified medical applications are also regulated by other legislations, including the Hazardous Substances and New Organisms Act 1996 (HSNO), the Medicines Act 1981 and by the Ministry of Health.

The use of genetically modified veterinary vaccines is a permitted activity where the vaccines are non-viable, or if viable, their administration is a specific delivery dose supervised by a veterinarian. Any other use of viable genetically modified veterinary vaccines is a discretionary activity. Non-viable genetically modified veterinary vaccines tend not to persist in the environment, appear to be low risk and are difficult to monitor, making control by the Plan less appropriate. Viable genetically modified veterinary vaccines can have higher risks if their administration is not supervised or controlled by a veterinarian. An example is a viable genetically modified veterinary vaccine distributed by way of edible food or edible plants, which cannot be supervised by a veterinarian, and which may present higher risks to the environment and to the health and safety of people. In this circumstance the Council will have the discretion to require controls or to decline an application. The Council will also be able to respond quickly if there are compelling reasons for its use to benefit human or animal health and welfare. It is generally expected that if a discretionary activity consent is granted, it would apply as a consent for the use of the viable genetically modified veterinary vaccine on any land in the region, noting that specific conditions such as exclusions of specified areas may apply.

Approval from the Environmental Protection Authority is required as a precondition for all applications for resource consent. The duration of any consent granted will be aligned with the Environmental Protection Authority approval terms.

E37.2. Objective [rcp/dp]
[The regional coastal plan [rcp] provisions (for activities or resources in the coastal marine area) are not operative until the Minister of Conservation has formally approved the regional coastal plan part of the Auckland Unitary Plan.]

(1) The environment, including people and communities and their social, economic and cultural well-being and health and safety, is protected from potential adverse effects associated with the outdoor use, storage, cultivation, harvesting, processing or transportation of genetically modified organisms.

E37.3. Policies [rcp/dp]
[The regional coastal plan [rcp] provisions (for activities or resources in the coastal marine area) are not operative until the Minister of Conservation has formally approved the regional coastal plan part of the Auckland Unitary Plan.]

(1) Adopt a precautionary approach by prohibiting the outdoor release of a genetically modified organism, and by making outdoor field trialling of a genetically modified organism and the use of viable genetically modified veterinary vaccines not of a specific dose and supervised by a veterinarian a discretionary activity.
E37 Genetically modified organisms

(2) Provide for the use of Environmental Protection Authority approved non-viable and/or viable genetically modified medical applications (including genetically modified vaccines) as a permitted activity.

(3) Require that the holder of a resource consent granted for the outdoor field trialling of a genetically modified organism is financially accountable (to the extent possible) for any adverse effects associated with the activity, including clean-up costs and remediation, including through the use of bonds.

(4) Require outdoor field trialling of genetically modified organisms to avoid, as far as can reasonably be achieved, risks to the environment or to the mauri of flora and fauna or to the relationship of Mana Whenua with flora and fauna from the use, storage, cultivation, harvesting, processing or transportation of a genetically modified organism.

(5) Require all monitoring costs to be met by the consent holder.

(6) Require that the outdoor use of genetically modified organisms does not result in migration of genetically modified organisms beyond the area designated by:

(a) ensuring adequate site design, construction and management techniques;

(b) preventing the escape of genetically modified organisms from transporting vehicles or vessels; and

(c) ensuring all heritable material is removed upon the conclusion of the activity.

(7) Adopt an adaptive approach to the management of the outdoor use, storage, cultivation, harvesting, processing or transportation of a genetically modified organism through periodic reviews of these plan provisions, particularly if new information on the benefits and/or adverse effects of a genetically modified organism activity becomes available.

(8) Require, where appropriate, more stringent measures than those required under the provisions of the Hazardous Substances and New Organisms Act 1996 to manage potential risks.

E37.4. Activity table

Table E37.4.1 Activity table specifies the activity status of the use of genetically modified organisms on land pursuant to section 9(3) of the Resource Management Act 1991 and the activity status of works, occupation and activity in the coastal marine area pursuant to sections 12(1), 12(2) and 12(3) of the Resource Management Act 1991.

Table E37.4.1 Activity table [rcp/dp]

[The regional coastal plan [rcp] provisions (for activities or resources in the coastal marine area) are not operative until the Minister of Conservation has formally approved the regional coastal plan part of the Auckland Unitary Plan.]

<table>
<thead>
<tr>
<th>Activity</th>
<th>Activity status</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A1) Research and trials within contained laboratories involving the use of genetically modified organisms, medical</td>
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applications involving the use of viable and/or non-viable genetically modified organisms (including genetically modified vaccines), veterinary applications involving the use of non-viable genetically modified organisms and any other genetically modified organism release or use not specifically provided for or prohibited

(A2) Genetically modified organism field trials on land and within the coastal marine area and any structure intended to house, or otherwise contain, plants and animals which are associated with the conducting of genetically modified organism field trials

(A3) The use of any viable genetically modified veterinary vaccine of a specific dose supervised by a veterinarian

(A4) The use of any viable genetically modified veterinary vaccine not otherwise provided for

(A5) Genetically modified organism releases – food-related on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with outdoor genetically modified organisms releases, except as specifically provided for

(A6) Genetically modified organism releases – non-food-related on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with outdoor genetically modified organism releases, except as specifically provided for

E37.5. Notification

(1) Any application for resource consent for the following activities must be publicly notified:

(a) genetically modified organism field trials on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with the conducting of genetically modified organism field trials; or

(b) the use of any viable genetically modified veterinary vaccine not otherwise provided for.

(2) Any application for resource consent for an activity listed in Table E37.4.1 Activity table and which is not listed in E37.5(1) above will be subject to the normal tests for notification under the relevant sections of the Resource Management Act 1991.
(3) When deciding who is an affected person in relation to any activity for the purposes of section 95E of the Resource Management Act 1991 the Council will give specific consideration to those persons listed in Rule C1.13(4).

E37.6. Standards

All activities listed as a discretionary activity in Table E37.4.1 Activity table must comply with the following discretionary activity standards. These standards are in addition to any controls/conditions imposed by the Environmental Protection Authority.

E37.6.1. Approvals

(1) All genetically modified organism discretionary activities must:

(a) have the relevant approval from the Environmental Protection Authority; and

(b) be undertaken in accordance with Environmental Protection Authority approval conditions for the activity.

E37.6.2. Bond requirements

(1) The Council requires the holder of a resource consent for an activity involving the use of a genetically modified organism to provide a bond in respect of the performance of any one or more conditions of the consent, including conditions relating to monitoring required of the genetically modified organism activity (prior to, during and after the activity), and that this bond be available to pay or reimburse any costs incurred by, or on behalf of, the Council to avoid, remedy or mitigate any adverse environmental effects and any other adverse effects to, or on, third parties (including economic effects), that become apparent during the exercise or after the expiry of the consent.

(2) The exact time and manner of implementing and discharging the bond will be decided by, and be executed to the satisfaction of, the Council.

(3) All of the following matters will be considered when determining the amount and type of the bond:

(a) what adverse effects could occur and the potential significance, scale and nature of those effects, notwithstanding any measures taken to avoid those effects;

(b) the degree to which the consent holder for the activity has sought to avoid those adverse effects, and the certainty associated with whether the measures taken will avoid those effects;

(c) the level of risk associated with any unexpected adverse effects from the activity;

(d) the likely scale of costs associated with remediating any adverse effects that may occur;
(e) the timescale over which effects are likely to occur or arise; and

(f) the extent of monitoring that may be required in order to establish whether an adverse effect has occurred or whether any adverse effect has been appropriately remedied.

E37.6.3. Monitoring

(1) A discretionary activity for a genetically modified organism may require monitoring during, and beyond, the duration of consent. Monitoring is to be carried out by either the Council, or the consent holder, with appropriate reporting procedures to the relevant regulatory authority.

(2) A monitoring strategy for a discretionary activity for a genetically modified organism can include all of the following matters:

(a) inspection schedules for the site, storage areas and equipment (daily, weekly, monthly, events based);

(b) testing of procedures (e.g. accidental release response);

(c) training programmes for new staff, and updates for existing staff;

(d) audits of sites and site management systems; and

(e) sample testing of plants, soils and water in neighbouring properties or localities for the presence of migrated genetically modified organisms.

E37.6.4. Reporting

(1) Reporting requirements by the consent holder must be stipulated in the consent conditions.

E37.7. Assessment – controlled activities

There are no controlled activities in this section.

E37.8. Assessment – restricted discretionary activities

There are no restricted discretionary activities in this section.

E37.9. Special information requirements

(1) An application for:

(a) the use of any viable genetically modified veterinary vaccine not otherwise provided for; or

(b) for genetically modified organism field trials on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with the conducting of genetically modified organism field trials

must be accompanied by all of the following:
(i) evidence of approval from the Environmental Protection Authority for the specific genetically modified organism for which consent is sought;

(ii) details of the proposed containment measures for the commencement, duration and completion of the proposed activity;

(iii) details of the species, its characteristics and lifecycle, to which the genetically modified organism activities will relate;

(iv) research on adverse effects to the environment and economy associated with the activity should genetically modified organisms escape from the activity area, and measures that will be taken to avoid, remedy or mitigate such effects;

(v) evidence of research undertaken that characterises and tests the genetically modified organisms, and the certainty associated with the accuracy of that information;

(vi) a management plan outlining on-going research and how monitoring will be undertaken during, and potentially beyond, the duration of consent;

(vii) details of areas in which the activity is to be confined; and

(viii) a description of contingency and risk management plans and measures.
Auckland Council, Far North District
Council, Kaipara District
Council and Whangarei District Council

Draft
Proposed Plan Change to the
District / Unitary Plan

Managing Risks Associated with Outdoor
Use of Genetically Modified Organisms

Draft Section 32 Report

January 2013
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2: Assessment of the proposed policies, rules and other methods under sections 32(3)(b) and 32(4)(a) of the Act. 39

VOLUME 2 - SUPPORTING DOCUMENTATION TO THE SECTION 32 REPORT

- Colmar Brunton Genetically Modified Organisms - Survey Results for Aggregated Northland Area, November 2009.
- Colmar Brunton Genetically Modified Organisms - Survey Results Prepared for Auckland Regional Council, November 2009.
1. INTRODUCTION

1.1 Scope and Purpose of the Report

This report has been prepared by the Auckland Council, Far North District Council, Kaipara District Council and Whangarei District Council ("the Northern Councils") to fulfill the statutory requirements of section 32 of the Resource Management Act 1991 ("RMA" or "the Act"). The report relates to the proposal to introduce new provisions via a Plan Change to the Northern Councils’ respective District / Unitary Plan, to manage outdoor activities involving genetically modified organisms ("GMOs").

Section 32 of the Act requires that before adopting any objective, policy, rule or other method, the Council shall have regard to the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and whether the policies, rules or other methods are the most appropriate for achieving the objective. A report must be prepared summarising the evaluation and giving reasons for the evaluation. This report is an evaluation of the "Proposed Plan Change to the District / Unitary Plan – Managing Risks Associated with the Outdoor Use of Genetically Modified Organisms" ("Plan Change") as required by section 32 of the Act. It should be read together with the text of the Plan Change. The Plan Change applies to proposed provisions for land use and for activities in the Coastal Marine Area ("CMA").

For the purposes of the Plan Change, the "Northern Peninsula" is defined as the geographic area from the southern boundary of the Auckland Council to the northern tip of New Zealand.

As the risks associated with the outdoor use of GMOs are not constrained by jurisdictional boundaries a unified approach from all Northern Councils provides an optimal framework. However, individual councils are able to tailor the generic provisions to their specific District / Unitary Plan, and particularly with regard to ensuring that the generic provisions give effect to, or address the absence of, provisions of the relevant Regional Policy Statement.

This report (and the accompanying Plan Change) outlines the mechanisms proposed by the Northern Councils in respect to managing risks associated with the outdoor use of GMOs, including in the CMA. The next step to inserting the Plan Change provisions governing GMO activities into the relevant District / Unitary Plan is targeted consultation and discussion with key interest groups and the community. Feedback received during consultation will assist the Northern Councils in refining the Resource Management Issue, and in determining the appropriateness, costs and benefits of the Plan Change.

This section 32 report is a working draft. It will continue to be refined and adjusted in relation to any consultation that occurs, or in relation to any new information that may arise. It will be finalised at the time a Plan Change or a Notified Proposed Plan is formally introduced.

1.2 Development of the Plan Change

The Plan Change has been progressively developed over the last 10 years. During this time community concerns over the potential use of GMOs in the Northern Peninsula have been demonstrated through numerous submissions on annual plans,
Long Term Council Community Plans ("LTCCPs"), Long Term Plans ("LTPs"), district plans, and a 7,000 plus signature petition to Whangarei District Council in 2001/2002 which called for "Whangarei District and environment to be free of any genetic engineering trials or crops grown within our district". In addition, tangata whenua have expressed on-going concerns over genetic engineering in iwi/hapu management plans and other forums. A comprehensive Colmar Brunton survey of community attitudes to GMOs commissioned by Northland and Auckland councils in 2009 revealed significant community concern over GMOs in the environment and support for local/regional management of GMOs in the Northern Peninsula.

As a consequence of on-going community concerns, all councils in Northland and three in the Auckland Region (prior to November 2010 amalgamation) included policy statements in their LTCCPs/LTPs\(^1\) that provided for a precautionary approach to the use of GMOs in the environment.

Local authorities in the Northern Peninsula responded to community concerns about GMO use by forming an Inter-council Working Party on GMO Risk Evaluation and Management Options ("the Working Party") in 2003\(^2\). The focus of the Working Party is to evaluate risks to local bodies and their communities in the Northern Peninsula from the outdoor use of GMOs, together with response options to those risks, including regulation of GMO land and water uses under the RMA.

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 available to address those risks. The reports and results of the Colmar Brunton survey commissioned form part of the section 32 evaluation and should be read in conjunction with this section 32 report. They are provided in Volume 2 to this document and include:

- Colmar Brunton Genetically Modified Organisms Survey, aggregated results prepared for the Northland Area and Auckland Regional Council.

The first report (Simon Terry Associates, 2004) investigated options for local authority management of GMOs. The second report commissioned (Simon Terry Associates and Mitchell Partnerships, 2005) examined in detail risks to local authorities and communities from outdoor use of GMOs and response options to manage those risks. It also recommended a joint community consultation programme as the next stage in the GMO evaluation process, to ascertain the level of risk the community was prepared

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\(^1\) The Far North District Council, Whangarei District Council, Kaipara District Council, Northland Regional Council, Rodney District Council, Waitakere City Council ("GE free in field and food") and Auckland Regional Council.

\(^2\) The Working Party initially comprised the Far North District Council, Kaipara District Council, Rodney District Council, Whangarei District Council, Waitakere City Council, Northland Regional Council and Auckland Regional Council. Auckland City Council and North Shore City Council were observers on the Working Party. Following the amalgamation of Auckland Regional Council and the seven previous city/district councils in 2010, the new Auckland Council became a representative on the Working Party.
to accept in respect to GMO use and whether regulations in respect to the management of GMOs should be set (and in what form) at the local level in addition to national level regulation.

The third report (Simon Terry Associates and Mitchell Partnerships, 2010) extended the earlier research by examining options available to councils under the RMA for managing the outdoor use of GMOs and identified a preferred response option (via a plan change).

The reports commissioned by the Working Party, and the results from the community survey undertaken (as recommended in the second report and detailed in Section 2.4 of this document) informed the development of the Plan Change and this section 32 evaluation.

1.3 Structure of the Report

This report has been prepared to meet the evaluation requirements of section 32 of the RMA and is set out in six sections as follows:

Section 1: This introduction.

Section 2: Provides a background to the rationale for the Plan Change, including outlining the potential use of GMOs in the Northern Peninsula, benefits and risks associated with the outdoor use of GMOs, identifies gaps in the national regulatory regime for GMOs and the absence of assurance of a precautionary approach, and outlines community opinions in respect to outdoor GMO use.

Section 3: Describes the scope of the Plan Change and defines the significant Resource Management Issue.

Section 4: Provides an evaluation of the Plan Change against the RMA and the section 32 legislative framework.

Section 5: Outlines the next steps recommended to progress the Plan Change and this draft section 32 report.

Section 6: Is the conclusion.
2. GENETICALLY MODIFIED ORGANISMS

2.1 Introduction

Genetic modification ("GM") refers to a set of techniques that alter genetic makeup by adding, deleting or moving genes (within or between species) to produce new and different organisms. GMOs are products of genetic modification. Another term often used to refer to the same technique is genetic engineering ("GE").

A wide range of GM products are being researched and developed for commercialisation. While the GMOs commercialised to date are in general directed at reducing harvest losses by combating pests and viruses, research into future varieties is attempting to considerably widen the scope of GM uses. This includes improved growth in plants, improved tolerance to environmental conditions and creating entirely new products and sectors of economic activity in agriculture, horticulture, plantation forestry, dairying, aquaculture and medicine.

GM techniques have been in wide use in laboratory-based research in New Zealand since the 1980s. The techniques are used by research institutes, private companies, universities and medical organisations primarily to:

- Identify genes and understand their functions.
- Investigate pests and diseases in animals and plants.
- Understand, diagnose and treat human disease.
- Investigate the control of environmental problems.
- Teach and educate future users of GM techniques.

New Zealand also conducts research into the social and environmental impacts of GM.

Most GM use in New Zealand is in contained environments, such as laboratories, and it is predominantly used as a tool for research. At present there are no GM crops grown commercially in New Zealand and only two field trials operating.\(^3\)

Pastoral farming, horticulture and forestry are the predominant land uses in the Northern Peninsula, and are major contributors to the local economy. Aquaculture is also a rapidly growing industry with the Northern Peninsula due to the area's extensive coastline, isolation from heavily populated and polluted areas (particularly north of the urban Auckland area), temperate climate and high water quality. The Northern Peninsula is an ideal area for growing seafood and further development of the aquaculture industry is expected in the future. Therefore it is anticipated that GMO developers will consider the outdoor use of GMOs in the Northern Peninsula that relate to these activities. Potential GMO activities of relevance include GM food crops, trees, grasses, animals and pharma crops, but exclude research within contained laboratories involving GMOs, medical applications involving the manufacture and use of GM

\(^3\) Trials are being conducted by Scion (a Crown Research Institute) involving two species of pine and with a focus on herbicide tolerance, reproductive traits, growth and quality traits, while AgResearch has approval to conduct experiments on nine different types of pasture animals and is mostly trialling GM cattle for a range of potential attributes and uses.
products, and food containing GM products that are not viable. Field trials and outdoor releases to the environment are the focus of the Plan Change.

2.2 Benefits and Risks

This section outlines the benefits and risks associated with the outdoor use of those types of GMOs which could be subject to approval under the Hazardous Substances and New Organisms Act 1996 ("the HSNO Act") and could be trialled or released within the Northern Peninsula. Potential risks are addressed in more detail than benefits as benefits do not influence the design of mechanisms to manage GMOs to the same extent that risks do.

2.2.1 Benefits

As outlined, the Northern Peninsula’s main land- and water-based industries are dependent upon the productive and environmental characteristics of a range of plants and animals. GM is one of the techniques available to change the existing characteristics of plants and animals, and carries the potential to improve productivity in agriculture, horticulture, plantation forestry, aquaculture and medicine.

Research and development into GMOs and associated benefits that could be used outdoors in the Northern Peninsula includes:

- Increased productivity in plants and animals, including forage grasses, horticulture produce, trees, cattle and fish.
- Environmental management and pest control.
- Biopharming.\(^4\)

Details of the benefits and risks associated with the outdoor use of GMOs are contained in Simon Terry Associates (March 2004) and Simon Terry Associates and Mitchell Partnerships (May 2005) (Appendix 1) and are summarised below.

**Increased Productivity in Plants and Animals**

The scope of GM research being undertaken with the objective of enhancing the productive capacity of plants and animals, or to producce new products or varieties, includes the following:

- Grasses research targeting cultivars that produce more biomass, have better resistance to drought, or result in lower greenhouse gas emissions. These would be principally intended for use in the dairy sector.
- Research on GM trees investigating the modification of genetic traits of trees such as *Pinus radiata* to improve wood quality and develop herbicide resistant trees (reducing use of toxic chemicals and potentially reducing the number of times a crop needs to be sprayed). A focus on breeding for resistance to diseases is also developing.

\(^4\) Biopharming is a sub-sector of the biotechnology industry that involves the process of genetically engineering plants so that they can produce certain types of proteins. The proteins can then be harvested and used to produce pharmaceuticals.
• Research on a range of horticultural crops is ongoing with the aim of developing varieties that are pest or herbicide resistant, have enhanced growth or storage characteristics, and are tolerant of a wider range of environmental conditions (for example, drought).

• The development of transgenic cattle has a range of focuses, from higher performing animals to deriving new specialist milks (such as those that are hypoallergenic).

• GM salmon are a focus of research in the United States and were experimented with in the Marlborough Sounds in the 1990s. Research targets include temperature and disease resistance, along with increased body mass.

• New hormones, vaccines and diagnostic products for sheep using GM techniques, and the development of transgenic sheep modified to produce greater amounts of wool.

**Environmental Management and Pest Control**

Scientists at Landcare Research and Massey University are using GM technology in the laboratory to assist in the protection of endangered and other native animal species, including the kakapo, kiwi, tuatara, and black and bush robins. The GM technology is used in a variety of ways, including assessing the genetic variation between species for taxonomic (classification) purposes.

GM is also being investigated for pest control, including:

• Research using genetically modified bacteria from the gut of wasps to produce a toxin that could kill wasp species.

• Possum control with GM carrots that deliver an oral contraceptive that results in infertility in female possums. Plants, bacteria or nematode parasites could then be genetically modified to produce possum-specific ‘infertility proteins’ so that the growth of the possum population is halted.

• Releasing sterile blowflies which will mate with fertile females and ensure they cannot lay any eggs. This could provide an environmentally friendly way of controlling flies that cause sheep strike.

**Biopharming**

In the United States, investment in plant biopharming is being made on the basis that plants, including GM varieties, will prove capable of reproducing certain pharmaceutical and industrial substances at costs lower than alternative production routes. This application of GM techniques is still at an early stage of development but will ultimately increase the range of potential GMOs that developers may wish to cultivate in the Northern Peninsula. These include GMOs that produce pharmaceutical proteins (so-called pharma crops) and GMOs that provide the raw feedstock for industrial uses (such as biofuels and plastics). An example of such an application in the outdoor developmental stage is corn that produces proteins for a vaccine to combat porcine transmissible gastroenteritis (in field trial phase in the United States).

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5 Produced from a genetically manipulated egg or embryo.
2.2.2 Risks

GM is one of a number of applied biotechnology techniques that together are forecast to offer benefits in many sectors (as outlined above). However, there are risks (both known and unknown) and scientific uncertainty with respect to GM techniques. These risks could be substantial and certain consequences irreversible. GM is a relatively new and fast developing technology and its effects, particularly over the long term, are not completely understood. There is a lack of scientific certainty and/or agreement over many issues relating to GMOs ranging from the safety of GM food products to long term environmental effects and effects on ecosystems and ecological processes from releases of GMOs into the environment.

Sources of risk from the outdoor use of GMOs in the Northern Peninsula include:

- Economic risk through accidental or unintentional migration of GMOs resulting in GMO contamination appearing in non-GM crops/species.
- Environmental risks such as adverse effects on non-target species, invasiveness of GM plants and altered gene transfer.
- Cultural effects arising from the mixing of genes from unrelated species, ecological effects, threats to the integrity of nature, and adverse effects on maori, whakapapa and tikanga involving kaitiakitanga.

These are summarised below.

Economic Risks

The key economic risk associated with the outdoor use of GMOs is economic damage through trace GM contamination appearing in non-GM crops and/or species beyond a GMO operator’s boundary (termed “spillover” effects).

Specific risks (both real and perceived) that are capable of causing economic damage associated with GMO contamination in the Northern Peninsula include:

- Market rejection and loss of income from:
  - An individual company’s product due to trace GM contamination.
  - One type of product from a region or country due to trace contamination from a GM product.
  - One type of product from a region or country due to concern about inability to separate GM and non-GM products.
  - Perceived contamination of a non-GM product.
- Negative effects on marketing and branding opportunities, including to regional initiatives such as the “Naturally Northland” brand, and to tourism.
- Costs associated with environmental damage, such as clean-up costs for invasive weeds and pests in reserves, parks, open space and the CMA.
- Opportunity costs (i.e., foreclosure of future options for organic or conventional farming).
High levels of consumer resistance to GM foods in Europe and the wealthier Asian nations such as Japan and Korea, has led to market rejection of conventional foods due to trace GM contamination. Major food retailers and manufacturers in Europe and Asia have responded by adopting GM free sourcing policies, and there is a trend towards greater labelling of foods for the use of GM feed in the production of meat and dairy goods.

Market resistance to GM produce has had major economic impacts. For example, within a few years of introduction of GM crops, almost the entire $300 million annual United States maize exports to the European Union ("EU") and the $300 million annual Canadian rape exports to the EU had disappeared. In 1996 GM canola was introduced in Canada and two years later CAD$300 - 400 million of annual sales to Europe ceased. Similarly, GM contamination of pollen has resulted in lost markets for Canadian Honey.\(^6\)

The scale of potential financial loss resulting from trace or perceived contamination can be substantial and potentially irreversible. For example, in 2003 a Japanese pizza maker rejected corn which routine testing showed to have 0.05% trace contamination (probably from seed stock). The Gisborne based company, Sunrise Coast, which supplied the corn product estimated losses in the order of $500,000. For organic farmers, GM contamination means that the produce cannot be sold as organic and lower returns must be sought in alternative markets.\(^7\)

More examples of economic harm associated with GMO contamination are detailed in Community Management of GMOs II: Risks and Response Options, (Simon Terry Associates and Mitchell Partnerships, 2005) provided in Volume 2 to this report.

**Environmental Risks**

Research into potential environmental effects of GMOs is limited due to the relative newness of the technology, the limited range of GMOs that have gained commercial approval, and gaps in research and monitoring information. Based on the current state of knowledge, and noting that the potential for, and consequences of, environmental effects will vary in magnitude and significance depending on the organism, GM trait and the receiving environment, key potential environmental risks associated with the outdoor use of GMOs in the Northern Peninsula include:

- Effects on non-target species (plant, animal or microbial) - either directly by harming or killing the organism, or indirectly through the food web affecting organisms that are not directly exposed to the GMO. Overseas research has found that BT insecticide producing crops have had toxic effects on non-target insect populations including butterflies, and beneficial pest predators such as ladybirds and lacewings\(^8\). Similarly, a government trial in the United Kingdom found that the cultivation of GM herbicide resistant crops reduced wildlife populations and damaged biodiversity\(^\text{9}\).  

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Invasiveness - increased persistence, invasiveness and competitiveness of GMOs with existing native or exotic plant species which could alter population dynamics and ecological balances.

Rare events - an incident that introduces consequences or effects of a disastrous magnitude in circumstances where little was known about the risk in advance. For example, the emergence of bovine spongiform encephalopathy ("BSE") in United Kingdom cattle when it was not considered possible for the disease to transfer to humans through consumption of meat products.

Development of herbicide or pesticide resistance creating "super-weeds" or "super-pests". Overseas experience with GMOs has resulted in the development of herbicide tolerant volunteers and weeds. There are now GM herbicide tolerant canola varieties being grown commercially in North America which are resistant to three different herbicides. Hybrids of canola and weed species containing two herbicide tolerant transgenes have also been identified.

It is noted that unintended environmental effects may only manifest later, being triggered by different environmental conditions, and that new generations of GMOs will increase the levels of unpredictability of ecological risks associated with current GMOs as they will differ markedly from the properties of known crops/species that form the baseline for current risk assessment. There is also uncertainty with respect to the effect of GMOs on soil ecosystems and effects arising from the use of plants to produce pharmaceuticals and other materials.

More examples of environmental effects associated with GMO contamination are detailed in Community Management of GMOs II: Risks and Response Options, (Simon Terry Associates and Mitchell Partnerships, 2005) provided in Volume 2 to this report.

Socio-cultural Risks

Cultural beliefs and attitudes are informed by and defined through knowledge systems (sciences, including ecology, agriculture and medicine, and technologies), spiritual beliefs and relationships (rights and responsibilities) to other human beings and cultures, and to the non-human world.

In that regard, the potential range of socio-cultural impacts (whether positive or negative) arising from the outdoor use of GMOs encompasses a wide terrain, including environmental and public health, ethics and social justice and they may be far-reaching in their effects on a community, its practices, future opportunities and relationship with the world (human and non-human).

The cultural effects associated with the outdoor use of GMOs in the Northern Peninsula have most clearly and consistently been raised by Māori. This is unsurprising as Māori make up a considerably greater proportion of the population in Northland than is represented nationally. While there is no single Māori view on GM, cultural concerns

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11 For example, in the Far North District 39.6% of population identify as Māori, 23.6% in Whangarei District and 21% in Kaipara District, compared with 14% nationally (Census 2006).
consistently expressed by the majority of Māori in Hui, surveys and in Māori institutional policy on GM include:

- Transgenics (breaking down of species barriers and mixing of genes from unrelated species) is a breach of the integrity of species and an offence to whakapapa.

- A breach of whakapapa is the resulting harm to the environment or community health, resulting in local iwi feeling they have failed to fulfil their duties as kaitiaki.

Overseas experience in countries that have adopted GMO production has sometimes resulted in a number of adverse social and cultural effects. For example, some farming communities in parts of North America have experienced serious social and cultural effects from GM contamination, resulting in widespread and on-going litigation over liability and compensation for loss of income, loss of market premiums and patent infringements. This has affected all levels of the industry (farmers, seed suppliers, manufacturers, exporters, retailers, consumers and the major biotech companies), and fragmented the farming community.\(^\text{12}\)

The introduction of high tech, GM industrial farming into small third world farming communities has had a profound effect on the social mores and cultural values and traditions of farming in those countries. For example, in India the introduction of GM crops, mainly cotton, and the high price of seed and licensing, along with the necessity of purchasing new seed each year, has pauperised many farmers.\(^\text{13}\) The practice of saving seed in developing countries is ingrained in their farming practices and farming culture and is often essential to economic survival. Having to purchase new seed every year along with an annual licence fee to foreign biotech companies is a profound change of farming practice and farming culture. Moreover sharing GM seed is prohibited under licencing arrangements and can result in prosecution through the courts.

### 2.3 Risk Management and Precaution

The use of GMOs is controlled at the national level by the HSNO Act. It establishes the legal framework for assessments by the national regulator, the Environmental Protection Authority ("EPA"). The EPA is responsible for regulating all research, development, importation, field testing and release of GMOs, and must hold public hearings on any applications to field test, conditionally release or release a GMO.

The HSNO Act sets minimum national standards against which proposed GMO activities are to be judged, and provides for the EPA to set conditions specific to approved GMO activities once it has weighed the costs and benefits. However, neither the HSNO Act nor any government policy statements provide meaningful guidance as to how high level provisions in the HSNO Act are to be interpreted nor the outcomes expected.


The HSNO Act and the EPA methodology that derives from it make many important features subject to their discretion. Those sections that focus on the actual evaluation generally require that the EPA only “take into account” and “consider” a variety of matters.\textsuperscript{14} There are thus remarkably few limitations on the outcomes the EPA can deliver.\textsuperscript{15}

The lack of surety over the outcomes that the EPA will deliver is especially important with respect to the degree to which precaution will be exercised. The precautionary principle was devised essentially as a response to analysis of the long-term effects of certain substances and organisms that had demonstrated alarming adverse effects that were unforeseen when first approved.\textsuperscript{16} The wording that has been the basis for most of the international agreements incorporating the precautionary principle in law is that established at the Rio Earth Summit in June 1992, and specifies:\textsuperscript{17}

“Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

However, the HSNO Act does not embrace the precautionary principle, nor does it mandate that the EPA be precautionary. Instead, as the regulator itself states with respect to section 7:\textsuperscript{18}

“The wording in the Act is very permissive, such that the [EPA] would be acting lawfully in deciding that caution was not warranted, provided it explained why. In practice, the [EPA] has generally exercised caution.”

Precaution is thus an option for the EPA, not a requirement, and if it is utilised, there is still uncertainty over what level of precaution will be adopted.

The wide uncertainty of outcome posed by the HSNO process raises difficulties for councils given their LGA responsibilities, including those relating to the LTPs. As Local Government New Zealand has noted:\textsuperscript{19}

“It is not apparent how the management framework outlined within [HSNO] will allow communities to preserve the opportunities they have identified, and agreed to pursue, as part of their own strategic goals. For example, a district (or a grower association) may wish to brand and market its grapes, wine, oranges, apples, lamb, milk, cut flowers or other crop or produce as GE Free.”

The core issue is a community’s tolerance for risk. There is no objective standard as to what is a correct level of risk as it is not an objectively determinable factor. However, as communities are the ultimate risk bearers, a council will look to ensure it can meet standards indicated by its constituents – rather than leave outcomes as uncertain.

\textsuperscript{14} The notable exception is section 36. This requires that if a release would be “likely” to cause “significant” harm to the environment or human health, it may not be made. As it is difficult to imagine responsible decision-makers approving a release which they thought at the time was likely to cause significant harm, it is also difficult to view this as a strong bottom line.

\textsuperscript{15} See Sustainability Council Submission in Respect of Revisions to the ERMA Methodology (October 2003).


\textsuperscript{17} Principle 15 of the Rio Declaration on Environment and Development, to which New Zealand is a signatory.

\textsuperscript{18} ERMA (2002) Approach to Risk, p. 3.

\textsuperscript{19} LGNZ (2003) Submission to Parliament with respect to the New Organisms and Other Matters Bill, p. 8.
Even when there is a common understanding on appropriate risk levels, a further issue highlighted by local government is the potential for councils and their constituents to suffer financial and economic costs as a consequence of outdoor GMO activities. Under the HSNO Act, an agent using GMOs is not financially liable to cover costs resulting from a GMO activity, as long as it abides by the conditions of an EPA approval.

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 financial costs as the government is only obliged to eradicate the unauthorised presence of a GMO, not one that was approved and is later shown to be invasive.

Similarly, the HSNO Act does not require the EPA to ensure that an applicant is financially fit and so able to pay compensation should adverse effects result from the activity. The HSNO Act instead places a heavy reliance on controls and penalties for breaching these but this requires the regulator accurately foreseeing all the circumstances in which something could go wrong, and being able to prescribe for these in advance. However, an important source of risk now recognised in respect of GMOs is unexpected adverse effects. A liability regime based on "perfect" foresight is therefore not suited to these risks.20

The absence of adequate liability provisions and the lack of surety of outcomes for local government are key gaps that have been identified in the national regulatory regime for GMOs. Where a local authority has determined that particular GMO risks are of concern to its community and that a precautionary approach is warranted, it can take action using other statutes. The RMA provides communities with the ability to set rules that embody community determined outcomes, including the level of risk it is willing to accept with respect to activities such as the management of GMOs.

2.4 Consultation

2.4.1 Community Concerns Regarding GMO Use

Community concern over the outdoor use of GMOs began to feature in the LTCCPs of many of the Northern Councils from 2003 and 2004. Submissions to the Northland Regional Council, Whangarei District Council and Far North District Council in particular evidenced large numbers of submitters (in relative terms) focusing on the GMO issue and these almost universally advocated a precautionary stance.21 In response, the Northern Councils established the Working Party to evaluate risks to local authorities and their communities, and to identify response options to those risks, including regulation of GMO use on the land and in the water, under the RMA. Subsequently, the former Auckland Regional Council responded to "overwhelming opposition to GMOs" in submissions by adopting in principle in its LTCCP, a policy of opposing the release of GMOs as a precautionary approach.22

22 "The ARC has adopted a policy, in principle, that it is opposed to the release of genetically modified organisms (GMO) in the field and in the production of food", ARC, LTCCP 2009 to 2019, p 88; and "ARC Regional Strategy and Planning Chair Paul Walbrran says the Council adopted the policy in
To ascertain community views on the management of GMOs in the Northern Peninsula, and to gauge the level of support for local/regional regulation under the RMA (as recommended in Simon Terry Associates & Mitchell Partnerships (2005)), a Colmar Brunton survey was undertaken in July and August 2009. The results for each jurisdiction participating in the survey\textsuperscript{23} were presented in separate reports, and were also aggregated to the regional level (provided in Volume 2 to this report). These results form part of the section 92 evaluation. Key results from the survey found:\textsuperscript{24}

- 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 averaged 68% in the Auckland region and 74% in Northland.

- 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%).

- The survey indicated that around half the residents (Auckland 44% and Northland 53%) want councils to have the right to prohibit GM plants and animals, either by setting local rules or allowing communities, through their councils, the right to reject use of a particular GMO in its area when the national regulator, the EPA (formally ERMA), is processing applications.

- When questioned whether councils should set rules in addition to those set by the EPA, 40% of Auckland respondents supported this mechanism and 46% of Northland respondents were in support. Amongst those respondents who support their council setting rules, total prohibition is the most favoured level of regulation (ranging from 39 - 57% across all council areas), with strict liability provisions the next most favoured (ranging from 22 - 32%), and prohibiting only GMOs for food production the third favoured (a range of 18-27%).

- Within the Auckland Region there is considerable variation in support for local regulation between individual council areas. For the Waitakere, Auckland and Franklin communities, levels of support for local regulation were significantly higher than for not utilising local regulation while for Manukau, North Shore and Rodney, the levels of support for and against local regulation were more evenly matched.

- However, 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.

- Support for local regulation is strongest amongst Māori, particularly in the Northland Region. It is also strongest amongst semi-rural and rural residents

\textsuperscript{23} All Working Party members with the exclusion of Northland Regional Council commissioned the survey.

\textsuperscript{24} This summary is adapted from that presented in the media release prepared by the Working Party on GMO Risk Evaluation and Management Options. For a full interpretation and the detailed results, see www.wdc.govt.nz.
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 greater amongst 18 - 39 year olds than older age
groups.

- 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
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 for their
districts.

2.4.2 Māori Perspectives

As outlined in Section 2.2.2, Māori make up a considerably greater share of the
population of Northland than is represented nationally. Local iwi have been active
participants in the development of GMO policies for the Northern Peninsula and their
stances generally reflect the concerns voiced at the national level. For example, the
Ngātiwi Trust Board supports adoption of a precautionary approach and locally
determined controls on GMOs that take full account of Tikanga Māori based values:

“Formulation of a policy on genetic engineering which commits supporting a
precautionary approach towards GE.”

“Genetic engineering is abhorrent to the values of Tangata Whenua and the
risks associated with experimentation in the District are unacceptable. Choices
are able to be made irrespective of the legislation [HSNO Act] as to how the
WDC should regulate genetic engineering consequences within its jurisdiction.
Tikanga Māori based values should play a significant part in determining
planning responses.”

The relief sought by the Ngātiwi Trust Board was that GM activities be prohibited
throughout the Whangarei District. Ngātiwi was also one of three iwi parties to an
appeal which aimed to secure local controls on GMO activities through amendment to
the Far North District Plan.

Similarly, in 2011 Ngāti Te Aha Waiohua sought that the Auckland Council declare the
region GMO free and adopt policies which support this position.

Ngāpuhi, the largest iwi in New Zealand with over 122,000 constituents, submitted on
the Northland Draft Regional Statement in June 2012 with specific regard to GMOs.
Ngāpuhi sought that a strong precautionary GMO policy be adopted and:

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25 Ngātiwi Trust Board submission to the Whangarei District Council’s LTCCP 2004 -2014.
26 Ngātiwi Trust Board submission to the Proposed Whangarei District Plan.
27 Ngāti Te Aha Waiohua Issues and Values, 29 November 2011, p. 16.
"That a provision classing all GE experiments and releases as a prohibited activity until outstanding issues such as liability, economic costs, benefits, environmental risks, cultural effects and significant consultation with iwi, Hapu and Whanau are resolved."

The Auckland Independent Māori Statutory Board requested that an excerpt from Wai 262 and Waitangi Tribunal Factsheet 3: Taonga Species be tabled at the Working Party meeting of 10 February 2012. The excerpt included a recommendation to amend the HSNO Act to:  

"...require that all those exercising functions, powers and duties under the Act to recognise and provide for the relationship between kaitiaki and their taonga species."

The Factsheet notes that iwi and hapu are obliged to act as kaitiaki (cultural guardians) towards taonga species of flora and fauna within their tribal areas, and refers to the Tribunal recommendation that the HSNO Act be amended: 

"so that greater weight is given to kaitiaki interests when decisions are made about genetically modified organisms."

Following a recent Hui to discuss GMOs, Tai Tokerau iwi were unanimous in their decision for wanting robust local control, and at the very least a precautionary approach be reflected through the Northland Regional Policy Statement to protect both local communities and local environments.

Sections 66(2A)(a) and 74 (2A) of the RMA require that councils, when preparing or changing a regional or district plan, must take into account any relevant planning document recognised by an iwi authority. A number of current iwi and hapū planning documents in the Northern Peninsula make statements opposing the release of GMOs and advocate a precautionary approach to GM, including those of Ngāti Hine, Ngātiwhaia, Ta Roroa, Ngāti Kuti, Ngāti Torehina, Ngāti Korokoro and Ngāti Whaararare, and Ngāti Rehia. For example, Te Iwi o Ngātiwai Iwi Environmental Policy Document includes the following policies regarding GMOs for the Ngātiwai rohe:

1. No genetically modified organisms, or products produced from such organisms, will be introduced.
2. The adoption of the precautionary approach by councils to genetically modified organisms, requiring that all risks be fully understood before these organisms are utilised.

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30 Taonga Species, Waitangi Tribunal Ko Aoteaorua Tēnei – Factsheet 3 www.waitangitribunal.govt.nz
33 Te Iwi o Ngātiwai Environmental Policy Document 2007: p71.
A number of other iwi planning documents identify GM as an issue, including documents by Ngāti Whātau Ngā Rima o Kaipara, Te Kawerau a Maki, Ngai Tai, and Hauraki iwi.34

2.4.3 Summary
Community consultation with respect to the outdoor use of GMOs has been comprehensive and includes community feedback obtained through the robust LTCCP and LTP processes, a Colmar Brunton survey, and through iwi participation in Hui, submissions to various strategies and documents, and in iwi/hapu management plans. This comprehensive process has resulted in the inclusion of policy statements that provide for a precautionary approach in a number of LTCCPs and LTPS in the Northern Peninsula, and has identified the communities’ desire for district/regional wide regulation.

2.5 Synopsis
The Northern Peninsula is an important agricultural production region and contains areas of ecological significance. A wide range of GMO products are being researched and developed, including ones that GMO developers/operators may consider introducing to the Northern Peninsula.

A range of benefits are projected to be available from the outdoor use of GMOs, though GMOs applicable to New Zealand’s needs remain to be developed in most cases. As well as benefits, there are also potential risks, including economic risks, environmental risks and socio-cultural risks that are largely unknown, and could be substantial and irreversible. Potential risks could also extend beyond the boundary of the GMO operators activities and result in significant costs to the wider area.

Key gaps identified in the national regulatory regime for GMOs are the absence of adequate liability provisions and applicant financial fitness requirements, and a lack of surety of outcome for local government. The RMA allows precisely targeted rules to be set under a District / Unitary Plan so that specific concerns can be addressed without compromising other activities. Local level regulation under the RMA provides communities with the ability to set rules that embody community (including Māori) determined outcomes, including the level of risk it is willing to accept with respect to activities such as the management of GMOs.

Consultation with the community (including under the LTP processes) has been comprehensive and has determined that the community (including Māori) desire a precautionary approach to the outdoor use of GMOs across the district/region to address what has been identified as a significant resource management issue.

3. **THE PLAN CHANGE**

3.1 **Introduction**

The fundamental purpose of the Plan Change is to apply a precautionary approach to managing the outdoor use of GMOs to minimise the risk to the environment, economy and socio-cultural resources and values. The purpose is also to ensure a financial liability regime is in place requiring GMO operators to meet any costs arising from any unexpected adverse effects associated with their activities, including clean-up costs, economic compensation/remediation and on-going monitoring costs. This will, to some extent, address the gaps identified in the national regulatory regime to provide the level of protection sought by the community against risks associated with the outdoor use of GMOs.

The Plan Change comprises the introduction of a significant Resource Management Issue, Objectives, Policies and Methods, including rules which will define how the outdoor use of GMOs are to be managed, including in the CMA. The Plan Change does not involve the management of all GMOs, but rather is limited to the outdoor use of GMOs, in particular field trials and releases.

Field trials (tests) are defined by the HSNO Act as:\(^{34}\)

> "in relation to an organism, the carrying on of trials on the effects of the organism under conditions similar to those of the environment into which the organism is likely to be released, but from which the organism, or any heritable material arising from it, could be retrieved or destroyed at the end of the trials."

Releases (food-related and non-food-related) are defined as:\(^{35}\)

> "...to allow the organism to move within New Zealand free of any restrictions other than those imposed in accordance with the *Biosecurity Act 1993* or the *Conservation Act 1987.*"

GMOs that are not classified as field trials and releases are not addressed by the Plan Change. This includes research within contained laboratories involving GMOs, medical applications (using non-viable GM products) and food containing GM products that are not viable.

The new provisions are to be inserted into the District / Unitary Plan as a new chapter or section. A definition for GMOs, field trials and releases is to be inserted into the Definitions / Interpretation section/chapter of each respective plan.

3.2 **Significant Resource Management Issue**

The significant Resource Management Issue that the community has identified is addressed by the Plan Change as follows:

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\(^{34}\) Section 2 (Interpretation), HSNO Act.

\(^{35}\) Section 2 (Interpretation), HSNO Act.
Issue
The outdoor use of GMOs can adversely affect the environment, economy and social and cultural resources and values, and significant costs can result from the release of a GMO.

To respond to the significant Resource Management Issue identified, the Plan Change acknowledges that the Northern Councils have insufficient information about the outdoor use of GMOs and will therefore apply a precautionary approach. The precautionary approach inserts provisions that prohibit classes of GMO activity that in absence of additional information are identified as “too high risk”, and establishes a financial liability regime for those engaging in a GMO activity.

3.3 Objectives and Policies

The Plan Change introduces the following Objectives and Policies to the District / Unitary Plan:

Objectives

1.4.1 The environment, including people and communities and their social, economic and cultural well-being and health and safety, is protected from potential adverse effects associated with the outdoor use, storage, cultivation, harvesting, processing or transportation of GMOs through the adoption of a precautionary approach, including adaptive responses, to manage uncertainty and lack of information.

1.4.2 The sustainable management of the natural and physical resources of the district/region with respect to the outdoor use of GMOs, a significant resource management issue identified by the community.

Policies

1.4.1.1 To adopt a precautionary approach by prohibiting the general release of a GMO, and by making outdoor field trialling of a GMO a discretionary activity.

1.4.1.2 To ensure that a resource consent granted for the outdoor field trialling of a GMO is subject to conditions that ensures that the consent holder is financially accountable (to the extent possible) for any adverse effects associated with the activity, including clean-up costs and remediation, including via the use of bonds.

1.4.1.3 To ensure that a resource consent granted for the outdoor field trialling of a GMO is subject to conditions that serve to avoid, as far as can reasonably be achieved, risk to the environment from the use, storage, cultivation, harvesting, processing or transportation of a GMO.

1.4.1.4 To ensure that a resource consent granted for the outdoor field trialling of a GMO is subject to a condition requiring that monitoring costs are met by the consent holder.

1.4.1.5 To require consent holders for a GMO activity to be liable (to the extent possible) for any adverse effects caused beyond the site for which consent has been granted for the activity.
1.4.1.6 To adopt an adaptive approach to the management of the outdoor use, storage, cultivation, harvesting, processing or transportation of a GMO in the district or region through periodic reviews of these plan provisions, particularly if new information on the benefits and/or adverse effects of a GMO activity becomes available.

Note: equivalent provisions in respect to activities in the CMA are introduced to the Unitary Plan (Objective 2.3.1 and Policies 2.3.1.1 to 2.3.1.6).

3.4 Related Provisions

3.4.1 Activity Rules

Permitted Activity Status

The Plan Change permits GMO activities that are not classified as field trials and releases, and are not specifically addressed by the Plan Change. This includes (but is not limited to) research within contained laboratories involving GMOs, medical applications (using GM products) and food containing GM products that are not viable.

All veterinary vaccines are listed as a Permitted Activity in the Plan Change and are exempt from the need to obtain a resource consent. This is because they do not tend to persist in the environment, appear to be low risk and are difficult to monitor.

Discretionary and Prohibited Activity Status

Not all categories of outdoor GMO use need to be regulated with the same degree of precaution. Different types of GMOs carry different risks, therefore the Plan Change groups similar GMOs together which can be expected to have similar types of effects that council may be required to avoid, remedy or mitigate.

The Plan Change classifies GMO outdoor uses into the following categories:

- Field Trials - **Discretionary Activity**.
- Food-related GMO Releases - **Prohibited Activity**.
- Non-food-related GMO Releases - **Prohibited Activity**.

Field trials are designed with the objective of ensuring that no altered genetic material leaves the test site and this greatly reduces the risks of harm arising. However breaches of trial conditions that could lead to GMOs escaping the trial site have occurred in New Zealand. Making all field trials a discretionary activity provides greater protection for the community by making the GMO operator financially accountable should adverse effects arise from a breach of conditions.

Given the high levels of potential harm and the uncertainties surrounding the extent of costs and benefits that could be expected from GMO releases, the Plan Change takes a precautionary approach and makes GMO releases a prohibited activity. Adopting an adaptive risk management approach, periodic reviews can be undertaken as to whether particular classes or individual GMOs should be made discretionary activities. Field trials could be considered a limited discretionary or restricted discretionary activity if a specific council determines this is appropriate in the context of their respective plan.
Discretion would be limited to the general development and performance standards provided in the Plan Change.

At the point a set of GMOs demonstrates the potential to provide net benefits, a change to the specific District / Unitary Plan can then make these subject to discretionary provisions. An application requirement is that the EPA has already approved such a release. Council's role is limited to determining whether there are additional conditions that would make release in the district or region permissible, or whether to decline the application.

3.4.2 General Development and Performance Standards

The Plan Change provides minimum general development and performance standards that apply to:

- Possession of relevant approvals from the EPA and compliance with conditions set by the EPA.

- Recovery of all costs associated with any monitoring required during and beyond the consent duration.

- Bond requirements to ensure funds are available for payment to address any adverse environmental effects and any adverse effects to third parties (including economic effects).

3.4.3 Definitions

A definition for GMOs, field trials and releases is to be inserted into the definitions/interpretation section/chapter of each respective plan.
4. SECTION 32 EVALUATION

4.1 Introduction

The Plan Change affects land that is within the jurisdiction of Far North, Whangarei, and Kaipara District Councils, and land and water within the jurisdiction of the Auckland Council. Section 66 (matters to be considered by a regional council) and section 74 (matters to be considered by a territorial authority) of the RMA state that any Plan Change to a District or Regional Plan must be made in accordance with the functions for regional and territorial authorities set out in sections 30 and/or 31, the provisions of Part 2, the duties under section 32 of the Act, and any regulations. Section 80 provides for combined plans.

Section 32 of the Act requires that before adopting any objective, policy, rule or other method, the Council shall have regard to the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and whether the policies, rules or other methods are the most appropriate for achieving the objective. Section 32 also specifies what the evaluation must examine:

(3) An evaluation must examine—

a) the extent to which each objective is the most appropriate way to achieve the purpose of the Act; and
b) whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

a) the benefits and costs of policies, rules, or other methods; and
b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

This section of the report provides a section 32 evaluation of the Plan Change provisions in the context of the RMA framework and should be read in conjunction with the preceding sections of this report. This section is set out as follows:

- Alternative planning strategies that have been considered to address the significant Resource Management Issue (Section 4.2);
- The risk of acting or not acting if there is uncertain or insufficient information (Section 4.3);
- The appropriateness of the Plan Change provisions (Section 4.4); and
- The benefits, costs and appropriateness of policies, rules and other methods (Section 4.5).
4.2 Alternative Means to Address the Issue

Section 32 of the RMA requires that alternatives to a Plan Change be considered. In respect to the consideration of alternatives, the Quality Planning Guidance “Section 32 – Methods of Implementation”\(^{36}\) notes:

Section 32 does not explicitly require the consideration of alternative means. However, it does require that the evaluation shows that, having regard to effectiveness and efficiency, the proposed policies, rules, or other methods are the ‘most appropriate’. This implies that some consideration of the effectiveness and efficiency of alternative provisions is required.

In 2011 the High Court held that the “most appropriate” method does not need to be the superior method\(^{37}\).

The following three alternative approaches have been identified to address the significant Resource Management Issue:

- Do nothing (i.e. “status quo”).
- Central Government amendment to the HSNO Act.
- Local Authority regulation through the RMA.

An assessment of the alternative options considered is outlined below and summarised in Table 1.

4.2.1 Do Nothing

The “do nothing” option does not address the significant Resource Management Issue and is not the most appropriate way of achieving the Objectives. The Objectives adopt a precautionary approach to protect the environment from potential adverse effects associated with the outdoor use, storage, cultivation, harvesting, processing or transportation of GMOs. The intent of the Objectives is to reduce environmental, economic and cultural risks, and to establish rules setting financial accountability standards for GMO operators. The current lack of provisions in the District / Unitary Plan with respect to GMO activities does not protect the environmental, economic or socio-cultural resources of the Northern Peninsula, nor does the absence of provisions reflect the level of control desired by the communities (including Māori) to manage GMO activities. The “do nothing” option does not achieve the purpose of the Act as it does not provide for the sustainable management of the resources in the Northern Peninsula.\(^{38}\)

Under national legislation, if a GMO operator has inadequate financial resources to cover environmental damage resulting from its activities, the burden tends to fall on local government and/or its constituents. This type of situation has been previously encountered by local government in respect to “Orphan Contaminated Sites” (abandoned sites contaminated with hazardous chemicals) where in most cases local

\(^{36}\) Last updated in 2008; \texttt{www.qualityplanning.org.nz/plan-development/implementation.php}


government and new land owners have been left with the responsibility and cost for the clean-up.

The "do-nothing" option will result in no costs to the Council in terms of time and resources required to implement a plan change and similarly, no costs for potential submitters who would otherwise become involved in the plan change process, and no costs for council to administer the new rules. However, a council is potentially financially and legally exposed, as discussed below in Section 4.3 and 4.5.

The do-nothing approach does not address concerns raised by the community regarding outdoor GMO risk (as evidenced by the 2009 Colmar Brunton survey and submissions on annual plans, LTCCPs, LTPs and district plans), or concerns raised by Māori.

4.2.2 Central Government Amendment to the HSNO Act

The preferred method of enabling councils to exercise local control on the use of GMOs would involve central governmentremedying the identified gaps in the national level regulation, and providing communities with the ability to veto or add local level conditions to any approval for a GMO activity that is granted by the EPA through the HSNO Act process.39

An amendment to the HSNO Act to remedy the deficiencies from a local government perspective would be an efficient response to address the significant Resource Management issue. In particular, amendments to the HSNO Act could be made to provide councils with the ability to ensure that their policies in relation to GMO activities are binding on the scope of EPA decision-making and approvals issued. This would provide a simpler means for local government to achieve the same regulatory outcomes as are currently able to be put in place under the RMA. Reform to the HSNO Act could provide for:

- The ability for local authorities to issue policy statements on GMO activities so that the EPA would be required to accommodate these policy statements in its decisions;
- The option to examine individual applications in tandem with EPA assessments, and, if required, to set stricter controls to apply within a local authority’s jurisdiction; and
- A strict liability regime, along with financial fitness requirements, that ensures the developers and users of GMOs are responsible for all environmental and economic harm that may result from outdoor uses of GMOs.

Such reforms would provide local authorities the opportunity to work in tandem with the EPA, and provide a more direct means of achieving desired community outcomes. The Working Party has sent letters to both the present Government and the previous Labour administration in 2006 and 2010 respectively, outlining local government and community concerns, and requesting changes to the HSNO Act to alleviate those concerns. However, the current Government (similar to the previous Labour administration) has indicated that it has no plans to amend the HSNO Act or establish alternative arrangements that would address the concerns of local government, nor do

they propose to provide any mechanism for councils to influence the outcomes of EPA assessments beyond those available to any other submitter. The letters sent to both Governments from the Working Party and the responses form part of the section 32 evaluation and are provided in Volume 2 to this report.

### 4.2.3 Local Authority Regulation through the RMA

Councils have jurisdiction under the RMA to set rules for GMOs that act in addition to those that may be set under the HSNO Act or by the EPA\(^\text{40}\), through inserting provisions into the District / Unitary Plan pursuant to sections 66 and 74 of the RMA. There is nothing in the HSNO Act to preclude a local authority imposing greater levels of control in its District / Unitary Plan for RMA purposes than those imposed by the EPA under the HSNO Act. The preparation of a section 32 report is therefore entirely appropriate to evaluate possible local/regional management of outdoor GMOs.

Given a council's general duty of care for its financial position and that of its constituents, there is a ready justification for councils to set mandatory conditions to provide for both financial accountability (through bonds and insurance requirements) and avoidance of economic damage. The RMA also provides communities with the ability to set rules that embody community determined outcomes, including the level of risk it is willing to accept with respect to activities such as the management of GMOs. Further, Council under section 35 of the RMA has a duty to undertake monitoring and may set conditions to provide for monitoring at the cost of the applicant.

Establishing controls on GMOs under the RMA requires a plan change or plan review\(^\text{41}\). The Environment Court is able to consider whether the objective, policies and methods in a plan change are valid pursuant to the relevant provisions of the RMA.

The functions of the EPA under the HSNO Act are different from those of local authorities under sections 30 and 31 of the RMA.

Overall, it is concluded that the relevant RMA provisions are not in conflict with those of the HSNO Act and the two statutes can operate side by side.

### 4.2.4 Assessment of Alternatives Considered

Table 1 provides an assessment of the advantages, and costs and risks associated with the three alternative options considered.

By way of summary, the "do nothing" approach does not address the significant Resource Management Issue and does not protect the natural, cultural and economic resources of the Northern Peninsula. Further, doing nothing does not address concerns raised by the community, including concerns raised by Māori. This option is not considered appropriate.

Central Government amendment to the HSNO Act to address gaps in the regulatory regime could address the concerns of local authorities and their communities in Northland/Auckland. However, the Government has consistently indicated since the formation of the Working Party in 2003 that it has no plans to do so. This option is therefore not considered the most appropriate.

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\(^{40}\) For further discussion, see Simon Terry Associates, *Community Management of GMOs: Issues, Options and Partnership with Government*, 2004.

\(^{41}\) Sections 85, 73, 79 and 80.
Of the existing statutes available to local government, the RMA offers the most durable, binding and well-targeted instrument for regulating the outdoor use of GMOs. Local authorities have jurisdiction under the RMA to set rules for GMOs that act in addition to those set under the HSNO Act or by the EPA. Given the statutory powers available to local government, the RMA is considered the most appropriate mechanism to resolve the significant Resource Management issue.

Table 1: The advantages, costs and risks of the alternatives considered.

<table>
<thead>
<tr>
<th>OPTION</th>
<th>ADVANTAGES</th>
<th>COSTS AND RISKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do nothing</td>
<td>No further work is required in processing a Plan Change. No costs for the Council in terms of time and resources to process the Plan Change and no cost for potential submitters who may become involved in the process. No constraint on GM operators who have EPA approval and are considering undertaking activities in the area. Potential economic benefit from GMO operations.</td>
<td>Retaining status quo does not protect environmental, economic or cultural resources or reflect the level of control desired by the community to manage GMO activities. Does not provide a Northern Peninsula-wide approach to addressing the issue and does not address future resource management issues in respect to the use of GMOs in the area. Does not address community concerns regarding outdoor GMO use. Does not address the concerns of tangata whenua regarding outdoor GMO use. Potential to lose “GM free” status and thus any marketing advantage this confers. Under the HSNO Act there are no requirements to provide liability against unanticipated events, therefore constituents are exposed to economic losses from GM contamination. Reliance on EPA conditions in respect to monitoring required for the activity. Costs of monitoring, and any costs required for clean-up, should a GMO activity cause an unexpected effect, could fall on the Council.</td>
</tr>
<tr>
<td>Central Government Amendment to the HSNO Act</td>
<td>Provides ability for local authorities to add local level conditions to any EPA approved activity in the district or region. Option to examine specific applications with the EPA, and set stricter controls if necessary or prohibit a specific GMO from the district or region. Opportunity to work in tandem with the EPA.</td>
<td>Requires Government to address the issue. There has been no indication from Government that this will happen. Uncertainty on when, and if this will eventuate, and whether the appropriate amendments will be made to address community and local government concerns.</td>
</tr>
</tbody>
</table>

This option is not recommended. This option is not recommended.
<table>
<thead>
<tr>
<th>OPTION</th>
<th>ADVANTAGES</th>
<th>COSTS AND RISKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local Authority Regulation through the RMA</td>
<td>Option to put in place a strict liability regime to compensate for potential environmental and economic harm.</td>
<td>The Environment Court may determine that the significant Resource Management Issue defined in the Plan Change can be addressed by the EPA pursuant to the HSNO Act.</td>
</tr>
<tr>
<td></td>
<td>Addresses key gaps in the HSNO Act in respect to liability provisions.</td>
<td>Costs associated with implementing the Plan Change and resource consent applications for GMO activities.</td>
</tr>
<tr>
<td></td>
<td>Can address risks of adverse effects on the environment, economy, and socio-cultural values.</td>
<td>The Plan Change provides prescriptive provisions. Any changes would require a new plan change.</td>
</tr>
<tr>
<td></td>
<td>Community determined outcomes can be set based upon a preferred level of risk determined by the community.</td>
<td>Reduces certainty of being allowed to operate for GMO developers considering undertaking their activity in the area.</td>
</tr>
<tr>
<td></td>
<td>Provides a prescriptive set of rules to ensure only the specified GMO activities can occur, and so specific concerns are addressed without compromising other activities.</td>
<td>Transaction costs (monetary) and opportunity costs (time delays) associated with a GM proposal having to go through both the HSNO Act and resource consent and / or Plan Change process.</td>
</tr>
<tr>
<td></td>
<td>Council can enforce higher standards for control through consent conditions, including bond requirements, monitoring requirements and compliance with performance standards.</td>
<td>There are no National Policy Statements or Environmental Standards to give effect to in respect to GMOs under the RMA.</td>
</tr>
<tr>
<td></td>
<td>Can operate in addition to the HSNO Act and can operate alongside.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Well drafted provisions will provide certainty to the community and the Council in respect to GMO use and the management of potential effects.</td>
<td></td>
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<tr>
<td></td>
<td>Integrity of District / Unitary Plan maintained.</td>
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<tr>
<td></td>
<td>Allows for full public participation.</td>
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</tbody>
</table>

4.3 Risk of Acting or Not Acting

Section 32(4)(b) of the RMA requires the s32 evaluation to take into account the risk of acting or not acting, specifically "if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods".

As outlined in Section 2, the outdoor use of GMOs is characterised by risks (both known and unknown) and uncertainty as to the outcomes that will result from an EPA assessment of an activity. In response, a precautionary approach is proposed to manage the risks and costs associated with the outdoor use of GMOs and to meet relevant community specified outcomes.
4.3.1 Ability to Deliver a Precautionary Approach

While precaution is not a requirement under the HSNO Act, the appropriateness of its application has been recognised under International Treaty, for example the United Nations Convention on Biodiversity and its Cartagena Protocol ("the Protocol"), which New Zealand is a signatory to.\(^{42}\) The Protocol focuses exclusively on living GMOs and reaffirms the precautionary approach set out in Principle 15 of the Rio Declaration, specifically in Article 10.6. \(^{43}\) While the Protocol's focus is the conservation and sustainable use of biological diversity, the principle it sets is equally applicable to other risks arising from GMOs, and is equally valid at the national and regional / district level.

The RMA is the principal statutory instrument designed to regulate land and water use (and thus the outdoor use of GMOs) and when considering it, the courts have ruled that a precautionary approach is inherent in the Act. In particular, section 3(f) states that the term "effect" includes "Any potential effect of low probability which has a high potential impact."\(^{44}\)

Traditional risk assessment relies on an ability to identify the nature of risk events and the probability they will occur in order to adequately regulate for them. With respect to the release of GMOs, while certain effects can be clearly anticipated, in many respects regulators are left with uncertainty as to what the effects will be (when the nature of the risk is clear but the probabilities are unknown), or simply uninformed (if neither the nature of the risk or the probability is known). In this situation, a precautionary approach is useful in guiding decision making.

In order for a council to have a meaningful opportunity to exercise precaution using RMA instruments, it needs to complete a Plan Change before the EPA has approved release of a GMO. The time required to complete a Plan Change is such that GMOs could be introduced to a council's area and expose constituents and the environment to many of the risks outlined in Section 2.2.2 before a Plan Change could be enacted. Thus with respect to the issue of acting or not acting if there is uncertain or insufficient information about the subject matter, there are clear benefits from acting in advance (as further detailed later in this subsection).

Field trials can be treated as discretionary activities under a precautionary approach as the national legislation already prescribes strict conditions, including prohibiting the flow of altered genes from the trial site and requiring removal of heritable material upon completion.

The appropriate precautionary approach to GMO releases however is to prohibit these under an adaptive management regime. The following lists important information considerations that bear on this judgement:

- No national policy statements or national environmental standards have been issued under the RMA to guide council responses to GMO proposals.
including consideration of potential risks to conventional and organic crops, bio-diversity, and the environment.

- The government has set no other national policy with respect to the assessment of potential GMO releases and has not provided directives to the EPA to guide its interpretation of the HSNO Act.\textsuperscript{45}

- There is no international or national guidance on how to address outstanding liability issues.\textsuperscript{46}

- The EPA has not yet had to respond to a proposed release of a food-related GMO, and so has yet to show how it would assess the complexities that arise with a food GMO in particular.\textsuperscript{47}

Consequently, local authorities have no guidance to assist them to manage risks from GMO activities on a regional or district-wide basis in order to meet their duties and functions under sections 30 and 31 of the RMA. There would be significant inefficiency for a council to endeavour to collect and create the information required (if available or sufficient) to develop effective policy and planning instruments in this context.

At the point the EPA approved a particular GMO release, there would then be a sizable body of information to help a council assess local impacts of that GMO. However, even then, the EPA is tasked simply with assessing the costs and benefits of a particular release proposal; the EPA is not expected at any stage to propose or define a national strategy for GMOs. The issues confronting a council however involve the broader question of the expected impacts of GMOs in general, and clearly include questions of local strategy such as the costs and benefits of an area remaining free of any GMO release.

The information required to undertake this wider assessment cannot be required of an agent seeking to undertake a particular release and so would present an additional uncompensated expense to the council were release activities to be made discretionary and a proponent lodged an application to the council. By making GMO releases a prohibited activity, a council ensures that any such assessment is either made at a time a council judges sufficient information is available, or acquisition of the information is an expense more fully covered by a release proponent through a private plan change. If the latter, then the onus is placed on the proponent to show that there is not only a national benefit (as the EPA is required to determine before issuing a consent) but that there is also a benefit to the area under the council’s jurisdiction.

A prohibited activity status for releases also ensures community determined outcomes can be delivered by a council. If they were a discretionary activity, the Minister for the Environment could call in an application under the RMA and the Minister would then decide the application - rather than the council. If an activity is prohibited, the Minister cannot intervene as no application can be made.

It is the ability to revise the activity status of particular GMOs or classes of GMOs as better information becomes available that ensures the proposed approach is adaptive. As the EPA and other authorities build up the basis for analysis, and as more field trials

\textsuperscript{45} Such directives may be issued under HSNO s17.

\textsuperscript{46} Policy development has in recent year been focused at the international level with respect to the Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Secretariat of the Convention on Biological Diversity, Montreal, United Nations, 2011.

\textsuperscript{47} The EPA has approved the use of GMO flu vaccine for horses but it has not been deployed and the assessment did not raise many of the issues that arise in the case of food-related GMOs.
and market analyses are undertaken, the basis for decision-making at a later point will improve.

The legal authority for the proposed approach is the case between Coromandel Watchdog of Hauraki Inc and Chief Executive of Ministry of Economic Development.48 In this case the Court of Appeal overturned the lower courts' decisions and held that prohibited activity status can be appropriate even when local authorities do not consider that an activity be forbidden outright and are not contemplating any change or exception. Instead, a local authority can use the prohibited activity status for activities for which, having undertaken the processes required by the RMA, it could rationally conclude that this was the most appropriate status.49 However, the court agreed with the lower courts that, if a local authority has sufficient information to undertake the evaluation of an activity at the time the district plan is being formulated, it is not an appropriate use of the prohibited activity classification to defer the evaluation required by the Act.50 That can be contrasted with the precautionary approach, where the local authority forms the view that it has insufficient information about an aspect of an activity, but further information may become available during the term of the plan.

With respect to the outdoor use of GMOs, the prohibited activity status is required because of the communities' desire to take a precautionary approach as a matter of policy due to lack of sufficient information currently available on the potential effects of GMOs on a district/regional wide basis.

In summary, a council cannot use the prohibited status to defer evaluation of an activity when formulating its plan if it has sufficient information to undertake that evaluation. However, with respect to the outdoor use of GMOs, it can defer evaluation as currently there is insufficient information about the activity, but further information may become available at a future time.

4.3.2 Proportionate Action and Difficulties Arising From Inaction

Having demonstrated that a precautionary approach is available under the RMA and that a Plan Change is required to provide this, the following sets out why such action is reasonable and proportionate relative to not acting.

As detailed in Table 1 in Section 4.3.5, there are costs associated with establishing the Plan Change provisions. While there will be some transaction and opportunity costs for a GMO proponent having to undertake two processes (EPA approval and Plan Change process), there is unlikely to be any significant opportunity cost, such as lost economic benefit from a GMO activity that would be prohibited. This is because of the ability to further amend the plan should a particular GMO or class of GMOs be shown to have clear net benefits for a jurisdiction. The transaction and opportunity costs to a GMO proponent would be small in relative terms and there need not be a delay in the

48 [2008] NZRMA 77 (CA).
49 The judgment stated: "Where the council takes a precautionary approach, if the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available". It also stated: "Where it is necessary to allow an expression of social or cultural outcomes or expectations. Prohibited activity status may be appropriate for an activity such as nuclear power generation which is unacceptable given current social, political and cultural attitudes, even if it were possible that those attitudes may change during the term of the plan". Brokers Resource Management, Vol.1, A77A.06.
50 Brokers Resource Management, Vol.1, A77A.06.
benefits being available to a jurisdiction as such a change could proceed after field trial data had been obtained and while the EPA was hearing an application at the national level for a release to be made. Overall, in regard to the costs or the loss of potential benefits, the risk of acting is limited. Future options are not foreclosed.

In contrast, the risks and potential costs of not acting are substantially higher. As outlined in Table 1, the "do nothing" approach will not protect the environmental, economic or cultural resources of the Northern Peninsula, or reflect the level of control desired by the community (including Māori) to manage GMO activities. Risks of not acting include:

- Adverse environmental effects including weediness and invasiveness, and effects on non-target species.

- Councils exposed to clean-up costs associated with any GMO activities as the Ministry of Primary Industries is only obliged to clean up illegal releases. Clean-up costs are potentially substantial.

- Constituents exposed to economic losses from GM contamination. This includes opportunity costs associated with the foreclosure of options for branding an area as GM Free. Councils owe a duty of care to constituents.

- Adverse socio-cultural effects including effects on tangata whenua cultural values and economic well-being.

- Monitoring, both during and after consent duration, may be required by the Council, and this can be expensive.

Another way of considering this question is to examine the extent to which a council can in practice "do nothing", and yet remain unencumbered financially.

A first issue for a council whose community has become concerned about GMO activities is whether it will need to arrange monitoring. If monitoring has not been required by the EPA, or is not in the form constituents seek, then a council can face a call from constituents to undertake this as a part of its duties under sections 35(2)(d) and (e) of the RMA. Such a call would become mandatory if a constituent succeeds in obtaining an enforcement order through the Environment Court.

The EPA can require monitoring where it is relevant to assess environmental risk. However, it is economic risks that are often a particular source of concern, and information from monitoring could be needed to underpin claims for compensation due to GM contamination. Therefore, in the event of a GM activity being undertaken within a council's jurisdiction, the prospect that the council will be required to monitor (for economic effects in particular) is quite high.

Monitoring can be expensive but a council can require the GMO operator to meet the costs under either the RMA or the LGA. The LGA is the simpler option as it does not involve a plan change – otherwise required under the RMA route.

However, those concerned about harm caused by any GMO contamination will require more than just monitoring provisions are in place. They will be particularly concerned to have mechanisms in place to promote financial accountability and clarify liability, and

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the LGA cannot deliver this effectively. While the HSNO Act\textsuperscript{51} includes a range of assessment criteria that the EPA is to consider for field tests, (i.e., taking into account adverse effects on human health and safety and the environment) and controls required for all field tests, there is no requirement to address liability issues. Councils owe a duty of care to their constituents and they may launch a legal challenge against the council if such measures were not in place.

Thus, under a "do nothing" response, a council could still expect to face significant pressure to complete a plan change under the RMA that would at least make GMO activities subject to minimum provisions concerning monitoring and financial accountability. This would be directed at having a council incorporate conditions or performance standards that would seek to ensure altered genetic material did not migrate beyond the site at which it was being used. There would be very little difference in cost between a plan change directed at a minimum response and that targeting a fuller response.

Another scenario is that a private plan change could be introduced and Council would become the respondent if it decided not to adopt it and did not have statutory grounds to reject the plan change.

In summary, the information behind the policies and methods promoted in this Plan Change is based on international and national evidence and there is little risk associated with the Plan Change going ahead. It is consistent with a precautionary approach that prohibits activities in the face of uncertainty, particularly where the potential costs are high and may be irreversible. The risk of not acting (not pursing this Plan Change) is that the significant Resource Management Issue remains unresolved and the resources of the Northern Peninsula are not managed sustainably.

4.4 Appropriateness of the Objectives in Achieving the Purpose of the Act

Section 32(3)(a) of the RMA requires the evaluation to examine the extent to which each objective is the most appropriate way to achieve the purpose of the Act. This section of the report considers the role of the Objectives in achieving the purpose of the Act and in achieving the sustainable management of the natural and physical resources in the Northern Peninsula.

The Plan Change Objectives are:

\textbf{1.4.1} The environment, including people and communities and their social, economic and cultural wellbeing and health and safety, is protected from potential adverse effects associated with the outdoor use, storage, cultivation, harvesting, processing or transportation of GMOs through the adoption of a precautionary approach, including adaptive responses, to manage uncertainty and lack of information.

\textbf{1.4.2} The sustainable management of the natural and physical resources of the district/region with respect to the outdoor use of GMOs, a significant resource management issue identified by the community.

\textsuperscript{51} Sections 44A and 45A.
These Objectives are the desired end point from the resolution of the significant Resource Management Issue set out in Section 3.1. Section 5 of the Act sets out its purpose as follows:

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
   a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
   b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
   c) Avoiding, remediating, or mitigating any adverse effects of activities on the environment.

Achieving the purpose of the Act also requires addressing the matters set out in sections 6 (matters of national importance), 7 (other matters) and 8 (Treaty of Waitangi) of the Act.

As set out in Section 4.2, inserting provisions into the District / Unitary Plan to manage the outdoor use of, and potential effects of, GMO activities is considered to be the most appropriate way of achieving the purpose of the Act for this type of activity. The Objectives clearly state the desired outcome of providing for outdoor use of GMOs while ensuring potential adverse environmental effects are avoided, or mitigated through a precautionary approach. The Objectives also ensure unacceptable risks to the community from the outdoor release of GMOs are avoided. The Objectives recognise the value of natural and cultural resources in the Northern Peninsula, and the need to protect these values from the outdoor use of GMOs.

The Objectives will sustain the physical resources of the Northern Peninsula, now and for future generations, in particular the life supporting capacity of air, water and soil ecosystems, and through the adoption of effective policies, rules and methods, any potential adverse effects on the environment can be avoided.

The Objectives will enable people and communities to provide for their social, economic and cultural well being and for their health and safety by protecting existing primary producers from possible economic harm through GM contamination and loss of markets, protecting marketing and branding advantages and price premiums for primary producers, marketing and branding advantages for the tourism sector, and respecting socio-cultural differences, particularly the cultural values of Māori.

The Objectives will ensure the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga are recognised and provided for.

The Objectives adopt a precautionary approach to the management of GMOs. The essence of the precautionary principle involves assessing and responding to potential risks or effects before they eventuate. There are uncertainties about the scope and scale of risks arising from the use of GMOs. Where the risks are high or difficult to assess or quantify by conventional risk analysis, or the potential effects are significant or uncertain, caution should be exercised before permitting and/or undertaking the activity in question, until more is known about the risks and potential effects. The adoption of a precautionary approach, as set out in Objective 1.4.1, to manage the
outdoor use of GMOs to minimise the risk to the environment, economy and socio-cultural resources and values, is inherent in the Act. The Objectives also reflect community preferences for a precautionary approach to address the issue of outdoor uses of GMOs.

It is concluded that the above Objectives are the most appropriate way of achieving the purpose of the Act.

**With Regard to other Objectives in the District / Unitary Plan**

Sections 59, 63 and 72 of the RMA state that the purpose of the preparation, implementation, and administration of regional policy statements, regional plans and district plans is to assist regional and district councils to carry out their functions in order to achieve the purpose of the Act. In assessing whether the Objectives are the most appropriate way to achieve the purpose of the Act, it is therefore appropriate to undertake an assessment to ensure that the Objectives are generally consistent with the other objectives in the District / Unitary Plan as these are an existing expression of how the council carries out its functions.

As the Plan Change provides generic plan provisions that will potentially be adopted by up to four territorial/unitary authorities and into a number of District / Unitary Plans, this assessment will be undertaken by each council when incorporating (and if necessary refining) the Plan Change provisions into their respective planning documents.

### 4.5 Appropriateness, Costs and Benefits of Policies, Rules and Other Methods

The assessment of the proposed policies, rules and other methods under section 32(3)(b) and 32(4)(a) is provided in Table 2. The following subsections draw issues together that benefit from a fuller description.

#### 4.5.1 Appropriateness

The Plan Change is an appropriate response to community aspirations for a process whereby councils can determine acceptable levels of risk and cost exposure with respect to outdoor GMO activities within a council’s jurisdiction.

Councils have repeatedly sought amendments to the HSNO Act to provide such a process within the national regulatory regime, but central government has ruled this out on a number of occasions. Additional controls at the local level are an alternative means of allowing councils to perform duties imposed on them under the LGA and the RMA.

As outlined in Section 4.2, the RMA is an effective option, and the most appropriate of those available. Further, there is not just an absence of conflict with the HSNO Act, supplementary regulation under the RMA is fully consistent with the intended interaction between the two statutes. At the time the HSNO Act was developed by central government, the intention was that additional controls could be set “under other legislation where these controls are more stringent or specific… and are required to
meet other outcomes or responsibilities.\textsuperscript{52} Accordingly, section 142 (3) of the HSN0 Act provides that local government can set higher standards for hazardous substances through RMA conditions, and while a similar provision is not specified for new organisms, a parallel use of the Act would be similarly consistent.

A key purpose of the Plan Change is to "meet other outcomes or responsibilities", especially those under the LGA and RMA, and the outcome sought is controls that overall will be "more stringent".\textsuperscript{53} Thus rather than duplication, supplementation is the mechanism being used to achieve increased protection for the community.

The controls are supplementary as they are precisely targeted to:

- \textbf{Fill gaps in the national regulatory regime} such as the lack of robust liability provisions for activities that do not breach EPA consents; and

- \textbf{Set standards to ensure community determined outcomes are achieved}. Relative to an uncertain and / or indeterminate standard for exercising precaution in particular, the plan change sets specific performance standards that are high in themselves and can reasonably be judged as providing higher standards than indeterminacy.

To the extent that field trials will be subject to discretionary controls and this involves additional analysis, as the controls require an EPA approval before an application can be made, further analysis (such as impacts on the local economy) will again be supplementary, as will information requirements on applicants.

As the RMA controls are supplementary and not duplicative, they are the most efficient option for a council to address the significant Resource Management Issue.

The Plan Change is also consistent with the recently revised purpose statement of the LGA.\textsuperscript{54}

\begin{quote}
"to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses".
\end{quote}

In order for a regulatory function to be "good quality", it must be efficient, effective, and appropriate to present and anticipated future circumstances.\textsuperscript{55} As the foregoing has set out, the Plan Change is effective and appropriate, and it is also the most efficient option available to a council.

\section*{4.5.2 Costs}

The greatest potential cost is the value of any opportunities lost as a result of the inability to release GMOs. The EPA specifies that the counterfactual for determining the benefit of a proposed GMO activity is the gains to New Zealand it would provide over and above that which could have been expected to result in any case.\textsuperscript{56} This

\begin{flushright}
53 The outcomes will in all cases be stricter in respect of financial accountability measures, and will tend to be more stringent or at least as stringent in other respects.
55 Section 10, as revised in 2012.
\end{flushright}

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means that for foregone benefits to count there must be benefits in addition to that which could have been expected if the GMO activity had not gone ahead.

The key area of interest is agricultural GMO applications, given the predominant land uses in the Northern Peninsula. Traditional breeding has delivered consistent incremental gains in agricultural productivity, so that the baseline is far from static. Discoveries in gene science in recent decades have led to new productivity enhancement techniques, and GM is one of a number of such applied technologies. In consequence, there are a number of routes to enhanced agricultural productivity, even when limiting consideration to the genetic makeup of the inputs.

A recent comparison of corn yields in the US (where GM maize dominates over non-GM varieties) and European countries growing essentially no GM maize demonstrated Europe’s equal or in many cases superior yields over a quarter of a century. This clearly illustrates that gains can be quite independent of access to any particular biotechnology, including GM products. Maize is the second most widely planted GM crop in the world and the comparison shows that since the introduction of GM crop varieties in the mid 1990s, gains in European corn yields have at least kept pace with those in the US on a per hectare basis.\(^5^7\)

For some time, GM developers have been anticipating step change gains that would separate food GMOs from such patterns but these have yet to be demonstrated in production. What has become clearer in recent years is that at least one other technique is equally capable of achieving step change gains. Marker Assisted Selection ("MAS"), also known as precision breeding, makes use of gene science to better understand the traits that are sought to be transferred from one plant to another, but the process of creating the new organism is based on traditional non-GM techniques - such that the result is not a GMO. MAS is generally capable of delivering the same scope of new varieties as GM.\(^5^8\)

Therefore, as GM is almost never a unique route to a particular productivity enhancement, and non-GM techniques can generally achieve similar outcomes, in principle there need not be any foregone benefits arising from prohibiting the release of GMOs. Actual costs will be scenario dependent, and in particular could depend on whether a New Zealand-based company has devoted its research effort to use of a GM route (versus a non-GM route) and whether competing non-GM options have been pursued locally or not.

Forecasting outcomes is further complicated at this point due to the potential for circularity in the analysis. If councils do not have controls to manage GMO activities in place, then developers are less likely to avoid GM routes to productivity enhancement, whereas if a number of councils have adopted such rules, local developers will tend to choose non-GM routes. In the long run, because of the availability of non-GM routes, the cost of prohibiting GMO release activities will tend to zero.

The overall analysis is however simplified by the ability to alter a plan so as to make a particular GMO or class of GMOs a discretionary activity as new information becomes available. As described in Section 4.3, where a GMO is considered to provide net benefits to the jurisdiction, a plan can be changed in a manner that minimizes the

\(^{57}\) Professor Jack Heinemann, Presentation to Hastings District Council, 24 October 2012.

\(^{58}\) GM does not enjoy a timing advantage either. Dr Robert Reiter, a molecular biologist and VP Biotechnology at Monsanto recently stated that: “Conventional crop breeding requires a 7 – 8 year cycle, compared to 10 – 15 years from inception to development for genetically modified crops...” [http://www.sciencemediacentre.co.nz/2012/09/04/gm-biotech-players-outline-their-science-roadmaps/](http://www.sciencemediacentre.co.nz/2012/09/04/gm-biotech-players-outline-their-science-roadmaps/)
potential for delay in securing those benefits. The existence of this option to reverse the constraint effectively caps the potential value of any lost opportunities arising from a GMO release at the cost of making a further plan change.

With respect to field trials, many of the controls set by the Plan Change are common to those required under the HSNO Act for a field trial – for example the prohibition on altered genetic material moving beyond the boundary of the test site. The financial accountability provisions are additional costs to the developer but as they are intended to internalise any costs otherwise externalised, there is no net cost to the community. A further overall feature of field trials is that these can generally be conducted in another part of New Zealand without affecting the prospects for later use of the GMO in question within a council’s jurisdiction. There would nonetheless be additional transaction costs to the GMO proponent involved in making a separate application to a council as well as the EPA if a field trial were sought to be conducted in the council’s area, but these costs will be minor. It is not unusual for consent applications to be made under different statutory codes in respect of a particular land use.

The residual cost that is not contingent (other than on this Plan Change proceeding) is the administrative cost of making the Plan Change. As described in Section 4.3, costs on a par with a plan change, if not actually a plan change of some form, may prove difficult to avoid if a community is strongly minded to seek a precautionary response.

4.5.3 Benefits

The principal benefit of the Plan Change is the ability to set community determined levels of risk and cost exposure with respect to GMO activities within a council’s jurisdiction. Establishing appropriate standards of protection will have benefits that are financial and non-financial.

Financial benefits arise from avoiding the risk of lost income due to GM contamination of non-GM crops, avoiding the need to curb or eradicate a GMO in the environment that proves to be unwanted, and potentially from price premiums delivered by branding that is in part reliant on a GM Free status for an area.

Pastoral farming, horticulture and forestry constitute the predominant land uses in the Northland Region and are also important land uses in the Auckland Region, though these are considerably less significant to its overall economy. GM varieties relevant to each of these sectors are either commercially available today or under active development. Both regions are also home to ecologically sensitive areas.

The main relevant land-based industries in Northland and Auckland are:

- Pastoral agriculture accounts for over half of land use in Northland, and carries 6% of the nation’s dairy stock and 10% of its beef stock, while Auckland carries 2% of the nation’s dairy stock and 3% of its beef stock.

Potential uses of live GMOs in pastoral farming include GM feed and pasture grasses and GM livestock.

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- Auckland accounts for 12% of national horticultural production and Northland 5%.  
- Northland accounts for 9% of the nation’s planted production forest area, and Auckland 2%.  
- Scion (a Crown Research Institute) is currently conducting field trials of GM pine and other species in Rotorua.

As set out in Section 2.2.2, there are a number of different risk pathways capable of triggering market or environmental damage that could result in significant financial consequences. The value of avoiding any one of these is scenario dependent. Experience with GM contamination events indicates that losses from a single event can amount to millions or tens of millions of dollars. Similarly, experience with unwanted new organisms has shown that the costs of eradicating one of these can amount to tens of millions of dollars, and attempts to even limit the rate of spread can require millions of dollars. The level of cost that could be expected within a particular jurisdiction depends on the type of GMO and the nature of the problem, but exposures to constituents in the millions of dollars per incident are reasonable to assume.

While the government is obliged to remove any GMO that is illegally present, it has complete discretion over whether it assists financially with the removal of a GMO that was approved for release by the EPA but later is seen as an unwanted new organism. Losses arising from GM contamination will tend to be faced by those in the community (whichever way claims between GM and non-GM growers are settled) and attenuated only to the extent that insurance can be obtained.

A further important benefit is avoiding the foreclosure of opportunities to enhance the value of a jurisdiction’s production through branding and marketing. The Northern Peninsula (north of the Auckland Isthmus) is geographically distinct and this provides a demonstrable physical separation from other areas. If the area were to be marketed as having distinct food production characteristics, including being GM Free, such a geographic separation could be pointed to in order to underscore the distinction.

Even within Europe, where GMO cultivation is very rare and constitutes 0.01% of global acreage, a number of regions have branded themselves GM Free. This includes 21 regions in France and 16 in Italy – many that evoque premium food attributes such as Tuscany, Salzburg, Burgundy and Provence.

In Australia, the South Australian Government legislated for the Eyre Peninsula to be provided with separate and stronger powers to exclude GM cultivation from an area in which quite strong restrictions already apply. Tasmania has gone further and adopted a policy of state-wide exclusion of GMOs and a branding strategy emphasising the region’s pristine character.

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61 Statistics New Zealand, 2011 data from table builder for agriculture.
63 Simon Terry Associates and Mitchell Partnerships, Community Management of GMOs II: Risks and Response Options, 2005, Section 2.3. In well-defined markets, the cost of a particular risk can be revealed by insurance contracts but the issue at hand is not suitable for this.
64 Simon Terry Associates and Mitchell Partnerships, Community Management of GMOs II: Risks and Response Options, 2005, Section 6.2.2.
66 See: www.brandtasmania.com
New Zealand currently enjoys de facto recognition as a GM free growing area and this has allowed maize producers as a group to secure higher returns than would otherwise be the case. As the spread of GM contamination makes it harder for producers in a number of countries to be GM free, and at the same time many high value consumer markets remain resistant to GM content in food, premiums for GM free production can be expected to remain if not expand.

A plan change that excludes GMO releases would provide the underpinning for individual companies and potentially for regional bodies to further develop and promote a brand capable of adding value to existing production as part of a wider promotion of local attributes.  

Other non-financial benefits of the Plan Change include:

- Avoidance of adverse effects on Māori cultural values;
- Reduced risk to biodiversity; and
- Reduced scope for tension between neighbours arising from any GM plantings.

Overall, the largest potential benefit is the avoidance of the risk of incurring costs that are measured in the millions to tens of millions of dollars per serious incident, whereas the cost of this Plan Change and any contingent costs (including subsequent plan amendment) together would be considerably less than the cost of even one of the minor GM contamination events that have occurred in New Zealand to date. The administrative costs involved in establishing the Plan Change are in effect the cost of avoiding these risks. While the prospect of any particular event occurring would be difficult to attach a probability to, the differential between the risks and the remedy is so large that the cost can be viewed as an insurance policy premium.

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67 Northland’s current branding initiative, led by Enterprise Northland, is called “Northland Naturally”, “rich in natural beauty and resource”.

68 At least three GM contamination events have occurred in New Zealand that have involved financial consequences, with each resulting in losses of $0.5 to $1 million. One of these is detailed in: Simon Terry Associates and Mitchell Partnerships, Community Management of GMOs II: Risks and Response Options, 2005, p13.
The proposal includes potential changes to the existing laws and regulations regarding the operation of medical devices. The ultimate goal is to improve patient safety and ensure that medical devices are used effectively. The proposal also includes an assessment of the potential impacts on the healthcare sector and the economy. The proposed changes are designed to address the current challenges faced by the industry and to promote innovation and research in medical device technology.
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**Notes:**
- Section A is not applicable.
- Sections B, C, and E are applicable and require further action.
- Sections D, G, H, I, and L are applicable but do not require further action.
- Sections J, K, M, N, and P are applicable and require additional consideration.
- Sections Q and S are applicable and require a detailed review.
- Sections T, U, W, and Y are applicable and require immediate action.
- Sections V, X, and Z are not applicable.
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**Appropriateness of achieving the objectives:**

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**Assessment under section 2(c)(ii) of the Act:**

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5. NEXT STEPS

Schedule 1 of the RMA outlines the requirements for consultation in the plan development process. In respect to a section 32 evaluation, consultation is important as it assists to identify and assess issues, gather information from, and understand the needs of, resource users and others in the community, including tangata whenua.

The initial evaluation of community responses has indicated that the Northern Peninsula community, including tangata whenua, seek a relatively strong degree of precaution in respect to the management of GMOs, but also remain open to opportunities that new GMOs may provide. This community preference has informed the development of the Plan Change.

Schedule 1 requires targeted consultation and allows for public consultation during the preparation of a plan or change to a plan. It is proposed that the Plan Change and Section 32 Report are now subject to consultation as required under Schedule 1 of the Act to assess community views on the Plan Change.

The consultation process should acknowledge the Waitangi Tribunal Wai 262 findings and should include engagement with Mana Whenua iwi authorities and with Mataawaka.

A good opportunity to undertake consultation in the context of the Auckland Council jurisdiction is in the form of the proposed March 2013 Unitary Plan Discussion Draft. The inclusion of the Plan Change provisions associated with this section 32 evaluation is a matter for the determination of the Auckland Council.
6. CONCLUSION

This report, along with the supporting documentation in Volume 2, provides a section 32 analysis with respect to a Plan Change that proposes new provisions for the Northern Peninsula's respective District / Unitary Plans to manage the outdoor use of GMOs. While there may be a range of benefits associated with the outdoor use of GMOs, there are also environmental, economic and socio-cultural risks that could be substantial, and irreversible. A wide range of GMO products are being researched and developed, including ones that GMO developers/operators may consider introducing to the Northern Peninsula. The current lack of provisions to manage GMOs in the District / Unitary Plans with respect to GMO activities does not protect the environmental, economic or socio-cultural resources of the Northern Peninsula, nor does the absence of provisions reflect the level of control desired by the communities (including Māori) to manage GMO activities.

There are key gaps in the national regulation of GMOs, namely the absence of adequate liability provisions and applicant financial fitness requirements, the absence of a mandatory precautionary approach, and a lack of certainty of outcome for local government and communities. Changes to the national level regulatory regime to address these gaps have not been forthcoming, despite substantial on-going local government pressure for such change. Where a local authority has determined that a precautionary approach to GMO risks is warranted, and that higher standards than those set by the EPA are warranted, or that the EPA cannot be relied on to undertake the level of monitoring or financial accountability sought, it has jurisdiction under the LGA and RMA to manage land and water uses involving GMOs. This interpretation is based on legal advice provided to the Working Party, and is consistent with Crown Law and Ministry for the Environment advice.

The purpose of the Plan Change is to apply a precautionary approach to manage the outdoor use of GMOs to minimise the risk to the environment, economy and socio-cultural resources and values. The Plan Change is established such that Northern Councils are employing supplementary, not duplicative, regulation. Local government is determining to impose stricter provisions to ensure community determined outcomes can be achieved and that it can fulfil its duty of care to its constituents.

The Plan Change inserts a new significant Resource Management Issue, Objectives, Policies and Methods (including new definitions) into the District / Unitary Plan. The purpose of this is to ensure that the outdoor use of GMOs, including in the CMA, is managed in accordance with the purpose of the RMA. The Plan Change provisions have been drafted generically, to enable individual councils to tailor the provisions to their specific District / Unitary Plan.

Initial consultation has found strong support for local authorities to have a role in regulating GMOs in their areas. Local or regional level regulation of the outdoor use of GMOs is supported by the Northern Peninsula communities, including Māori. Issues raised during consultation have been addressed through the commissioning of technical assessments, the refinement of the Plan Change provisions, and this section 32 evaluation.

An assessment of the proposed provisions under section 32 of the Act has determined that the Objectives are appropriate to achieve the purpose of the Act, and that the proposed policies, rules and other methods are the most appropriate way to achieve the Objectives. The provisions are an appropriate response to community aspirations to manage risks associated with GMO activities, and are consistent with the
precautionary approach provided for under the RMA, where activities may be prohibited if there is uncertain or insufficient information. The assessment has also determined that the risk (and cost) arising from acting is low, but that the risks and potential costs arising from not acting are high.

Targeted consultation and discussion with key interest groups and the community is required to assist the Northern Councils to further refine the significant Resource Management Issue and determine the appropriateness, costs and benefits of the Plan Change.

The various provisions detailed within this report are considered to be the most appropriate way to address the significant Resource Management Issue. Based on the assessment provided in this report, it is appropriate for the Northern Councils to proceed with the Plan Change.
7. REFERENCES


Environmental Protection Authority. Assessment of Economic Risks, Costs and Benefits: Consideration of impacts on the market economy, November 2011.


Saskatchewan Organic Directorate, Presentation to the Canadian House of Commons, Standing Committee on Agriculture and Agri-food, 29 January 2002.


Sustainability Council Submission in Respect of Revisions to the ERMA Methodology (October 2003) at http://www.sustainabilitynz.org/docs/CouncilOptionsforGMmanagement

APPENDIX C

SELECTED CASELAW
Federated Farmers of New Zealand v Northland Regional Council

[2015] NZEnvC 89

Environment Court, Auckland (ENV-2013-AKL-161)

Judge Newhook

24 April; 12 May 2015


Federated Farmers of New Zealand appealed against the precautionary Genetically Modified Organisms (GMO) provisions in the proposed Regional Policy Statement for Northland.

The sole point remaining before final resolution of the appeals concerned the question as to whether there was power under the Resource Management Act 1991 for regional councils to make provision for control of use of GMOs through regional policy statements and plans.

The appeal centred around whether the regulation of GMOs in New Zealand was undertaken solely under the Hazardous Substances and New Organisms Act 1996, as Federation Farmers contended, or whether some level of regulation could also be undertaken under the Resource Management Act 1991.

Federated Farmers contended that Hazardous Substances and New Organisms Act 1996 was the only code to address GMOs.

The Northland Regional Council submitted that consideration of the control of GMOs could be addressed under the comprehensive Resource Management Act 1991 framework for promotion of the sustainable management of natural and physical resources, including the avoiding, remediating or mitigating of any adverse effects of activities on the environment. The Council argued that Hazardous Substances and New Organisms Act 1996 played a more confined role in the overall legislative
picture, addressing the more limited issue of the granting of approvals to import, develop, field test, or release, new organisms, somewhat as a more one-off regulatory transaction.

**Held**, (1) the starting point was exemplified in a strong statement by the High Court in its *Meridian Energy* decision (cited below), such that “in general terms, all resource use is amenable to its framework, unless expressly exempted from consideration.” This statement is one of legal principle, not merely *obiter dicta* as argued by Federated Farmers. The *Meridian* case was authority for the proposition that a statutory interpretation exercise of the kind before the Court should not be confined to an assessment of whether express exemption occurs under the Resource Management Act 1991, because express exemption may be found in other legislation. (paras 36, 40, 42, 44)


(2) Regulatory jurisdiction under the *Hazardous Substances and New Organisms Act 1996* is limited to the activity of introduction of new organisms to New Zealand. The argument that Hazardous Substances and New Organisms Act 1996 is the exclusive code for control of GMOs would bring about an *awkward* proposition creating a disparity between the Resource Management Act 1991 between control of new organisms on the one hand and all other organisms on the other, which was contrary to the broad regulatory approach under the *Resource Management Act 1991*. There was no express exemption for consideration of the control of new organisms under the Resource Management Act 1991 in either that Act or the Hazardous Substances and New Organisms Act 1996. This indicates that the Hazardous Substances and New Organisms Act 1996 was not an exclusive code for regulatory control of GMOs in New Zealand. The Resource Management Act 1991 and Hazardous Substances and New Organisms Act 1996 offer significantly different approaches to the regulation of GMOs. (paras 45, 47, 49)

*Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC), considered

(3) The doctrine of implied repeal of relevant provisions of the Resource Management Act 1991 by enactment of the Hazardous Substances and New Organisms Act 1996 was not open in the present circumstances. The two Acts had complimentary rather than overlapping roles. Even if the regulatory provisions of the Hazardous Substances and New Organisms Act 1996 are more precise in some respects than the broad provisions in the Resource Management Act 1991, there was no context for taking the extreme approach of an implied repeal. (paras 57-59)

*Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121, considered

**Cases referred to**

*Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC)


*NZ Forest Research Institute Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 298, [2014] NZRMA 181

*Petone Planning Action Group Inc v Hutt City Council* EnvC Wellington W20/08, 2 May 2008

*R v McNeish* [1982] 1 NZLR 247 (CA)

*Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121

Appeal

This was an unsuccessful appeal against the precautionary genetically modified organisms provisions in the Regional Policy Statement for Northland over whether there is jurisdiction under the Resource Management Act 1991 for regional councils to make provision for the control of the use of Genetically Modified Organisms through regional policy statements and plans.

M R Christensen and R Gardner for appellant
J A Burns for respondent
G J Mathias for Whangarei District Council
R A Makgill for Soil & Health Association of NZ Inc, GE Free NZ (Northland) Inc
(and the other parties under s 274, numbers of whom had written to the Court expressly opposing the Federated Farmers’ position)

Cur adv vult

JUDGE NEWHOOK

Introduction and statement of the issue

[1] The current argument arises in one of a set of appeals concerning decisions on submissions about the proposed Regional Policy Statement for Northland. Almost all points in the appeals have been quickly settled in mediation, and the Court is in the process of considering draft consent orders on those. The subject matter of the present decision follows a hearing about what is almost the sole point remaining before final resolution of the appeals.

[2] The question before the Court is as to whether there is power under the RMA for regional councils to make provision for control of use of GMOs through regional policy statements and plans. Some parties endeavoured to extend the question by analogy to the promulgation of district plans as well. I have maintained the focus on regional instruments in this decision, because the appeal concerns a regional policy statement.

[3] Subject to the detail that follows, the argument is whether the regulation of GMOs in New Zealand is undertaken solely under the Hazardous Substances and New Organisms Act 1996 (HSNO), or whether some level of regulation may also be undertaken under the RMA. (No party sought to argue that the RMA in any way takes precedence over HSNO.)

[4] The argument is a strictly legal one, involving statutory interpretation. It does not address the merits of the RPS provisions under appeal.

[5] My approach, having heard the lengthy submissions on behalf of the parties, will be as follows:

(a) The task should commence with consideration of the text of relevant sections of the two statutes, informed to the extent necessary by the purpose and context of them.

(b) It is appropriate in taking that first step, to seek to reconcile the enactments if possible, and if it is not, then to consider which of the enactments should prevail.

(c) There are various approaches available should it be necessary to consider which of the enactments should prevail, including "express repeal", "express exclusion", and in the last resort, "implied repeal".
[6] One final introductory matter is that the relationship in question between the RMA and HSNO has been discussed in an Environment Court Decision on one occasion previously. That case was NZ Forest Research Institute Ltd v Bay of Plenty Regional Council.\(^1\) Having noted that s 30 RMA makes no reference to "genetically modified organisms", but only to "hazardous substances", and noting the absence of a definition of a "genetically modified organism" in the RMA; also that HSNO is silent on any relationship between the two Acts concerning GMOs, the Court observed:

\[15\] Taken that far, the inclusion of hazardous substances in both pieces of legislation, and the complete absence of genetically modified organisms in the RMA, might be thought of some significance, perhaps leading to the conclusion that the omission is deliberate, and thus the RMA has no place in the management of GMOs.

[7] Mr Christensen, counsel for Federated Farmers, placed some emphasis on those findings early in his submissions, but very properly acknowledged that they were *obiter dicta*\(^2\). I observe that I have the distinct sense that the point was not nearly as thoroughly argued as it was in the case before me, where in contrast it was the very subject matter of the argument I heard.

**Text, purpose and context**

[8] The term "genetically modified organism" is not defined in the RMA, but is defined in s 2 of HSNO in the following terms:

- **Genetically modified organism** means, unless expressly provided otherwise by regulation, any organism in which any of the genes or other genetic material—
  (a) have been modified by *in vitro* techniques; or
  (b) are inherited or otherwise derived, through any number of replications, from any genes or other genetic material which has been modified by *in vitro* techniques.

[9] The purpose, principles and matters relevant to the purpose of HSNO are set out in its ss 4, 5 and 6. They are as follows:

4. **Purpose of Act**

The purpose of this act is to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.

5. **Principles relevant to the purpose of the Act**

All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, recognise and provide for the following principles:

(a) The safeguarding of the life-supporting capacity of air, water, soil and ecosystems;

(b) The maintenance and enhancement of the capacity of people and communities to provide for their own economic, social and cultural wellbeing and for the reasonably foreseeable needs of future generations.

6. **Matters relevant to purpose of Act**

All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, take into account the following matters:

(a) The sustainability of all native and valued introduced flora and fauna;

(b) The intrinsic value of ecosystems;

(c) Public health;

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2. That is, not part of the reasoning for the decision in that case.
(d) The relationship of Maori and their culture and traditions with the ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga;

(e) the economic and related benefits and costs of using particular hazardous substance or new organism;

(f) New Zealand’s international obligations.

[10] Section 7 of that Act sets out a requirement for a precautionary approach to be taken where there is scientific and technical uncertainty about adverse effects. Section 8 requires all persons exercising powers and functions under the Act to take account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[11] The purpose of the RMA is set out in s 5 of that Act. It is well known, but I will set it out for the purposes of comparison with the relevant provisions of HSNO:

5. Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources;

(2) In this Act, sustainable management means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while—

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[12] Section 6 RMA sets out, in some detail, seven matters of national importance which people are to recognise and provide for when exercising functions and powers under the Act, which include (in summary), natural character of the coastal environment and other water bodies; outstanding natural features and landscapes; areas of significant indigenous vegetation and significant habitats of indigenous fauna; public access to and along water bodies; the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga; historic heritage; and protected customary rights.

[13] Section 7 sets out other principles at a slightly lower level of importance than those under s 6, and they include (in summary), kaitiakitanga; the ethic of stewardship; the efficient use and development of natural and physical resources; the efficient end use of energy; maintenance and enhancement of amenity values; intrinsic values of ecosystems; maintenance and enhancement of the quality of the environment; finite characteristics of natural and physical resources; the protection of the habitat of trout and salmon; the effects of climate change; and benefits to be derived from the use and development of renewable energy.

[14] Section 8 RMA concerns the Treaty of Waitangi, and is fairly similar to s 8 HSNO, except that it commences with the words “In achieving the purpose of this Act,” a difference which is probably not important for present purposes.

[15] Sections 5, 6, 7 and 8 of each Act bear some similarities to each other.

[16] The RMA originally included a pt XIII, repealed by the enactment in 1996 of HSNO. Indeed, that Part was never in force, given absence of a required Order in Council. That former Part foreshadowed a Hazards Control Commission to assist in the control of hazardous substances and new organisms. Section 345(2) required the Commission to balance the benefits which might be obtained from hazardous substances and new organisms against the risks and damage to the environment and to
the health, safety and economic, social and cultural wellbeing of people and communities. The Commission was (if formally established) to have regard to pt 2 RMA in carrying out its functions. It would have had a range of functions recorded under s 347 RMA. Those functions were principally of an advisory, consultative, and recording nature, but were to involve licencing, monitoring and enforcement of hazardous substances or new organisms “if required by any legislation”.

[17] Some similarities also exist between the two Acts as to the definition in each of “effect.”

[18] In HSNO, effect includes:
(a) Any potential or probable effects; and
(b) Any positive or adverse effects; and
(c) Any temporary or permanent effects; and
(d) Any past, present or future effects; and
(e) Any acute or chronic effect; and
(f) Any cumulative effect which arises over time or in combination with other effects.

[19] In the RMA, the meaning of effect is found in its own separate section, s 3, which provides as follows:

In this Act, unless the context otherwise requires, the term effect includes—
(a) Any positive or adverse effect; and
(b) Any temporary or permanent effect; and
(c) Any past, present, or future effect; and
(d) Any cumulative effect which arises over time or in combination with other effects—regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
(e) Any potential effect of high probability; and
(f) Any potential effect of low probability which has a high potential impact.

[20] The two main differences between the respective provisions are, first that the issue of potential effects under the RMA is separated out from the definition section and incorporated into provisions relating to process, for instance s 104 concerning consideration of applications for consent; secondly that cumulative effects are dealt with in somewhat more detail in the RMA. The first difference is probably semantic only, while the second may be of more significance for present purposes.

[21] RMA provisions concerning regional government plan-making have long included functions in respect of hazardous substances, but not concerning GMOs. Interestingly, while pt XIII RMA was repealed by HSNO in 1996, references to regional government control of hazardous substances were not.

[22] Section 30 RMA sets out the functions of regional councils under that Act. It provides as follows:

30. Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
(b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
(c) The control of the use of land for the purpose of—
(i) Soil conservation:
(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:
(iii) The maintenance of the quantity of water in water bodies and coastal water:

[(iii-a) The maintenance and enhancement of ecosystems in water bodies and coastal water:]

(iv) The avoidance or mitigation of natural hazards:

(v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

[(ca) the investigation of land for the purposes of identifying and monitoring contaminated land:]

(d) In respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—

(i) Land and associated natural and physical resources:

[(i-i) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:]

(iii) The taking, use, damming, and diversion of water:

(iv) Discharges of contaminants into or onto land, air, or water and discharges of water into water:

[(i-v-a) The dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:]

(v) Any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

(vi) The emission of noise and the mitigation of the effects of noise:

(vii) Activities in relation to the surface of water:

(e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) The setting of any maximum or minimum levels or flows of water:

(ii) The control of the range, or rate of change, of levels or flows of water:

(iii) The control of the taking or use of geothermal energy:

(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

[(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:]

[(fb) if appropriate, and in conjunction with the Minister of Conservation,—

(i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:

(ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:]

(g) In relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—

(i) Soil conservation:
(ii) The maintenance and enhancement of the quality of water in that water body;

(iii) The maintenance of the quantity of water in that water body;

(iv) The avoidance or mitigation of natural hazards;

[(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity;]

[(gb) the strategic integration of infrastructure with land use through objectives, policies, and methods;]

(h) Any other functions specified in this Act.

[2] A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

[3] However, a regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control aquaculture activities for the purpose of avoiding, remediating, or mitigating the effects of aquaculture activities on fishing and fisheries resources.

[4] A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) nothing in paragraph (a) affects section 68(7); and

(c) the rule may allocate the resource in anticipation of the expiry of existing consents; and

(d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—

(i) allocate all of the resource used for an activity to the same type of activity; or

(ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and

(e) the rule may allocate the resource among competing types of activities; and

(f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).]

[23] Subject to some confined exceptions (eg concerning control of fisheries), it can be seen that the functions of regional councils under the Act are very broad, and cover a multitude of matters.

[24] Section 59 RMA provides the purpose of regional policy statements, in the following terms:

59. Purpose of regional policy statements

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

[25] Section 60 RMA provides process for the preparation and change of regional policy statements.

[26] Section 61 RMA lists matters to be considered by regional councils in policy statements as follows:
61. Matters to be considered by regional council (policy statements)

[(1) A regional council must prepare and change its regional policy statement in accordance with—
(a) its functions under section 30; and
(b) the provisions of Part 2; and
(c) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
(d) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
(e) any regulations.]

(2) In addition to the requirements of section 62(2), when preparing or changing a regional policy statement, the regional council shall have regard to—

(a) any—
(i) management plans and strategies prepared under other Acts; and
(ii) Repealed
[[(iii) Relevant entry on the New Zealand Heritage List/Rarangi Korero required by the Heritage New Zealand Pouhere Taonga Act 2014; and]
(iii) Regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to tiaipure, mainga mataiati, or other non-commercial Maori customary fishing); and
(iv) Repealed
to the extent that their content has a bearing on resource management issues of the region; and
(b) The extent to which the regional policy statement needs to be consistent with the policy statements and plans of adjacent regional councils; and
[(c) the extent to which the regional policy statement needs to be consistent with regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and]

[(2A) When a regional council is preparing or changing a regional policy statement, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:
(a) the council must take into account any relevant planning document recognised by an iwi authority; and
(b) in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Tikutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—
(i) recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and
(ii) take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.]

[(3) In preparing or changing any regional policy statement, a regional council must not have regard to trade competition or the effects of trade competition].

[27] Section 62 RMA provides for contents of regional policy statements:

62. Contents of regional policy statements

(1) A regional policy statement must state—
(a) the significant resource management issues for the region; and
[(b) the resource management issues of significance to iwi authorities in the region; and]]
(c) the objectives sought to be achieved by the statement; and
(d) the policies for those issues and objectives and an explanation of those policies; and
(e) the methods (excluding rules) used, or to be used, to implement the policies; and
(f) the principal reasons for adopting the objectives, policies, and methods of implementation set out in the statement; and
(g) the environmental results anticipated from implementation of those policies and methods; and
(h) the processes to be used to deal with issues that cross local authority boundaries, and issues between territorial authorities or between regions; and
(i) the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—
   (i) to avoid or mitigate natural hazards or any group of hazards; and
   (ii) to prevent or mitigate the adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
(j) the procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement; and
(k) any other information required for the purpose of the regional council’s functions, powers, and duties under this Act.

(2) If no responsibilities are specified in the regional policy statement for functions described in subsection (1)(i)(i) or (ii), the regional council retains primary responsibility for the function in subsection (1)(i)(ii) and the territorial authorities of the region retain primary responsibility for the function in subsection (1)(i)(ii).

(3) A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement or New Zealand coastal policy statement.

[28] Sections 65 and 66 provide for preparation and change of regional plans, and matters to be considered by the regional council in them. These are again very broad in similar fashion to the sections relating to regional policy statements. Of some note, s 66(1) requires regional councils to prepare and change any regional plan in accordance with its functions under s 30, the provisions of pt 2, directions from the Minister for the Environment under s 25A, obligations under s 32, and any regulations.

[29] Counsel for Federated Farmers, Mr Christensen, stressed the repeal of pt X11 RMA by HSN0 in 1996. He contrasted the retention of reference to control of hazardous substances in sections of the Act concerning regional policy statements and plans, with the complete absence of any provision relating to the control of GMOs.

[30] Mr Christensen then developed an argument that HSN0 is a code for regulation and control of GMOs, based on the last two factors. He pointed to s 142 HSN0 about relationship with other acts:

142. Relationship to other acts

(1) Nothing in this Act shall affect the requirements of the Biosecurity Act 1993 in relation to any organism.

(2) Every person exercising a power or function under the Resource Management Act 1991 relating to the storage, use, disposal, or transportation of any hazardous substance shall comply [with the provisions of this Act and with Regulations and Notices of Transfer made under this Act].

(3) Nothing in ss (2) shall prevent any person lawfully imposing more stringent requirements on the storage, use, disposal or transportation of any hazardous
substance and may be required by or under this Act where such requirements are considered necessary by that person for the purposes of the Resource Management Act 1991,

(4) Nothing in this Act shall apply to any resource consent, being:

(a) A land use consent relating to the storage, use, disposal, or transportation of any hazardous substance; or

(b) A coastal permit to do something that would otherwise contravene s 15 of the Resource Management Act 1991; or

(c) A discharge permit,—

where that resource consent was granted before the coming into force of any regulations made under this Act (other than regulations made under Parts 11-16) until such time as the conditions on the resource consent are reviewed in accordance with s 128 of the Resource Management Act 1991.

(5) For the purposes of this section, resource consent has the same meaning as in the Resource Management Act 1991.

(6) Any controls prescribed under any other Act for any other hazardous substance shall not contravene the provisions or regulations made under ss 75 and 76 unless—

(a) There is a provision in that Act that expressly provides that controls made under that Act for specified purposes may contravene the provisions and regulations made under this Act; and

(b) The controls are made for the purposes provided for in that Act.

[31] Mr Christensen submitted about the express reference to hazardous substances in that section, noting that HSNO directs how the RMA is to be interpreted in relation thereto. He noted the continuing absence of reference to GMOs.

[32] He submitted that this was analogous to the relationship between the RMA and the Building Act 2004, on the basis that he considered that such relationships were detailed in their respective pieces of legislation, in effect leaving regulation of GMOs as a point of difference. He referred to cross-references between the Building Act and the RMA, each to the other. Control of GMOs standing in contrast to such relationships, he submitted that HSNO is a code in relation to the control of GMOs, it being, he submitted, "exhaustive". He submitted that therefore there was no role for local authorities to regulate and control them.

[33] The burden of the detail of submissions in opposition to the Federated Farmers' position was carried by Mr Matthias, counsel for Whangarei District Council.

[34] Mr Matthias submitted that it was inappropriate for Federated Farmers to have focussed almost solely on provisions relating to hazardous substances and new organisms in the respective pieces of legislation. He submitted that absence of careful comparison of the purposes of the two Acts was a notable oversight. He discounted the reference to pt XIII RMA because it had never actually come into force in the manner required, by Order in Council.

[35] Mr Matthias focussed on the provisions of s 5 RMA, particularly in the regional context. He submitted that this was achieved by public law process which recognises two main concepts in the Act, namely the provision for the development of environmental policies to promote the goal of sustainable management, and the use of integrated environmental management to implement that goal. He noted that s 5(2) contains a multitude of considerations, offering an environmental decision-maker considerable leeway for making policy and strategic decisions in order to attain the

3 Mr Burns, counsel for Northland Regional Council, adopted and supported the submissions on behalf of WDC and provided brief reasons which entirely aligned with Mr Matthias’s submissions.
goal of the legislation. In that regard, consideration needed to be given to the functions of regional councils. In particular, he noted that in addition to protection of the biophysical environment, a regional council could incorporate social and economic development into its approach. In doing so it could take into account the potential effects of the use or release of GMOs not only in an ecological sense, but also in economic and social terms.

[36] Mr Matthias made reference to what he considered an important and relevant statement by the High Court in *Meridien Energy Ltd v Southland District Council* at [23]:

The RMA provides a comprehensive framework for the regulation of the use of land, water and air. It signalled a major change from the direct and control emphasis of the previous planning regime to the sustainable management of resources, with its composite objective of enabling people and communities to provide for their wellbeing while, among other things, mitigating, avoiding or remediying adverse effects on the environment. The Act is carefully framed to provide control of the effects of resource use, including regulatory oversight given to functionaries at national, regional and district levels. In general terms, all resource use is amenable to its framework, unless expressly exempted from consideration. [emphasis added. Original footnotes omitted.]

[37] Mr Matthias noted that the sentence I have emphasised in the quote is drawn from the decision of the Supreme Court in *West Coast ENT Inc v Buller Coal Ltd*. The Supreme Court had identified that the effects of climate change could be exempted from consideration on a resource consent application because there had been specific provision in the Resource Management (Energy and Climate Change) Amendment Act 2004 which specifically directed local authorities not to have regard to the effects of discharges into air of greenhouse gases on climate change on certain applications, referring to s 104E RMA. Mr Matthias emphasised the stated requirement for express exemption, and submitted that an example was to be found in s 30(2) RMA, where regional councils have certain broad functions in respect of the coastal marine area that specifically exclude certain matters such as the taking, allocation, or enhancement of fisheries resources for the purpose of managing fishing or fishing resources controlled under the Fisheries Act 1996.

Analysis

[38] The question that needs to be addressed is as to whether the two pieces of legislation provide separate codes, with HSNO being the only code to address GMOs. As against this, it can be asked whether consideration of the control of GMOs can be addressed under the undoubted comprehensive RMA framework for promotion of the sustainable management of natural and physical resources including the avoiding, remediying or mitigating of any adverse effects of activities on the environment, while HSNO plays a more confined role in the overall legislative picture, addressing the more limited issue of the granting of approvals to import, develop, field test, or release, new organisms, somewhat as a more one-off regulatory transaction. Federated Farmers advocated the former situation, and the parties opposing it, advocated the latter.

[39] After consideration of all submissions, I have decided that the opposing parties are correct.

[40] I consider that the starting point is exemplified in the passage already quoted from *Meridien Energy Ltd v Southland District Council*. Faced with that strong statement by the High Court, Federated Farmers sought to persuade me that it was

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merely *obiter dicta*, not one of legal principle. Federated Farmers criticised the opposition parties’ submission essentially that the RMA does not expressly exempt controls related to GMOs such that the RMA can address control of GMOs.

[41] Mr Christensen for Federated Farmers submitted that the *Meridian* passage was *obiter* because the Court was considering whether the specific provisions of 1963 Manapouri — Te Anau Development Act over-ride the general provisions in s 9 RMA. He submitted that the “comments” were made in the particular context of that case and not intended to be general statements of the law.

[42] I disagree, and accept the submissions of Mr Makgill for opposing parties that the statement by the High Court in *Meridian* is the *ratio decidendi* (rationale) for the decision. I consider that the statement was the starting point for the result reached in *Meridian*, past which the Court looked to see whether the provisions of the Manapouri-Te Anau Act were an exception, which is what the Court found, for six reasons, in that case. I also agree with Mr Makgill that *Meridian* is authority for the proposition that a statutory interpretation exercise of the kind before me should not be confined to assessment of whether express exemption occurs under the RMA, because express exemption may be found in the other legislation. I consider that to be correct in law, and that the exercise presently being undertaken should be to endeavour to identify whether either of the RMA or HSN0 demonstrates express exemption from consideration of new organisms under the RMA.

[43] Federated Farmers cited a decision of the Environment Court *Petone Planning Action Group Inc v Hutt City Council*6 as supporting its argument focussing on apparent lack of express exemption in the RMA in relation to building code matters. Mr Makgill cited the *Petone* decision as further authority for the analysis not being confined simply to indications in the RMA — s 7(2) of the Building Act 2004 having been identified as presenting such exemption in the *Petone* decision.

[44] I hold that not only was the passage quoted from the High Court Decision in *Meridian, ratio decidendi*, but also that statutory analysis seeking the identification of express exemption from consideration of a topic under the RMA, should not be confined to that Act alone.

[45] The opposing parties argued strongly that the regulatory jurisdiction under HSN0 is limited to the activity of introduction of new organisms to New Zealand. (A more careful phrasing of the proposition would have one cite s 34 HSN0 where the relevant wording refers to importation for release and/or release from containment of new organisms). I accept that the clear words of the section limit the regulatory considerations under HSN0 to new organisms. If I were to accept Mr Christensen’s argument that HSN0 is the exclusive code for control of GMOs, there would seem the creation of a disparity under the RMA between control of new organisms on the one hand and all other organisms on the other. This could be thought contrary to the broad regulatory approach under the RMA described in the *Meridian* decision. To explain the concern a little more, the overall legislative scheme of things would then be to the effect that there would be no requirement to regulate the potential adverse effects of GMOs beyond the act of approving them for release, thereby elevating animals and plants containing GMOs into a special category not amenable to regulation under the RMA as are animals and plants already present in New Zealand. Further, that integrated management of them would not be possible. That apparently awkward proposition needs to be viewed against analysis of both pieces of legislation to ascertain whether there is exemption of RMA regulation of GMOs expressed in either statute.

6 EnvC W20/08, 2 May 2008.
[46] I have already referred to the provisions of s 142 HSNO (Relationship to other Acts), which is where one finds reference the RMA. As already noted, s 142 focuses on the issue of hazardous substances. It does not deal with GMOs.

[47] I can find no express exemption for consideration of control of new organisms under the RMA in either the RMA or HSNO. This is one factor pointing to HSNO not being an exclusive code for regulatory control of GMOs in New Zealand. There is nothing in the scheme of either Act, or the two read together, to call for an interpretative limitation to be placed on the definition of natural and physical resources, which is:

includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures. [emphasis added]

[48] The “awkward proposition” I have just referred to is not, logically on this statutory interpretation analysis, brought into play. I find that there is nothing present in these pieces of legislation to prevent the establishment of objectives, policies and methods to achieve integrated management of natural and physical resources in the broad terms directed by the RMA.

[49] I consider that there is a readily identifiable policy reason for that in these pieces of legislation, read together. Once having been approved for import and release into New Zealand under HSNO, regional authorities can provide for use and protection of them together with other resources in a fully integrated fashion, taking account of regional needs for spatial management that might differ around the country for many reasons, not the least of which might include climatic conditions, temperatures, soils, and other factors that might drive differing rates of growth of new organisms and/or of other organisms, as just a few of perhaps many examples. I agree with the opposition parties that the RMA and HSNO offer significantly different functional approaches to the regulation of GMOs.

[50] There is a further decision of the High Court that I consider provides a strong pointer to a finding that the provisions of the RMA go significantly beyond the narrower provisions of HSNO. That case is Bleakley v Environmental Risk Management Authority7 in which the Court held at [114]:

[114] Given that the authority found that there was no such danger of escape, there was no obligation in law — and it certainly was not appropriate — for the Authority to venture into more orthodox pollution issues. It is true that the Act has an environmental protection purpose, as does the Resource Management Act, however that prima facie wide purpose is to be read in the context of its subject matter and specifics. It is to protect the environment against hazardous substances and organisms, and not on a wider scale. The wider scale is the role of others under general legislation in the RMA. Thus, if spraying milk on pastures were to raise a concern that heritable material might escape, that would be a concern for the Authority. If after Authority action, there was a risk of escape of heritable material, but there remained a risk of another environmental character — eg destruction of aquatic life in streams — that would be a concern to be dealt with under the Resource Management Act. It should not be an Authority matter, despite the breadth of the opening sections of the Act. It is a not unfamiliar judicial problem to reconcile legislation relating to specific activities, and a general legislation in the resource management field.

[51] Essentially, the High Court found against excluding the jurisdiction of a local authority should it deem it appropriate following an evaluation under s 32 RMA, to, for instance, identify areas more (or less) suited to the establishment of activities involving approved GMOs. For instance, regional authorities might, with community

7 [2001] 3 NZLR 213 (HC) at [114].
input, consider particular regional approaches acknowledging social, economic and cultural wellbeing (amongst other things), somewhat beyond the more limited policy considerations for regulation of import and release of new organisms under HSNO. These aspects in s 5 RMA are underpinned by the statutory requirements for preparing and publishing evaluation reports under s 32, including by way of just one example, the requirement for assessment of benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of proposed provisions, including opportunities for economic growth and employment.8 Particular regional considerations would come in for study in a way not anticipated by HSNO.

[52] Mr Matthias gave further examples including policy positions representative of strong cultural concerns of Maori, and if thought appropriate “marketing and branding advantages” based on an approach to limiting the use of GMOs in an area, for instance by encouraging price premia for agricultural production and tourism activities in the locality. I accept these submissions.

[53] Mr Matthias went on to refer to a statement found on the website of the Ministry for the Environment in relation to genetic modification and local government, which appeared to offer an opinion that councils’ functions under the RMA theoretically include addressing environmental risks arising from the development of GMOs in their regions. He also pointed to a Government paper on proposals for Resource Management reform in 2013 advising that “the explicit function for councils to control hazardous substances and the ability for councils to control new organisms through the RMA will be removed. This is considered to be best managed under the Hazardous Substances and New Organisms Act 1996 and by the Environmental Protection Authority ...”. Needless to say I am not here concerned with future central Government policy; that is a matter entirely for Parliament. My finding on Mr Matthias’s reliance on these quotes is that while they may be indicative of policy thinking on the part of officials, I can place little weight on them for assistance with the interpretation of law currently found on the statute books.

Implied repeal

[54] I will address this topic purely for completeness and out of caution. Section 5(1) of the Interpretation Act 1999 requires that the meaning of an enactment must be ascertained from its text in the light of its purpose.9 This principle has properly been the foundation for many judicial exercises in statutory interpretation, including recently and importantly in the decision of the Supreme Court in Terminals (NZ) Ltd v Comptroller of Customs.10 It is widely accepted that the doctrine of implied repeal is one of last resort, to be applied only where all attempts at reconciliation have failed11 (which I have found is not the case here).

[55] The Court of Appeal wrote of the principles of implied repeal in R v McNeish12 in the following terms:

The general legal principles are well settled. One provision repeals the other by implication if, but only if it is so inconsistent or repugnant to the other that the two are incapable of standing together. If it is reasonably possible to consider the provisions so as to give effect to both, that must be done ...

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8 s 32(2) RMA.
9 I acknowledge that this core statutory principle applies equally to the previous parts of this decision, as much as it does to this one.
12 [1982] 1 NZLR 247 (CA) at 248.
Mr Christensen submitted on behalf of Federated Farmers, that the doctrine of implied repeal of relevant provisions of the RMA 1991 by enactment of HSNO in 1996, is open in the present circumstances. Having offered the careful concession that there is a presumption that Parliament does not intend that statutes contradict one another, but operate instead within their respective spheres where possible, Mr Christensen developed his argument about implied repeal. Moving to counter opposition arguments that regional social, economic or cultural matters in the RMA range beyond biophysical and health and safety matters in HSNO, Mr Christensen said:

However, such an argument does not properly reflect the extent of controls which can be imposed on the development, field testing and release of GMOS by the EPA under HSNO. Those controls are extensive and detailed. They require the EPA to give wide consideration of socio-economic and cultural matters.

Mr Christensen endeavoured to argue, without close analysis of such HSNO provisions, that one could draw the conclusion that HSNO and RMA can be interpreted as having overlapping rather than complementary roles. He further developed the argument by submitting that the expression expressio unius est exclusio alterius is apt. He submitted that the express mention of a role for local authorities regarding hazardous substances in ss 30 and 31 RMA, and in s 142 HSNO, and the absence of mention of a role for local authorities in either Act regarding GMOS, indicates that regulation of GMOS is removed from the control of local authorities.

I have dealt with these issues in some measure in earlier sections of this decision. I refer to my findings about comparison of purposes and regulatory functions in each Act. I do not consider that these matters “overlap” as between these statutes, certainly not to the extent that there has been an implied repeal of the general RMA provisions by HSNO provisions. It is relevant again to refer to the decision of the Supreme Court in Terminals NZ Ltd v Comptroller of Customs, in particular the following passage:

The proper approach to statutory construction is set out in the Interpretation Act. The primary task is to interpret the text in light of this purpose. In undertaking this task, we accept that there may be some place for the old canons of construction. However, the maximum expressio unius does little more than draw attention to what might be seen as the obvious proposition that in many contexts mentioning a particular matter may warrant an inference that other relevant matters were intentionally excluded. But whether that is so or not depends on the context. The exclusion might have been accidental or there might have been good reason for it. [emphasis provided. Original footnotes omitted.]

Given the absence of complete overlap, even if regulatory provisions of HSNO are more precise in some respects than the broad provisions in the RMA, I find that there is no context for taking this quite extreme approach. The reasons are found in the earlier section of this decision, and I will not repeat them.

Conclusion

I find against the propositions advanced on behalf of Federated Farmers. I hold that there is power under the RMA for regional councils to make provision for control of the use of GMOS through regional policy statements and plans.

Costs are reserved. Any application should be made in writing within fifteen working days of the date of this decision.

13 Submissions on behalf of Federated Farmers dated 9 March 2015. [36].
14 Interpreted by him to the effect that the express mention of one of them excludes all others.
15 [2013] NZSC 139, at [74].
Appeal dismissed

Reported by Philippa Breaden
IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

UNDER

the Resource Management Act 1991

IN THE MATTER

of an appeal from a decision of the Environment Court under s 299 of the Act

BETWEEN

FEDERATED FARMERS OF NEW ZEALAND INCORPORATED

Appellant

AND

NORTHLAND REGIONAL COUNCIL

Respondent

Hearing: 9 and 10 February 2016

Appearances: P R Gardner for Applicant

J A Burns for Respondent

G J Mathias for Whangarei District Council

R J Somerville QC and M S Makgill for Soil & Health Association of NZ Inc

Judgment: 31 August 2016

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 31 August 2016 at 11 am pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: ..............................

Solicitors: John Burns, Auckland

Lewis’ Law, Cambridge

Thompson Wilson, Whangarei

Counsel: R J Somerville QC, Dunedin

Copy for: Federated Farmers of New Zealand, Auckland
The Appellant ("Federated Farmers") appeals against a decision of the Environment Court ("Court") dated 12 May 2015, in which the Court determined that "there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements or plans".¹

Background

In October 2012, the Northland Regional Council ("Council") notified its proposed regional policy statement for Northland ("statement"). At the time of notification, the statement did not include provisions concerning or referring to genetically modified organisms ("GMOs").

The Council appointed Commissioners to hear submissions on the statement. The Council’s decisions on the submissions, notified in about September 2013, included a decision to make provision in the statement relating to the use of GMOs ("GMO decision"). In particular, references were made in that part of the statement which identified issues of resource management significance to iwi and which identified policies to be adopted. This latter section included a statement to the effect that a "precautionary" approach should be taken to the introduction of GMOs in circumstances of scientific uncertainty.

Federated Farmers appealed to the Court against several of the Council’s decisions, including the GMO decision. Although the parties were able to resolve some issues, they were unable to resolve their dispute regarding the GMO decision.

The matter came before the Court on the basis that it would determine whether the Council had jurisdiction to make any provision for GMOs at all. If that issue were determined against Federated Farmers, then any dispute as to individual provisions in the statement would be argued in a separate hearing.

In summary, Federated Farmers’ case then, and now, was that the regulation of GMOs is the sole province of the Environmental Protection Agency ("EPA") under the Hazardous Substances and New Organisms Act 1996 ("HSNO") and is not a matter for which a regional council may make provision in a regional policy.

statement or plan. The Council, the Whangarei District Council and Soil & Health Association of NZ Inc (and other parties associated with it) opposed that submission.


Appeal to the High Court

[8] Federated Farmers has a right of appeal to the High Court on a question of law.\(^2\) French J summarised the principles to be applied in determining such an appeal as follows:\(^3\)

[34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:

i) applied a wrong legal test; or,

ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or,

iii) taken into account matters which it should not have taken into account; or,

iv) failed to take into account matters which it should have taken into account.

[35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

[36] Further, not only must there have been an error of law, the error must have been a “material” error, in the sense it materially affected the result of the Environment Court’s decision.

[9] Broadly, Federated Farmers appeals on the grounds that the Court:

(a) applied a wrong legal test in reaching its conclusion; and

(b) took:\(^4\)

[62] … into account matters it should not have taken into account, or came to a conclusion without evidence, or failed to take into account matters which it should have taken into account …


\(^3\) Ayrburn Farm Estates Ltd v Queenstown Lakes District Council [2012] NZHC 735, [2013] NZRMA 126 (footnotes omitted).

\(^4\) Submissions of Counsel for the Appellant at [62].
Court decision

[10] Before addressing the questions of law raised by Federated Farmers, it is appropriate to summarise the approach the Court took to determining the issue before it, which the Court recorded as.\(^5\)

... whether there is power under the RMA for regional councils to make provision for control of use of GMOs through regional policy statements and plans.

[11] As the Court said, determination of the issue required it to interpret the Resource Management Act 1991 ("RMA") and HSNO. The Court said:\(^6\)

(a) The task should commence with consideration of the text of relevant sections of the two statutes, informed to the extent necessary by the purpose and context of them.

(b) It is appropriate in taking that first step, to seek to reconcile the enactments if possible, and if it is not, then to consider which of the enactments should prevail.

(c) There are various approaches available should it be necessary to consider which of the enactments should prevail, including "express repeal", "express exclusion", and in the last resort, "implied repeal".

[12] The Court then gave detailed consideration to the "purpose and principles" provisions of the RMA and their equivalent in HSNO.\(^7\) Having conducted this analysis, the Court noted that the provisions in each Act bore some similarity to each other. The Court also considered other provisions from the RMA, including those relating to the functions of regional councils and the preparation of regional policy statements.

[13] Counsel for the Whangarei District Council had referred the Court to the following passage in Whata J's decision in Meridian Energy Ltd v Southland District Council:\(^8\)

[23] The RMA provides a comprehensive framework for the regulation of the use of land, water and air. It signalled a major change from the direct and control emphasis of the previous planning regime to the sustainable management of resources, with its composite objective of enabling people

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\(^5\) Federated Farmers of New Zealand v Northland Regional Council, above n 1, at [2].

\(^6\) At [5].

\(^7\) At [8] – [37].

and communities to provide for their wellbeing while, among other things, mitigating, avoiding or remedying adverse effects on the environment. The Act is carefully framed to provide control of the effects of resource use, including regulatory oversight given to functionaries at national, regional and district levels. In general terms, all resource use is amenable to its framework, unless expressly exempted from consideration.

[Emphasis added.]

[14] The Court considered that the final sentence of this passage was the “starting point” for its analysis, and that it should:  

...endeavour to identify whether either of the RMA or HSNO demonstrates express exemption from consideration of new organisms under the RMA.

[15] Having reviewed the RMA and HSNO, the Court concluded that no express provision of either exempted a “new organism” (and a GMO is a “new organism” for the purposes of HSNO) from control under the RMA. The Court considered this “one factor” that suggested HSNO was not an exclusive code for regulatory control of GMOs in New Zealand.

[16] Moreover, the Court also considered that there was nothing in the scheme of either Act, or the two read together, that warranted reading down the definition of “natural and physical resources” in s 2 of the RMA which provides:

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

[Emphasis added.]

[17] Indeed, rather than considering that GMOs were excluded from consideration under the RMA, the Court considered that there was a:

...readily identifiable policy reason for that in these pieces of legislation, read together. Once having been approved for import and release into New Zealand under HSNO, regional authorities can provide for use and protection of them together with other resources in a fully integrated fashion, taking account of regional needs for spatial management that might differ around the country for many reasons, not the least of which might include climatic conditions, temperatures, soils, and other factors that might drive differing rates of growth of new organisms and/or of other organisms, as just

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9 At [40] and [42].
10 At [47].
11 At [47].
12 At [49].
a few of perhaps many examples. I agree with the opposition parties that the RMA and HSNO offer significantly different functional approaches to the regulation of GMOs.

[18] Consistently with this, the Court also referred to (a full) High Court decision in *Bleakley v Environmental Risk Management Authority*, in which the Court held that the RMA and HSNO have complementary purposes.¹³

[19] Lastly, the Court addressed the possibility of implied repeal.¹⁴ The Court referred to s 5(1) Interpretation Act 1999 ("Interpretation Act"), which requires the meaning of an enactment to be ascertained from its text and in light of its purpose, and the Supreme Court’s decision in *Terminals (NZ) Ltd v Comptroller of Customs*.¹⁵ It noted that the doctrine of implied repeal was “one of last resort” if it were impossible to reconcile the two statutes – which the Court had found was not the case with the RMA and HSNO.¹⁶

[20] The Court did not consider that there was sufficient overlap between the subject matter of the two statutes so as to require a conclusion of implied repeal of the relevant provisions of the RMA.¹⁷

[21] Accordingly, the Court was not persuaded by Federated Farmers’ submission and reached the conclusion in [1] above.¹⁸

**Question one**

[22] Federated Farmers’ first question of law on appeal is:

> Whether the Environment Court applied the correct test in determining that there is jurisdiction for a regional council to include the regulation of GMOs in its RPS.

[23] Counsel for Federated Farmers submits that the Court erred by adopting what counsel referred to as an “express exemption test”. This is said to have derived from *Meridian Energy*.

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¹³ *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC).
¹⁴ At [54].
¹⁶ *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [54].
¹⁷ At [59].
¹⁸ At [60].
[24] I do not consider the Court adopted an “express exemption test”. The Court made it clear that it took Whata J’s statement in Meridian Energy as a “starting point” and as “one factor” only to be considered in determining the issue before it.\textsuperscript{19}

[25] An exercise in statutory interpretation begins with s 5(1) Interpretation Act: the meaning of an enactment is to be ascertained from its text and in light of its purpose. In the context of this case, that required the Court to consider the text and purpose of both the RMA and HSNO.

[26] As is apparent from the outline above, the Court undertook that analysis. Although the first express reference to s 5(1) Interpretation Act is towards the end of the judgment, the Court made it clear that the principle applied to the analysis throughout.\textsuperscript{20}

[27] The statement in Meridian Energy was an observation made in the course of a detailed consideration of the provisions of the RMA, and no more than that. The lack of an express exclusion is not determinative. As the Court recognised, other factors may affect the construction of the statute.

[28] For these reasons, I do not accept Federated Farmers’ submission that the Court erred in that it determined the issue solely by reference to whether there was an “express exemption” of GMOs from the ambit of the RMA. However, in deference to the submissions made to me, I shall address the specific errors that Federated Farmers contends were made, these being:

(a) An “express exemption test” cannot be the proper test for establishing the jurisdictional boundary between the RMA and HSNO because:

(i) the exclusion of the RMA by way of “express exemption” arises in some, but not all, cases: see Meridian Energy;\textsuperscript{21}

(ii) although “express exemptions” exist in other legislation, such exemptions are not always sufficient to exclude the operation

\textsuperscript{19} At [40] and [47].
\textsuperscript{20} At [54].
\textsuperscript{21} Meridian Energy Ltd v Southland District Council, above n 8.
of the RMA: see *Christchurch International Airport Ltd v Christchurch City Council*,²²

(iii) in some cases, Courts have excluded the operation of the RMA, even where no “express exemption” is provided for in the legislation: see *Dome Valley Residents Society Inc v Rodney District Council*,²³

(b) the Court incorrectly identified the decision of the Supreme Court in *West Coast ENT Inc v Buller Coal Ltd* as authority for the “express exemption” test,²⁴ and

(c) the Court erred in determining that the “express exemption test” set out in *Meridian Energy* is *ratio decidendi*, rather than obiter.

[29] In support of the submission referred to in [28](a) above, counsel for Federated Farmers referred me to three cases in which the Court has considered the interaction between the RMA and other legislation. Counsel submitted that in each case the Court determined the issue before it with differing regard to “express exemptions”.

[30] I accept that submission. In each of those cases it is apparent that the Court determined the issue before it having regard to the text and purpose of the applicable provisions in the RMA and the other enactment. That is always the critical issue and that is what was done in this case. In so far as concerns the cases to which Federated Farmers referred me, it is only to be expected that the different wording and purposes of different legislation will affect the conclusion reached.

[31] As to the submission made in [28](b) above, Federated Farmers contends that the Court incorrectly identified the Supreme Court decision in *Buller Coal* as authority for the “express exemption test”. I am not satisfied that is correct. Whata J cited *Buller Coal* in his judgment in *Meridian Energy* as an instance in which a matter (in that case, the effect of greenhouse gas emissions) was held to be excluded

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²² *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC).
²³ *Dome Valley Residents Society Inc v Rodney District Council* [2008] 3 NZLR 821 (HC).
²⁴ *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.
from consideration under the RMA. In the present case, the Court simply referred to
the fact that Whata J had done so. Nothing more should be read into it.

[32] As to the matter referred to in [28](c) above, Federated Farmers submits that
the Court erred in finding that the passage quoted from Meridian Energy was
ratio decidendi. I accept that the Court may have overstated the significance of the
passage but the error was not material, given the breadth of the analysis the Court
conducted.

[33] For these reasons, the answer to the first question is that the Court did not err
in the manner in which it determined the issue before it.

Question two

[34] Given the conclusion reached as regards question one, it is unnecessary to
determine Federated Farmers’ second question, which is:

Whether the correct test for determining whether there is jurisdiction for a
regional council to include the regulation of GMOs in its RPS is something
along the lines [sic]:

Is there a resource management purpose for controlling GMOs to
achieve environmental standards which are other than those that are
able to be specified by way of HSNQ.

Question three

[35] Federated Farmers’ third question is:

Whether the Environment Court took into account matters that it should not
have taken into account, or came to a conclusion without evidence, when it
determined, at [60] that “... there is power under the RMA for regional
councils to make provision for control of the use of GMOs through regional
policy statements.”

[36] Federated Farmers submits that the following matters were wrongly taken
into account:

(a) the Court misconstrued one of Federated Farmers’ submissions. The
Court understood Federated Farmers to be submitting that HSNQ is
the “exclusive code” for the regulation of GMOs whereas Federated
Farmers had submitted that it was an “exhaustive code”;
(b) the Court misquoted a passage from *Bleakley*;  

(c) the Court erred in concluding that the RMA is concerned with “cumulative effects” to a greater extent than HSNO; and

(d) the Court considered matters of policy which are substantive, rather than jurisdictional, considerations.

[37] The first error is immaterial. The Court accurately recorded Federated Farmers’ submission that HSNO is an “exhaustive code” at an earlier point in the judgment.  

[38] Secondly, as Federated Farmers submits, it is correct that the Court reproduced a passage from *Bleakley* inaccurately. The passage quoted should have read:

[116] Given that the authority found there was no such danger of escape, there was no obligation in law – and it certainly was not appropriate – for the authority to venture into more orthodox pollution issues. It is true that the Act has an environmental protection purpose, as does the Resource Management Act, however, that prima facie wide purpose is to be read in the context of its subject-matter and specifics. It is to protect the environment against hazardous substances and organisms, and not on a wider scale. The wider scale is the role of others under general legislation in the RMA. Thus, if spraying milk on pastures were to raise a concern that heritable material might escape, that would be a concern for the authority. If after authority action, *there was no risk of escape* of heritable material but there remained a risk of another environmental character – eg destruction of aquatic life in streams – that would be a concern to be dealt with under the Resource Management Act. It would not be an authority matter, despite the breadth of the opening sections of the Act. It is a not unfamiliar judicial problem to reconcile legislation relating to specific activities, and a general legislation in the Resource Management field. [Emphasis added.]

[39] In fact, as it appeared in the Court’s judgment, “a” was substituted for “no” in the italicised words.  

[40] However, nothing turns on this error. The Court referred to this passage as supporting a submission that the scope and purpose of the RMA may be wider than

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25 *Bleakley v Environmental Risk Management Authority*, above n 13.
26 *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [32].
27 *Bleakley v Environmental Risk Management Authority*, above n 13.
28 *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [50].
the scope and purpose of HSNO. The typographical error does not detract from the point the Court was making.

[41] Thirdly, Federated Farmers submits that the Court found, wrongly, that the RMA addresses “cumulative effects” in more detail than HSNO.

[42] In its decision, the Court set out the different definitions of “effect” in each Act. In HSNO, the word “effect” is defined in s 2 as:

effect includes—
(a) any potential or probable effect; and
(b) any positive or adverse effect; and
(c) any temporary or permanent effect; and
(d) any past, present, or future effects; and
(e) any acute or chronic effect; and
(f) any cumulative effect which arises over time or in combination with other effects.

[43] In the RMA, the word “effect” is defined in s 3:

3 Meaning of effect

In this Act, unless the context otherwise requires, the term effect includes—
(a) any positive or adverse effect; and
(b) any temporary or permanent effect; and
(c) any past, present, or future effect; and
(d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
(e) any potential effect of high probability; and
(f) any potential effect of low probability which has a high potential impact.

29 At [50].
30 At [8] – [37].
[44] After setting out these definitions, the Court commented on the difference between them:

[20] The two main differences between the respective provisions are, first that the issue of potential effects under the RMA is separated out from the definition section and incorporated into provisions relating to process, for instance s 104 concerning consideration of applications for consent; secondly that cumulative effects are dealt with in somewhat more detail in the RMA. The first difference is probably semantic only, while the second may be of more significance for present purposes.

[45] I do not consider that the Court erred in this observation but, in any event, it was not significant in the scheme of the analysis the Court conducted. It is not a material error, if an error it was.

[46] Fourthly, Federated Farmers submits that the Court took into account policy issues in reaching its conclusion, and that they were irrelevant to the issue it was required to determine.

[47] However, as Mr Somerville QC for Soil & Health submitted, policy considerations may be relevant to ascertaining the meaning of an enactment. In any event, the Court did not place great weight on policy matters, as appears from the following.32

... Needless to say I am not here concerned with future central Government policy; that is a matter entirely for Parliament. My finding on Mr Matthias's reliance on these quotes is that while they may be indicative of policy thinking on the part of officials, I can place little weight on them for assistance with the interpretation of law currently found on the statute books.

[48] For the reasons given, I answer this third question: No, the Environment Court did not take into account matters that it should not have taken into account, or come to a conclusion without evidence, when it determined at [60] that “there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements.”

**Question four**

[49] Federated Farmers' fourth question of law on appeal is:

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32 Federated Farmers of New Zealand v Northland Regional Council, above n 1, at [53].
Whether the Environment Court failed to take into account matters which it should have taken into account when it determined, at [60] that “... there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements.”

[50] Federated Farmers submits that the Court failed to take into account that both the RMA and HSNO.\textsuperscript{33}

... cover the full gamut of social, economic and cultural considerations, such that HSNO covers all the matters which the RMA covers, meaning that there is no substantive difference between the purposes of HSNO and the RMA as regard the control of GMOs. ...

[51] Again, I do not accept that the Court erred in the respect contended. The Court was conscious of the overlap between the RMA and HSNO but it was not persuaded that overlap required a conclusion that GMOs (and other new organisms) are required to be excluded from consideration in the promulgation of a regional policy statement or plan.

[52] It follows that I answer this fourth question of law: No, the Environment Court did not fail to take into account matters which it should have taken into account when it determined, at [60] that “there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements or plans”.

\textbf{Result}

[53] I dismiss this appeal.

[54] The parties may make submissions on costs if they are unable to agree.

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\textsuperscript{33} Submissions of Counsel for the Appellant, above n 4, at [104].