WAIKATO DISTRICT COUNCIL

Hearings of Submissions on the Proposed Waikato District Plan

Report and Decisions of Independent Commissioners

Decision Report 12: Genetically Modified Organisms

17 January 2022

Commissioners

Dr Phil Mitchell (Chair)

Mr Paul Cooney (Deputy Chair)

Councillor Jan Sedgwick

Mr Weo Maag

Contents

Glossary of terms

Council	Waikato District Council
EPA	Environmental Protection Authority
FFNZ	Federated Farmers of New Zealand Incorporated
GMO	Genetically modified organisms
HSNO Act	Hazardous Substances and New Organisms Act 1996
LSN	Life Sciences Network Incorporated
Panel	The Waikato District Plan Hearings Panel
PDP	Proposed Waikato District Plan
WED	Whaingaroa Environmental Defence Incorporated Society

1 Introduction

1.1 Hearing 8B concerned the topic of Genetically Modified Organisms (GMO). As notified, the PDP did not contain provisions relating to GMO. A number of submissions sought that an objectives, policies and rules framework be incorporated within the PDP to place controls on the release and use of GMO.

2 Hearings Arrangement and Evidence Presented

2.1 Hearing 8B was held on 30 January 2020 at the Waikato District Council Offices at 15 Galileo Street, Ngaruawahia. All of the relevant information pertaining to this hearing (i.e. Section 42A report, legal submissions and evidence) is contained on the Waikato District Council website.

2.2 We heard from the following parties on the matter of GMO provisions:

Council	Neil Taylor (author of Section 42A Report)
Life Sciences Network Incorporated (LSN)	Mark Christensen (Counsel) William Blair Rhodes Rolleston Andrew Allan Gerard Matthew Willis Dr Anthony John Conner Arthur Grimes
GE Free New Zealand	Claire Bleakley Gavin Fisher Kathy Bentham Jesiah Alexander Frank Rowson
Whaingaroa Environmental Defence Incorporated Society	Malibu Hamilton
Tainui o Tainui	Angeline Greensill
New Zealand Forest Research Institute Limited	Elspeth Ann MacRae
Biotech New Zealand (BiotechNZ)	Dr Will Barker Dr Sean Simpson
Federated Farmers of New Zealand Incorporated	Gavin Keith Forrest Dr Paul Le Mière
Waikato - Tainui	Marae Tukere

3 Overview of issues raised in Submissions

3.1 In the section 42A Report, Mr Taylor set out the full list of submissions on the subject matter of GMO. The notified PDP did not contain provisions relating to the management of GMO. All 30 of the original submissions sought controls on the release and use of GMO to be included in the PDP.

3.2 In brief, the key matters of relief sought by the submitters included:

a) Add a resource management framework for the management of GMO that is specific to the Waikato District, taking into account environmental, economic and social well-being considerations.

b) Add strong precautionary and prohibitive policies and rules relating to the management of GMO that are same or similar to those in the Far North District Plan, Whangarei District Plan and Auckland Unitary Plan. More specifically:

i) GE Free NZ sought to include new provisions into the PDP and provided the text to be incorporated into the PDP, which replicated the provisions of the Auckland Unitary Plan.

ii) Soil and Heath Association provided specific text to be included in the PDP and also sought the inclusion of provisions to address cultural effects of GMO on tāngata whenua.

c) The release of GMO has potential to cause significant adverse effects on cultural wellbeing of tāngata whenua through harm to cultural values.

d) Further submitters opposed the original submissions seeking the inclusion of GMO provisions in the PDP, generally on the basis that the issues raised in the submissions are already considered by the Environmental Protection Authority (EPA) under the Hazardous Substances and New Organisms Act 1996 (HSNO Act), including the opportunity for public consultation as part of that process.

3.3 The evidence presented on behalf of GE Free NZ focused primarily on the need to adopt a precautionary approach to the use of GMO. Ms Claire Bleakley noted that the HSNO Act was set up to monitor and ensure the government's oversight in relation to GMO development, field testing and conditional release conditions. However, she stated that local regulations are necessary when it comes to the release of GMO, as the EPA has no role under the HSNO Act once a GMO has been released. The information presented in the hearing on behalf of GE Free NZ also highlighted concerns in relation to GMO contamination, loss of GMO-free certification, adverse effects on flora and fauna and on tāngata whenua through harm to cultural values. Ms Bleakley requested that we look ahead to the emerging issues associated with GMO and address the adverse effects of GMO-related land uses on the environment and communities' health and economic well-being.

3.4 On behalf of the Whaingaroa Environmental Defence Incorporated Society (WED), Mr Malibu Hamilton raised concerns of risk and liability, particularly concerning the removal and elimination of escaped GMO. Mr Hamilton considered that the HSNO Act does not protect the community from adverse effects of the release of GMO. He expressed the view that there are no impediments to inserting GMO provisions in the PDP. WED requested that we insert strong precautionary and prohibitive GMO provisions in the PDP.

3.5 We received a letter from Ms Marae Tukere, on behalf of Waikato – Tainui, supporting the evidence provided by Mr Hamilton. Ms Tukere confirmed that Waikato – Tainui had relied on the expertise of Mr Hamilton in respect of their own submission.

3.6 On behalf of Tainui o Tainui, Ms Angeline Greensill explained that in recent years, Tainui and the local community have become better informed and concerned about the risks of GMO. She considered that the recent arrival of gene editing technologies in the primary sector is potentially putting taonga at risk, along with posing risks to primary production and the economy. Ms Greensill requested that the precautionary principle should be applied. Tainui o Tainui sought to include GMO provisions in the PDP that would prohibit the release of GMO into the rural environment of Tainui rohe.

3.7 In his legal submissions on behalf of Life Sciences Network Incorporated (LSN), Mr Mark Christensen informed us that the Royal Commission on Genetic Modification held a public inquiry into the use of genetic modification in New Zealand in 2001, following which the HSNO Act was amended in 2002 and 2003 to implement the Commission's recommendations. He submitted that the concerns raised by the submitters are generally the same concerns that were raised before the Royal Commission. Having considered these concerns, both the Royal Commission and the Government were satisfied that appropriate decisions on the use and development of GMO can be properly made by way of the EPA making decisions under the HSNO Act. Having regard to this context, Mr Christensen stated that LSN's position is that any controls imposed by the Resource Management Act 1991 (RMA) on GMO in the PDP should only relate to those matters which are either:

a) Not legally able to be addressed/considered by the EPA under the HSNO Act; or

b) Necessary at a district level in addition to the considerations/controls by the EPA because EPA cannot properly consider district or regional considerations.

Mr Christensen submitted that the evidence presented by the experts on behalf of LSN demonstrated that restrictions and prohibitions on GMO sought by the submitters were unnecessary because the issues that are raised by the submitters duplicated the powers and functions of EPA, and they were inappropriate because not only would they ban release, they were also a de facto ban on research and development of the technology across New Zealand.

3.8 Ms Elspeth MacRae presented evidence on behalf of New Zealand Forest Research Institute Limited. She noted that New Zealand is not genetic engineering free. She explained that genetic modification is an established technology with approved GMO having an extensive history of benefit. Ms MacRae stated that international research on risks associated with released products have been shown to be negligible and the process required under the HSNO Act means that only organisms of low and negligible risk would be released in the Waikato (or anywhere else). She also stated that biotechnology is a necessary tool for New Zealand.

3.9 Federated Farmers of New Zealand Incorporated (FFNZ) considered that the PDP should not contain specific provisions on GMO. Mr Gavin Forest explained that the risk-related issues raised in the submissions were already considered (using a precautionary approach) by the EPA, and any residual issues can be managed using existing powers under the RMA or by engaging with the Regional Council to amend the provisions of the Biosecurity Act (Pest Management Strategies) when needed. Mr Forest also stated that the regulation of GMO as sought by the submitters would undermine Waikato's position

as a leader in agricultural science, would erode scientific capability, and would limit access to new technologies. Mr Forest considered that there was no justification in terms of a section 32 analysis under the RMA for including the GMO provisions sought by the submitters.

3.10 Dr Will Barker presented evidence on behalf of Biotech New Zealand (BiotechNZ). He stated that the use of genetic modification was already stringently regulated in New Zealand and there was no need for further regulation at the local level. Dr Barker stated that the implementation of GMO provisions into the PDP would discourage companies engaged in the development of GM technologies and may force them out of the region or overseas. He stressed that the loss of highly innovative companies was a significant economic opportunity loss for New Zealand.

4 Panel's Decision and Reasons

4.1 We appreciate the extensive information and evidence presented by the submitters on the issue of GMO. It is clear to us that the matter is a polarising one, with one group of submitters generally seeking greater restrictions or prohibition on GMO and other group seeking to ensure the ongoing use and development of GMO, where appropriate.

4.2 We also appreciate that there are fundamental differences of opinion regarding the development, release and use of GMO, but accept Mr Christensen's submissions that the development, release and use of GMO can be appropriately managed through the EPA approval process, such that, we consider it unnecessary to replicate the EPA approval process in the PDP.

4.3 However, the question that does arise is whether there are residual or additional effects, such as locational effects, that should be addressed in the PDP following an approval by the EPA. On this key issue, we agree with the submission of Mr Christensen that any provisions on GMO in the PDP should only relate to those matters which are not legally able to be addressed or considered by the EPA under the HSNO Act.

4.4 Accordingly, we address below the following key questions, all of which we canvassed extensively with parties at the hearing:

a) Would it be lawful to include GMO provisions in the PDP in response to submissions, given their absence from the notified version?

b) In any event, does the Council have jurisdiction under the RMA to include GMO provisions in the PDP?

c) Are there any particular adverse effects on the environment associated with the outdoor use of GMO which are not able to be addressed or considered by the EPA process, and which therefore should be included in the PDP?

Scope / Jurisdiction Issues

4.5 A jurisdictional issue was raised by some further submitters that the inclusion of GMO provisions in the PDP was not "on" the PDP as there were no GMO provisions in the plan that could be subject of a submission. We do not accept that argument. This is a full district plan review and as such a broad approach on the scope of submissions is

warranted. We consider that submissions seeking the inclusion of GMO provisions are "on" the plan and within jurisdiction.

4.6 With respect to the broader issue of whether the Council has the jurisdiction under the RMA to include GMO provisions in the PDP, we accept the submission of Mr Christensen who freely acknowledged that both the Environment Court and High Court have found that councils do have jurisdiction under the RMA to include provisions on GMO. Mr Taylor also accepted this and confirmed that three district plans include GMO provisions: Far North District Plan, Whangarei District Plan and the Auckland Unitary Plan.

Adverse effects

4.7 Because there is no legal impediment to include provisions on GMO in the PDP, we have carefully considered whether or not the concerns of submitters are able to be adequately addressed under the provisions of the HSNO Act and the EPA approval process.

4.8 We accept that there is a jurisdictional overlap between HSNO Act and the RMA in relation to GMO, but also accept the submissions of Mr Christensen and the evidence of Mr Willis, to the effect that:

a) *Integrated management and precautionary approach to GMO*: the EPA must "take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects" under section 7 of HSNO Act.[1]

b) *Eradication of GMO once released into the environment*: Section 37 of the HSNO Act and Clause 10 of the Methodology Order expressly require the EPA, when making a decision, to have regard to this matter when considering applications.[2]

c) *Risk of cross contamination of non-GMO crops*: This is a key issue for the EPA when considering applications for release of a GMO. The EPA is able to take into account local (district/regional) differences which may influence variations at the local level. Under Section 38D(1), the EPA can impose conditions on the release of the GMO, including requiring contingency plans, compliance with relevant codes of practice or standards, limiting proximity of organisms to other organisms or limit the number of people that hold an approval.[3]

d) *Adverse effects of GMO contamination on mauri and tikanga of tāngata whenua:* Section 8 of the HSNO Act requires that the EPA take into account the principles of the Treaty of Waitangi. Under Section 6(d) of the HSNO Act and Clauses 9 and 25(2) of the Methodology Order, the EPA must take into account "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga".[4]

[1] Paragraph 2.12 of Mark Christensen's Legal Submissions, dated 24 January 2020.
[2] Table A (A.3) of Mark Christensen's Legal Submissions, dated 24 September 2020.
[3] Table A (A.7) of Mark Christensen's Legal Submissions, dated 24 September 2020.
[4] Table A (A.9) of Mark Christensen's Legal Submissions, dated 24 September 2020.

e) Consideration of the location and distribution of proposals involving GMO on a district basis, together with the protection of rural resources: Clause 13(c) of the Methodology Order requires the EPA to take into account "the distributional effects of the costs and benefits over time, space, and groups in the communities".[5]

f) *Financial liability from GMO Contamination:* There is strict liability for any breaches of the HSNO Act controls. Under Section 38D(2) of the HSNO Act, the EPA may impose a bond in the event of damage caused by the authorised use of a GMO.[6]

g) *Role of EPA under the HSNO Act after a GMO is released:* under section 103 of the HSNO Act, the EPA has broad enforcement powers to monitor compliance with the conditions of controls placed on an approval to release new organisms. A new organism is only released without conditions or controls where the EPA is confident the risk is negligible. In the event of unforeseen issues occurring after a full release of GMO, those issues are able to be managed at a national or regional scale under the Biosecurity Act 1993.[7]

4.9 The section 32 analysis in Mr Willis' evidence assessed four regulatory options:

a) Option 1 - rely on the HSNO Act; or

b) Option 2 - rely on the HSNO Act with a backstop strategy consisting of plan changes and/or requests to the Waikato Regional Council for a regional pest management plan. This option would be actioned in the event there is a likelihood of the EPA approving an organism for release which would be of a particular concern to the Waikato District community; or

c) Option 3 - introduce limited controls under the PDP by way of controlled activity consent for specific GMO in some or all of the district, where they may have a heightened risk that is not likely to be considered by the EPA; or

d) Option 4 - introduce a heavy regulatory approach under the RMA that prohibits outdoor release and requires discretionary consent for field trials.

Mr Willis concluded that Option 1 (rely on the HSNO Act) was the most effective and efficient option and that Option 4 (control GMO in the PDP) the least efficient and effective option in terms of section 32 of the RMA.

4.10 In response to our questions, we were advised by Mr Christensen that under section 53(1)(d) of the HSNO Act, any application to field test a GMO must be publicly notified. We are satisfied that this process provides opportunities for the Waikato community to engage in the decision-making process.

4.11 We also accept the evidence of Mr Taylor that the introduction of GMO provisions in the PDP would have implications for the Council, in particular having to acquire expertise in the GMO field and undertaking monitoring. We consider that it is more appropriate that the EPA applies expertise to the decision making on GMO, noting that this expertise is not currently available within the Council. We make no finding on Mr Taylor's contention

[5] Table B (B.6) of Mark Christensen's Legal Submissions, dated 24 September 2020.
[6] Table B (B.7) of Mark Christensen's Legal Submissions, dated 24 September 2020.
[7] Page 25 of Statement of Evidence of Gerard Willis, dated 18 December 2019.

that the Council might be potentially liable, in civil terms, if it were to assume a regulatory role in respect of GMO.

4.12 We accept and adopt the section 32 analysis submitted by Mr Willis.

4.13 Overall, we are satisfied that the development, release and use of GMO can be appropriately managed through the EPA approval process and it is unnecessary to include provision for them in the PDP.

For the Hearings Panel

Dr Phil Mitchell, Chair

Dated: 17 January 2022