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## **RULES REGULATING GMOS: COMPLIANCE, MONITORING AND ENFORCEMENT AND LIABILITY FOR ACCIDENTAL RELEASE OF OTHERWISE AUTHORISED USES**

### **Introduction and summary**

1. Northland Regional Council (**Council**) is considering submissions on the Proposed Regional Plan for Northland (**Proposed Regional Plan**) that seek to include objectives, policies and rules regulating the use or release of genetically modified organisms (**GMOs**) in the coastal marine area. On 1 March 2019 we provided a legal opinion on whether including provisions on GMOs in the Proposed Regional Plan would increase the Council's legal liability to clean-up or otherwise address illegal use or introduction of GMOs in the coastal marine area.
2. By Minute dated 15 April 2019, to assist with its deliberations the Council has requested further information. You have asked us to provide a further legal opinion on the following questions:
  - i) If the Regional Plan included rules regulating GMOs in the coastal marine area:
    - a) What would Council's responsibility be to monitor and enforce the rules?
    - b) Would it increase Council's legal liability to clean-up or otherwise address the accidental release of a GMO resulting from an 'act of god' on an otherwise authorised use of GMOs (for example, a tsunami destroying a contained GMO field trial undertaken on a wharf)?
3. In summary:
  - a. The Council has statutory obligations in respect of compliance, monitoring and enforcement of the Proposed Regional Plan. However, the Council has broad discretion over how it undertakes compliance, monitoring and enforcement.
  - b. If rules are included in the Proposed Regional Plan to regulate GMOs, the Council will be required to take the same approach to compliance, monitoring and enforcement as for all other provisions. This will include applying the Council's policy on monitoring and enforcement of permitted activity rules at a group level, and applying the Council's normal approach to the compliance, monitoring and enforcement of all other provisions.

- c. The RMA does not impose an obligation on the Council to clean-up or otherwise address adverse effects caused by other persons, even in the case of accidental releases from unforeseeable events. The Council would be able to use its enforcement tools to seek that the person responsible for the GMO remedy or mitigate the environmental effects from such an event.
- d. In our opinion, including provisions in the Proposed Regional Plan to regulate GMOs will not increase the Council's legal liability to clean-up or otherwise address the accidental release of GMOs as a result of an unforeseeable event.
- e. If the Proposed Regional Plan does not include rules regulating GMOs, the Council would likely have limited regulatory oversight of such activities.<sup>1</sup> In the absence of a rule in the Proposed Regional Plan, the Council may be unable to decline resource consent, as no resource consent is needed, would not be able to impose conditions and would have limited enforcement powers to require GMO operators to remedy or mitigate environmental effects.

### Monitoring and enforcement responsibility

- 4. As we have previously advised,<sup>2</sup> if the Council includes rules in the Proposed Regional Plan regulating GMOs in the coastal marine area, it will be subject to additional obligations under the RMA. These obligations include:
  - a. under section 35, an obligation to gather information and monitor and report on the efficiency and effectiveness of policies and rules of the Proposed Regional Plan;
  - b. under section 84, an obligation to observe and enforce the observance of the Proposed Regional Plan (once it becomes operative).
- 5. While these obligations form the basis of councils' compliance, monitoring and enforcement responsibilities, the RMA does not prescribe how councils should carry out compliance, monitoring and enforcement.<sup>3</sup> Instead, councils have considerable discretion to determine how its statutory obligations will be achieved. Case law confirms this broad discretion, with the Environment Court finding:<sup>4</sup>

In any event, I accept Mr Milne's submission that there is a well-established line of authority stemming from the decision of Wylie J in the *Manukau Shopping Centre* case (refer [15]), in terms of which councils should be left free to decide the means and courses of action to be adopted in multifarious fact situations, against the overall aim of ensuring that planning instruments are complied with. After all, the courts expect in general, and without importing any a prior contrary presumption, that a duly constituted public authority will exercise its powers and fulfil its duties responsibly and according to law.

- 6. However, this broad discretion does not remove a council's obligations to monitor the effectiveness of its rules or to enforce observance with its plans. While it is unlikely

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<sup>1</sup> This is because in most instances the activities would fall under section 12(3) of the RMA which contains a presumption that any activity is allowed unless it is regulated by a rule in a regional coastal plan. Depending on the particular circumstances, a release of a GMO in the CMA could be interpreted as a discharge of a contaminant to water and therefore require consent under section 15 of the RMA. However, as noted below, we are not aware that this interpretation has ever been tested.

<sup>2</sup> Legal opinion "Legal Liability for Clean-up of Illegal Use or Introduction of GMOs", 1 March 2019, at [10]-[14].

<sup>3</sup> The Ministry for the Environment has published guidance on "best practice" compliance, monitoring and enforcement. However, that guidance has no statutory weight.

<sup>4</sup> *Gunson v Waikato Regional Council* [2009] NZRMA 349, at [88].

that a claim for breach of statutory duty would succeed under the RMA,<sup>5</sup> a council that does not monitor the effectiveness of its rules or enforce observance of its plan could be subject to enforcement orders or judicial review.

7. In terms of implementing this discretion, it is common for councils to take a risk-based approach and many councils have developed compliance, monitoring and enforcement policies to guide how their discretion will be exercised. Northland Regional Council has developed a policy for compliance, monitoring and enforcement of the permitted activity rules in the Proposed Regional Plan.<sup>6</sup> That policy provides for risk assessment, monitoring and enforcement at a group level. In terms of enforcement, the policy provides for a graduated response, using both regulatory and non-regulatory methods to encourage or ensure compliance.<sup>7</sup>
8. The Council has a range of internal compliance, monitoring and enforcement policies and procedures, including a Resource Consent Monitoring Quality Procedures Manual<sup>8</sup> and an Enforcement Quality Procedures Manual.<sup>9</sup> These manuals provide guidance on when and how monitoring and enforcement will be undertaken by the Council and both seek to apply a fair, responsive and risk-based approach. The Council also applies external guidance on best practice, including guidance developed in partnership with other regional councils<sup>10</sup> and guidance issued by the Ministry for the Environment.<sup>11</sup>
9. In our opinion, monitoring and enforcement of the proposed rules to regulate GMOs would be subject to the same process as all other rules in the Proposed Regional Plan. In our opinion, this would require the Council to:
  - a. apply its existing policy for compliance and monitoring of permitted activities to the proposed GMO permitted activities (which allow research and trials within laboratories, medical applications and veterinary applications under the supervision of veterinarians);
  - b. apply its internal compliance, monitoring and enforcement policies and procedures to the other proposed rules; and
  - c. continue to implement its discretion to determining how it will enforce observance of the Proposed Regional Plan.
10. We note that including rules in the Proposed Regional Plan to regulate GMOs would likely increase public expectation of an enforcement response in the event of a breach. For example, if GMOs were released as a result of a tsunami or other natural hazard event, the general public would likely expect an elevated response (such as an enforcement order or prosecution) if the release breached a rule in the Proposed Regional Plan. In contrast, if the release breached the general requirement not to discharge contaminants in section 15 of the RMA (addressed in

<sup>5</sup> *Daisley v Whangarei District Council* [2018] NZHC 2211; *Mawhinney v Auckland Council* [2013] NZHC 159.

<sup>6</sup> Northland Regional Council *Plan to monitor and enforce compliance: Proposed Regional Plan for Northland*.

<sup>7</sup> Northland Regional Council *Plan to monitor and enforce compliance: Proposed Regional Plan for Northland*, Figure 7.

<sup>8</sup> *Resource Consent Monitoring Quality Procedures Manual*, December 2014.

<sup>9</sup> *Formal Enforcement Issued Under Resource Management Act 1991 Quality Procedures Manual*, December 2014.

<sup>10</sup> *Regional Sector Strategic Compliance Framework 2016-2018*, prepared by the Compliance and Enforcement Special Interest Group, which includes Northland Regional Council and 13 other regional councils.

<sup>11</sup> *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991*, 2018, Ministry for the Environment.

further detail below), the public would likely expect a lesser response. This does not affect the Council's legal liability, but could have reputational impacts for the Council.

11. For completeness, as previously advised,<sup>12</sup> it is highly unlikely that the Council would face increased legal liability for failing to enforce the Proposed Regional Plan. Liability is only likely to arise in a case of misfeasance in public office (which requires either a deliberate and dishonest abuse of a decision-making power with the intention of harming someone, or intentionally acting outside statutory powers knowing that it would cause harm). Provided the Council's usual enforcement and conflict procedures are followed, we consider this risk is negligible.

### **Liability for accidental release of authorised use**

12. As previously advised, the RMA does not impose an obligation on councils to remediate the adverse effects caused by another person's unlawful actions.<sup>13</sup> The RMA similarly does not impose an obligation on councils in respect of accidental environmental harm.
13. In the example provided (accidental release of a GMO due to a natural hazard event), the Council would be able to rely on its enforcement powers to seek that the GMO operator remedy or mitigate the adverse effect. While such an event may provide a good defence to a prosecution under the RMA,<sup>14</sup> it does not prevent the Council issuing abatement notices or seeking enforcement orders.<sup>15</sup> For example, the Council could issue an abatement notice to the GMO operator requiring compliance with its resource consent or the Proposed Regional Plan,<sup>16</sup> or the Council could seek an enforcement order requiring the GMO operator to take action to avoid, remedy or mitigate effects on the environment caused by the GMO operator.<sup>17</sup>
14. In the event that the GMO operator cannot be held liable (for example, if the operator company is liquidated), the environmental effects would be "socialised" and borne by the public. In other words, it would be up to the Council and the Crown as public representatives to determine whether environmental effects should be cleaned up and how that should occur. There is no legal obligation under the RMA that requires the Council to proactively remedy environmental effects caused by other persons.<sup>18</sup>
15. We have also considered whether regulating GMOs in the Proposed Regional Plan would increase the Council's potential legal liability beyond the RMA (for example, a claim for negligence by a person who suffers a loss from an accidental release). By regulating GMOs, in addition to monitoring and enforcing the provisions, the Council would be responsible for processing and making decisions on resource consent applications. There is risk that resource consent decisions on a GMO application might be made erroneously, resulting in potential liability. However, we consider such risk is very low:

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<sup>12</sup> Legal opinion "Legal Liability for Clean-up of Illegal Use or Introduction of GMOs", 1 March 2019, at [13].

<sup>13</sup> Legal opinion "Legal Liability for Clean-up of Illegal Use or Introduction of GMOs", 1 March 2019, at [15]-[19].

<sup>14</sup> Under section 341(2)(b) of the RMA it is a defence to a prosecution under the RMA if an offence was caused by an event beyond the control of the defendant (including natural disaster), the event was unforeseeable and the defendant took steps to mitigate or remedy the effects after the event.

<sup>15</sup> The fact that adverse effects resulted from an unforeseeable event may be a factor that the Environment Court considers when considering its discretion to grant an enforcement order or consider an appeal against an abatement notice. However, it is not a formal defence in the same way as for prosecution.

<sup>16</sup> RMA, s 322.

<sup>17</sup> RMA, s 314(1)(b) or (c).

<sup>18</sup> In particular, there is no power for a person to seek an enforcement order against the Council to remedy an effect on the environment, unless the Council caused the effect.

- a. Case law confirms that councils generally do not owe duties of care (a necessary element of a negligence claim) when considering and issuing resource consents.<sup>19</sup> The Council would only be liable for negligence in resource consent decision-making if:
    - i. it grants consent in accordance with a procedure it knows is erroneous;<sup>20</sup> or
    - ii. it knowingly ignores a requirement of the Proposed Regional Plan.<sup>21</sup>
  - b. An error, such as an error in interpretation, is not sufficient to give rise to liability in negligence.<sup>22</sup>
16. Provided the Council follows its usual procedure for processing and assessing any application to use GMOs, any claim for negligence as a result of a subsequent accidental GMO release is likely to fail. We also reiterate that this risk is not a direct result of including provisions to regulate GMOs, but instead relates to the inherent risk in the subsequent resource consenting process.
  17. Accordingly, in our opinion, including rules in the Proposed Regional Plan regulating GMOs will not increase the Council's legal liability to clean-up or otherwise address the accidental release of GMOs.
  18. As previously advised, if the Council includes rules regulating GMOs the general public is likely to expect that the Council will play a role in remediating any environmental effects that result from GMOs, whether the GMOs are released unlawfully or as a result of natural hazard events. While we have concluded that regulating GMOs in the Proposed Regional Plan does not change the Council's legal liability, there is the potential for reputational harm, should the Council decide not to remedy such effects.
  19. A further important point to consider is that if rules are not included in the Proposed Regional Plan to regulate the use of GMOs in the coastal marine area, most GMO activities will likely be able to be undertaken without resource consent.<sup>23</sup> This would prevent the Council having any regulatory control over whether or not the activity should be approved or how the potential environmental effects of the activity should be managed.<sup>24</sup> For example, the Council would not be able to assess the potential for natural hazard risks, the sensitivity of the environment in the proposed location and the conditions that might be imposed on any resource consent (for example, emergency response measures and performance bonds).
  20. Legal advice provided to Federated Farmers and released through the hearings process states that the release of GMOs to the environment could be discharge of a

<sup>19</sup> See *Monticello Holdings Ltd v Selwyn District Council* [2015] NZHC 1674, at [78]-[81] and *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZCA 33.

<sup>20</sup> *Port Underwood Forests Ltd v Marlborough District Council* [1982] 1 NZLR 343 (HC).

<sup>21</sup> *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA), though the validity of this case was doubted in *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZCA 33.

<sup>22</sup> *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA).

<sup>23</sup> Sections 12(1) and (2) of the RMA restrict certain activities in the coastal marine area unless resource consent is held or the activities are authorised by a rule in a regional coastal plan. The use of the coastal marine area for GMOs are generally not restricted by those sections. As a result, under section 12(3) of the RMA, the use of GMOs in the coastal marine area can generally be undertaken, unless restricted by a rule in a regional coastal plan. We note, however, that certain GMO activities may require consent under section 12(1) of the RMA. In particular, section 12(1)(f) restricts the introduction of any exotic or introduced plant in, on or under the foreshore and seabed – this may capture certain GMO activities related to plants.

<sup>24</sup> The use of GMOs would still be subject to assessment by the EPA, however, that assessment is unlikely to address the same issues a resource consent process would.



“contaminant”<sup>25</sup> and therefore regulated under section 15 of the RMA. We agree that some GMOs could be considered contaminants and therefore their accidental release would be an illegal discharge, which could be enforced against even in the absence of a rule in the Proposed Regional Plan. However, some GMOs (for example, live organisms) are unlikely to be considered contaminants so would not be restricted in this way.

21. If rules are not included in the Proposed Regional Plan to regulate GMOs in the coastal marine area, the Council will generally not have access to all of its RMA enforcement tools in respect of potential environmental effects that might result.<sup>26</sup> If an accidental release occurs and the GMO operator cannot be pursued under the RMA, the environmental effects will still be socialised, as described at paragraph 14 above.

## Conclusion

22. In our opinion, if the Proposed Regional Plan included rules regulating GMOs in the coastal marine area:
  - a. The Council’s responsibility to monitor and enforce the rules would be the same as for the other provisions of the Proposed Regional Plan, over which the Council has broad discretion.
  - b. The Council’s legal liability to clean-up or otherwise address the accidental release of GMOs from otherwise authorised uses would not be increased as a result of including rules regulating GMOs.
23. Please contact us if you require further information or would like to discuss this opinion.

Yours faithfully  
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<sup>25</sup> Contaminant is defined as follows:

“**contaminant** includes any substance (including gases, odorous compounds, liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat—

- (a) when discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or
- (b) when discharged onto or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged.”

While some GMOs may meet this definition, a genetically modified live organism (for example, a fish), is unlikely to be considered a contaminant for the purpose of the definition. Whether or not a GMO is a “contaminant” will need to be assessed on a case-by-case basis. We are not aware of this interpretation having ever been tested in the Environment Court or High Court.

<sup>26</sup> An abatement notice or enforcement order could be issued under the general duty to avoid, remedy or mitigate adverse effects on the environment under section 17 of the RMA. However, such enforcement processes would be more difficult than enforcing rules in the Proposed Regional Plan.