Appendix B Court Decisions

BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 89

IN THE MATTER	of an appeal under Clause 14 of the First Schedule to the Resource Management Act 1991 (**RMA**)
BETWEEN	FEDERATED FARMERS OF NEW ZEALAND (ENV-2013-AKL-000161) Appellant
AND	NORTHLAND REGIONAL COUNCIL Respondent

Hearing at:	Whangarei on 24 April 2015
Court:	Principal Environment Judge LJ Newhook, sitting alone pursuant to s279(1)(e) of the Act
Appearances:	MR Christensen and R Gardner for the appellant JA Burns for the respondent GJ Mathias for Whangarei District Council RA Makgill for Soil & Health Association of NZ Inc, GE Free NZ (Northland) Inc (and the other parties under s274, numbers of whom had written to the Court expressly opposing the Federated Farmers' position).
Date of Decision:	12 May 2015

DECISION OF THE ENVIRONMENT COURT ON JURISDICTION UNDER THE RMA FOR POLICY STATEMENTS AND PLANS TO MAKE PROVISION FOR CONTROL OF GENETICALLY MODIFIED ORGANISMS ("GMOs")

A. There is jurisdiction under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements and plans.

B. Costs reserved.

REASONS FOR DECISION

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 Limited v Bay of Plenty Regional Council.***[1] Having noted that s30 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 s2 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.

[1] [2013] NZEnvC 298, [2014] NZRMA 181.
[2] That is, not part of the reasoning for the decision in that case.

[9] The purpose, principles and matters relevant to the purpose of HSNO are set out in its sections 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;
> (d) the relationship of Māori 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 s5 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 Māori 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 s6, 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 s8 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 Part 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 Part 2 RMA in carrying out its functions. It would have had a range of functions recorded under s347 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, s3, 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–
> a. 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 s104 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 Part XIII RMA was repealed by HSNO in 1996, references to regional government control of hazardous substances were not.

[22] S30 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:
(iiia) 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:
(ii) 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:
(iva) 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, remedying, 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] S59 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] S60 RMA provides process for the preparation and change of regional policy statements.

[26] S61 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/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014; and
    (iv) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing); and
    (v) [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 (Takutai 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] S62 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) 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

(iii) to maintain indigenous biological diversity; 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)(i) 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] Ss65 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, s66(1) requires regional councils to prepare and change any regional plan in accordance with its functions under s30, the provisions of Part 2, directions from the Minister for the Environment under s25A, obligations under s32, and any regulations.

[29] Counsel for Federated Farmers, Mr Christensen, stressed the repeal of Part X111 RMA by HSNO 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 HSNO is a code for regulation and control of GMOs, based on the last two factors. He pointed to s142 HSNO 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 s15 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 s128 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 ss75 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.[3]

[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 Part 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 s5 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 s5(2) contains a multitude of considerations, offering an environmental decision-maker considerable leeway for making policy and strategic decisions in order to attain the 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 ***Meridian Energy Limited v Southland District Council***[4] at paragraph [23]:

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[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 Mathias's submissions.
[4] [2014] NZHC 3178 (Justice Whata)

> 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 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]

[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 Limited***.[5] 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 s104E RMA. Mr Matthias emphasised the stated requirement for express exemption, and submitted that an example was to be found in s30(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, remedying 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.

[5] [2014] 1 NZLR 32

[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 ***Meridian Energy Limited v Southland District Council***. Faced with that strong statement by the High Court, Federated Farmers sought to persuade me that it was 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-rode the general provisions in s9 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 HSNO 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 – s7(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

[6] [2008] W 020/08

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 HSNO is limited to the activity of introduction of new organisms to New Zealand. (A more careful phrasing of the proposition would have one cite s34 HSNO 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 HSNO to **new** organisms. If I were to accept Mr Christensen's argument that HSNO 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.

[46] I have already referred to the provisions of s142 HSNO (Relationship to other Acts), which is where one finds reference the RMA. As already noted, s142 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 Authority***[7] in which the Court held at paragraph [243]:

> [243] 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 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.

[51] Essentially, the High Court found against excluding the jurisdiction of a local authority should it deem it appropriate following an evaluation under s32 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 input, consider particular regional approaches acknowledging social, economic and

[7] [2001] 3NZLR 213 at paragraph [243]

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 s5 RMA are underpinned by the statutory requirements for preparing and publishing evaluation reports under s32, 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 Māori, 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

[8] s32(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.

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 failed[11] (which I have found is not the case here).

[55] The Court of Appeal wrote of the principles of implied repeal in ***R v McNeish***[12] 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...

[56] 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:[13]

> 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.

[57] 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.[14] He submitted that the express mention of a role for local authorities regarding hazardous substances in ss30 and 31 RMA, and in s142 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.

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[10] [2013] NZSC 139
[11] See, for instance, ***Burrows & Carter Statute Law*** 4th Ed. p453
[12] [1982] 1 NZLR 247
[13] Submissions on behalf of Federated Farmers dated 9 March 2015, paragraph [36]
[14] Interpreted by him to the effect that the express mention of one of them excludes all others.

[58] 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 Limited v Comptroller of Customs***, in particular the following passage:[15]

> 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]

[59] 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

[60] 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.

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

SIGNED at AUCKLAND this 12th day of May 2015

L J Newhook
Principal Environment Judge

[15] [2013] NZSC 139, at paragraph [74]

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2015-488-0064
[2016] NZHC 2036

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 R A 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
R A Makgill, Auckland

Copy for: Federated Farmers of New Zealand, Auckland

[1] 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

[2] 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").

[3] 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.

[4] 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.

[5] 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.

[6] 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

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1 *Federated Farmers of New Zealand v Northland Regional Council* [2015] NZEnvC 89, (2015) 18 ELRNZ 603 at [60].

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.

[7] The Court rejected Federated Farmers' submission and reached the conclusion stated in [1] above.

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 ...

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2 Resource Management Act 1991, s 299.

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].
8 *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178, (2014) 18 ELRNZ 473 (footnotes omitted).

> 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: [9]

> ... 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.[10]

[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:[11]

> 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:[12]

> ... 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].
15 *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121.
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.[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.[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*;[21]

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

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19 At [40] and [47].
20 At [54].
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 HSNO.

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 HSNO 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*;[25]

(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.[26]

[38] Secondly, as Federated Farmers submits, it is correct that the Court reproduced a passage from *Bleakley* inaccurately.[27] 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.[28]

[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.[29] 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.[30]

[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.

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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.[31] 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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31 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Auckland City Council v Glucina* [1997] 2 NZLR 1 (CA) at 4.

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:[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".

Result

[53] I dismiss this appeal.

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

.....

Peters J

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

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 44

IN THE MATTER	of an appeal under Clause 14 of the First Schedule to the Resource Management Act 1991 (RMA)
BETWEEN	WHANGAREI DISTRICT COUNCIL("WDC")
	(ENV-2013-AKL-000159)
	Appellant
AND	NORTHLAND REGIONAL COUNCIL ("NRC")
	Respondent
AND	FEDERATED FARMERS OF NEW ZEALAND ("Federated Farmers")
	Section 274 party

Decision made on the papers

Court:	Principal Environment Judge LJ Newhook
Counsel:	J Burns for Northland Regional Council GJ Mathias for Whangarei District Council RA Makgill for Soil & Health Association of New Zealand Inc R Gardner for Federated Farmers
Date of Decision:	12 April 2018
Date of Issue:	12 April 2018

DECISION OF THE ENVIRONMENT COURT AS TO AMENDMENT TO A POLICY IN THE PROPOSED NORTHLAND REGIONAL POLICY STATEMENT SOUGHT BY WDC

A. Relief sought by WDC is within jurisdiction and is granted.

B. Costs reserved.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

REASONS

Introduction

[1] This is the last remaining appeal before the Court concerning the provisions of the Proposed Regional Policy Statement of NRC. The appeal sat alongside, but had a contrary thrust to, an appeal by Federated Farmers which has now been withdrawn. Federated Farmers is a party to the present appeal under s274RMA.

[2] Despite losing a jurisdictional argument in this Court in its own appeal[1], losing its appeal to the High Court[2], and withdrawing its subsequent appeal to the Court of Appeal and its substantive appeal to this Court, Federated Farmers has endeavoured to run somewhat similar arguments on the papers before me in the current stage of the WDC appeal. These things collectively seem quite remarkable.

The current argument

[3] Northland Regional Council issued its decisions following hearing of submissions on the RPS in September 2013. Some of the decisions concerned references to Genetic Engineering ("GE"), and Genetically Modified Organisms ('GMOs').

[4] Of relevance to the present proceedings, one of the decisions amended Policy 6.1.2 in Chapter 6 "Policies and Methods – Efficient and Effective Planning" to read:

> Adopt a precautionary approach towards the effects of climate change and introducing genetically modified plant organisms to the environment where they are scientifically uncertain, unknown or little understood, but potentially significantly adverse.

[5] Whereas Federated Farmers appealed against the provision, alleging want of jurisdiction (and as recorded lost, appealed twice, and ultimately withdrew), Whangarei District Council in its appeal simply sought amendment of the Policy by deleting the word "plant" so that the Policy would require a precautionary approach to be adopted towards the effects of climate change and introducing GMOs generally to the environment.

[6] Because Federated Farmers raises jurisdictional matters again, I will briefly touch on the findings of the Environment Court and the High Court in the two decisions referred to above.

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[1] Federated Farmers of New Zealand v Northland Regional Council [2015] NZEnvC 89.

[2] Federated Farmers of New Zealand Inc v Northland Regional Council [2016] NZHC 2036.

[7] In the appeal in this Court, I found:[3]

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

[8] That decision was upheld in the High Court.

[9] The submissions lodged by Federated Farmers in the present case are curious to say the least. Mr Makgill submitted that its submissions were rather difficult to follow in logic, and I agree.

[10] While appearing to acknowledge the earlier decisions of the High Court and the Environment Court that there is power under the RMA for regional councils to make provision to control GMOs through regional policy statements and plans, Federated Farmers appears now to offer the strained submission that the Regional Council does not have jurisdiction to regulate GMOs "on the basis that they are GMOs", because that is the sole prerogative of regulators under the Hazardous Substances and New Organisms Act 1996 ("HSNO"), except to the extent that s 360D(2) in some way empowers local authorities to regulate GMOs that are crops; as a result of which the word "plant" should be retained in Policy 6.1.2; or that the word "plant" can be removed because, regardless of the wording of the Policy, local authorities implementing the Policy can only regulate GMOs that are crops.

[11] Federated Farmers appears to submit that the latter aspect is some sort of "materiality" argument. Counsel appears to have drawn that term from the High Court decision referred to above, tacked on another buzz phrase "precautionary approach" drawn from HNSO, and constructed the notion that regional councils do not have jurisdictions to regulate GMOs "on the basis that they are GMOs".

[12] The argument is a series of *non-sequiturs*. "Materiality" is a concept employed by the High Court in applying a discretion as to whether to grant relief in appeals on points of law, and has nothing to do with the present situation. Policy 6.1.2 employs its own precautionary approach requirement that does not need bolstering by reference to HNSO. On top of these concepts, counsel offers the curious concession that it is immaterial that the word "plant" is included in the Policy.

[13] What follows next in the submissions of Federated Farmers, is largely a re-run of the arguments about jurisdiction previously heard in this Court and the High Court, and

[3] [2015] NZRMA 217 at [60].

ruled upon. It is not open to Federated Farmers to run these arguments again, especially in view of the binding findings of the High Court, and I will not consider that part of the submissions further.

[14] Mr Gardner then turned to s 360D RMA, introduced in the 2017 amendment to the Act, authorising Orders in Council introducing regulations on the recommendation of the Minister (and subject to certain qualifications) to prohibit or remove specified rules or types of rules that would duplicate, overlap with, or deal with the same subject matter that is included in other legislation. One of the exceptions is, by subsection (2), that the provision does not apply to rules or types of rules that regulate the growing of crops that are genetically modified organisms.

[15] Yet again, the submission is irrelevant to the matter before me. I agree with opposing counsel that s 360D(2) does not create powers to regulate GMO crops, but merely prevents regulations being made overriding local authorities' regulation of GMO crops. As Mr Makgill put it:

> The "carve out" in s 360D(2) only makes sense if local authorities have the power to make rules regulating use of GMOs.

Conclusion

[16] There is no lawful constraint against that which the Appellant seeks, the removal of the word "plant" from Policy 6.1.2.

[17] The argument before me being a legal one calling for a decision on the papers, there is no evidence in the mix to persuade me that there is any merits-based reason for not doing so. Indeed, one of the more curious submissions on behalf of Federated Farmers goes so far as to suggest that it would be immaterial as to whether the word "plant" is included or excluded.

[18] I grant the relief sought by the Whangarei District Council. Policy 6.1.2 is directed to be worded as follows:

> **Policy 6.1.2 – Precautionary Approach**
>
> Adopt a precautionary approach towards the effects of climate change and introducing genetically modified organisms to the environment where they are scientifically uncertain, unknown or little understood, but potentially significantly adverse.

[19] WDC had also appealed seeking deletion of words from Method 6.1.5 and its Explanation, about plan provisions not attempting to address liability for harm. The parties have all agreed on these amendments sought by WDC, and I have no difficulty in approving the changes which involve the removal of the words struck through in the following Method and Explanation:

> **6.1.5 Method – Statutory Plans and Strategies**
>
> The regional and district councils should apply Policy 6.1.2 when reviewing their plans or considering options for plan changes and assessing resource consent applications, ~~but should not include plan provisions or resource consent conditions that attempt to address liability for harm.~~
>
> **Explanation:**
>
> Method 6.1.5 implements Policy 6.1.2. ~~The method discourages councils from attempting to change the liability regime for potential harm from genetically modified plant organisms because there is no strong basis for regional or local liability controls.~~

[20] I direct that Policy 6.1.5 and its explanation be confirmed in the RPS modified to remove the struck through words above.

[21] Costs are not usually an issue in appeals on plans and policy statements. I leave the question open in the current case however. If any application for costs is to be made it should be filed and served within 15 working days of the date of this decision. Any reply thereto should be filed within 10 further working days.

LJ Newhook
Principal Environment Judge