BEFORE THE ENVIRONMENT COURT

Decision [2013] NZEnvC 298
ENV-2012-AKL-000146

IN THE MATTER	of an appeal under cl 14 of Schedule 1 to the Resource Management Act 1991
BETWEEN	NZ FOREST RESEARCH INSTITUTE LIMITED Appellant
AND	THE BAY OF PLENTY REGIONAL COUNCIL Respondent

Court: Environment Judge C J Thompson
Environment Commissioner I M Buchanan
Environment Commissioner A C E Leijnen
Hearing: 28 – 29 November 2013 at Mt Maunganui
Counsel: H A Atkins for NZ Forest Research Institute Ltd - appellant
R M Makgill and M S Makgill for Soil and Health Association of NZ Inc, GE Free NZ, J Sanderson, K M Summerhays - s274 parties
M H Hill for the Bay of Plenty Regional Council

DECISION ON APPEAL

Decision issued: 18 DEC 2013

The appeal is allowed in part see para [31]

Costs are reserved

Introduction

[1] The Bay of Plenty Regional Council publicly notified its Proposed Regional Policy Statement (RPS) in November 2010. At issue in this appeal are provisions in the RPS relating to the release, control and use of genetically modified organisms (GMOs). The proposed provisions are opposed by NZ Forest Research Ltd (Scion), but are supported by other bodies and individuals who have joined Scion's appeal as s274 parties. The issues have been the subject of Court-assisted mediation and inter-party discussions, with the Council modifying the provisions to what it considers to be a better version, but the second paragraph of it is still completely opposed by Scion.

[2] The disputed provision is in Part One of the RPS, and that Part is headed *Promoting sustainable management in the Bay of Plenty region.* It contains one section entitled *Introduction* under which a number of introductory statements about the Plan follow on a topic basis. The *Statement structure* is described in part as:

> The statement is in five parts. Part one contains introductory and explanatory material about the structure and purpose of the Statement in relation to the purpose of the Act. It also addresses the philosophy behind the Statement and discussion of the concept 'sustainable region'. An overview of the Bay of Plenty region is provided from various perspectives, alluding to resource management issues arising in those contexts.[1]

So, Part One is not a part of the RPS which contains objectives, policies and methods for resource management. It is rather a statement of the background issues, setting the stage for the more formal parts which follow in that document and, of course, in the regional plan.

[3] As put forward by the Council after mediation, the disputed provision would read:

> Section 1.7 Precautionary approach
>
> The ability to manage activities can be hindered by a lack of understanding about environmental processes and the effects of activities. Therefore, an approach which is precautionary but responsive to increased knowledge is required. It is expected that a precautionary approach would be applied to the management of natural and physical resources wherever there is uncertainty, including scientific, and a threat of serious or irreversible adverse effects on the resource and the built environment. It is important that any activity which exhibits these constraints is identified and managed appropriately. Although those intending to undertake activities seek certainty about what will be required

[1] Proposed Bay of Plenty Regional Policy Statement Part One Clause 1.2 Statement Structure

of them, when there is little information as to the likely effects of those activities, public authorities are obliged to consider such activities on a case-by-case basis. Such consideration could be provided for in regional and district plans, through mechanisms such as zoning or rules enabling an assessment of effects through a resource consent process, or through other regulation such as bylaws. Any resource consent granted in such circumstances should be subject to whatever terms and conditions and/or reviews are considered necessary to avoid significant adverse effects on the environment and protect the health and safety of people and communities.

The existence of genetically modified organisms in the environment has generated community concern. Of particular concern is the placement and location of trial and containment facilities. The Bay of Plenty Regional Council promotes a precautionary approach to the release, control and use of genetically modified organisms within the region. The precautionary approach is a necessary response to unresolved issues relating to potential environmental risks, economic costs, and cultural and social effects. The Hazardous Substances and New Organisms Act 1996 ("HSNO Act") contains specific legislation for managing genetically modified organisms. These legislative functions are carried out by the Environmental Protection Authority. Where appropriate the Resource Management Act may complement and supplement the HSNO Act to regulate in this area.

The parties' positions

[4] The Council has chosen to place this provision in the Introductory Part of the RPS, rather than being mentioned in a later Part as a matter of regional significance, with supporting Objectives and Policies, which would directly require territorial authorities to make provision for the management of GMO issues in their district planning documents. It has done so with the intention of drawing attention to the issue and the need for careful management of it, without creating a directive regime for either regional or district authorities to follow.

[5] It regards the provision as an appropriate reaction to, and a reflection of, the concerns formally communicated to it during the RPS preparation process about the potentially disastrous consequences of a mishap involving, for instance, the *escape* of a GMO into the extensive horticultural land in the region. The Council does not see the HSNO regime and an RMA process as being duplication, but rather as being complementary.

[6] The Council points out that the following RPS Policy in Part Three *Policies and Methods* of the Plan was not submitted on by Scion or the s274 parties to this appeal. It was appealed by Federated Farmers and Horticulture NZ, but those appeals were resolved through mediation. This version, now beyond dispute, is the agreed outcome:

> Policy IR1B: Applying a precautionary approach to managing natural and physical resources
>
> Apply a precautionary approach to the management of natural and physical resources, where there is scientific uncertainty and a threat of serious or irreversible adverse effects on the resource and the built environment.
>
> Explanation
>
> There is a lack of complete information and understanding about some natural and physical resources, and their use and development. A precautionary approach requires that any adverse effects can be identified and understood and any activity is carried out at a level or rate that adequately considers the risk of operating with imperfect information. Where appropriate, the precautionary approach may include an adaptive management approach.
>
> Councils are expected to apply the precautionary approach as appropriate when considering resource consents and developing district and regional plans. Where a precautionary approach is needed, such activities will be considered as part of the planning and resource consent process.

The Council also notes that Policy IR1B is supported by Method 3 (resource consents and plan reviews and changes) and by Method 8 (liaising on cross-boundary issues). Neither of these provisions add to the present issues, in our view. While not making specific reference to GMOs, as does the disputed provision, Policy IR1B undoubtedly introduces the concept of the *precautionary approach* to the management of resources where there is scientific uncertainty, and the possibility of serious and/or irreversible adverse effects.

[7] The appellant, Scion, is a Crown Research Institute established under the Crown Research Institutes Act 1992. It is charged with research for, and the sustainable improvement of the value and productivity of, the country's forestry sector. Its main campus is in Rotorua, in the Bay of Plenty region.

[8] Scion wishes to see the issue of the management of GMOs omitted from the RPS altogether. It advances the argument that the mechanisms in HSNO are, and are intended to be, a self-contained and exclusive method of managing both the potential benefits and risks associated with GMOs. It believes that an inevitable consequence of having the proposed provisions in the RPS will be that territorial authorities will believe themselves

required to make provision for the management of GMOs in district planning documents by assigning an activity status to their use, and having objectives, policies and methods. That outcome, it believes, will only duplicate the work of the Environmental Protection Agency (EPA). Worse, it will mean that even when HSNO consent has been obtained, those who are philosophically opposed to GMOs will be given free rein to promote time and resource-consuming litigation before councils and courts which are, it believes, bodies ill-equipped to deal with the scientific issues involved.

[9] Scion has a complaint too about the way in which the present formulation of section 1.7 came about – ie as the result of mediation and consultation, rather than by notification of a proposal and a public process thereafter. It criticises the result as being ... *policy by stealth.*

[10] The Soil and Health Association of NZ, and the parties aligned with it in opposing the Appeal against the proposed provisions, wish to see a rigorous regime in place through regional and territorial planning documents. As parties with concerns wider than the straight science, they say that they cannot adequately express their concerns about the risks attaching to work with GMOs through the HSNO processes, and point to incidents involving the actual or potential uncontrolled release of GMOs under the existing statutory regime as justification for imposing further, and what they see as more effective, management regimes.

[11] In closing the case for the s274 parties, Mr Makgill put forward a modified version of the disputed second paragraph of section 1.7 which, he suggested, might meet the ambitions of both sides. His version is this, with the amended parts in italics:

> *Section 1.7(a) – Emerging Issue – Genetically Modified Organisms*
>
> The existence of genetically modified organisms in the environment has generated community concern. Of particular concern is the placement and location of trial and containment facilities. The Bay of Plenty Regional Council promotes a precautionary approach to the release, control and use of genetically modified organisms within the region. The precautionary approach is a necessary response to unresolved issues relating to potential environmental risks, economic costs, and cultural and social effects. The Hazardous Substances and New Organisms Act 1996 ("HSNO Act") contains specific legislation for managing genetically modified organisms. These legislative functions are carried out by the Environmental Protection Authority. Where appropriate the Resource

> Management Act may complement and supplement the HSNO Act to regulate in this area. The identification of genetically modified organisms as an emerging issue under section 1.7(a) does not have the status of an objective or policy under this regional policy statement. If this issue is assessed to be of regional significance in the future, objectives and policies may be prepared subject to section 32 and the First Schedule of the Resource Management Act.

We shall return to that suggestion shortly.

The statutory background

[12] The relevant functions of a regional council are set out in s30 RMA, and include the following:

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

While mentioning hazardous substances more than once, s30 contains no reference to *genetically modified organisms* at all.

[13] That becomes less surprising when other parts of the Act are considered because, while incorporating the HSNO definition of *hazardous substance*, the RMA has no definition of, or even reference to, the term *genetically modified organism*. That term is defined in the HSNO as:

> *Genetically modified organism* means, unless expressly provided otherwise by regulations, 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:

For completeness we note also that the HSNO defines *new organism* as:

> (1) A new organism is—

(a) An organism belonging to a species that was not present in New Zealand immediately before 29 July 1998:

(b) An organism belonging to a species, subspecies, infrasubspecies, variety, strain, or cultivar prescribed as a risk species, where that organism was not present in New Zealand at the time of promulgation of the relevant regulation:

(c) An organism for which a containment approval has been given under this Act:

(ca) an organism for which a conditional release approval has been given:

(cb) a qualifying organism approved for release with controls:

(d) A genetically modified organism:

(e) An organism that belongs to a species, subspecies, infrasubspecies, variety, strain, or cultivar that has been eradicated from New Zealand.

(2) An organism is not a new organism if—

(a) the organism is not a genetically modified organism and—

(i) an approval is granted under section 35 or 38 to release an organism of the same taxonomic classification; or

(ii) the organism is a qualifying organism and an approval has been granted under section 38I to release an organism of the same taxonomic classification without controls; or

(iii) an organism of the same taxonomic classification has been prescribed as not a new organism; or

(b) the organism is a genetically modified organism and—

(i) an approval is granted under section 38 to release an organism of the same taxonomic classification with the same genetic modification; or

(ii) the organism is a qualifying organism and an approval has been granted under section 38I to release an organism of the same taxonomic classification with the same genetic modification without controls; or

(iii) an organism of the same taxonomic classification with the same genetic modification has been prescribed as not a new organism; or

(c) the new organism was deemed to be a new organism under section 255 and other organisms of the same taxonomic classification were lawfully present in New Zealand before the commencement of that section and in a place that was not registered as a circus or zoo under the Zoological Gardens Regulations 1977.

(2A) A new organism does not cease to be a new organism because—

(a) it is subject to a conditional release approval; or

(b) it is a qualifying organism approved for release with controls; or

(c) it is an incidentally imported new organism.

(3) Despite the provisions of this section, an organism present in New Zealand before 29 July 1998 in contravention of the Animals Act 1967 or the Plants Act 1970 is a new organism.

(4) Subsection (3) does not apply to the organism known as rabbit haemorrhagic disease virus, or rabbit calicivirus.

[14] The HSNO Act has a specific provision dealing with its relationships with other Acts. It is s142, which provides:

(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 subsection (2) of this section shall prevent any person lawfully imposing more stringent requirements on the storage, use, disposal, or transportation of any hazardous substance than 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. ...

So, in dealing with *hazardous substances*, both the HSNO and the RMA must be given effect, and more stringent requirements may be imposed under the RMA than the HSNO alone would require. But, as to a relationship between those two Acts vis a vis *organisms*, the HSNO is silent, and refers only to the Biosecurity Act 1993. That Act, via s13, gives regional councils a rather limited role in pest management planning, but is silent on the issue of a regional council being able to control the development, use, or release of new organisms.

[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. However, this was not argued before us, as it appeared that the parties generally agreed the RMA could have jurisdiction over genetically modified organisms. We are content to decide this appeal on that basis.

The precautionary approach, or the precautionary principle

[16] To begin at the beginning, we can perhaps look to the report of the *United Nations Conference On Environment and Development* (the *Rio Declaration* of 1992), Principle 15 of which says this:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Since 1992 there has been a good deal of ink and breath expended on the difference, if such there be, between a precautionary *approach*, and a precautionary *principle*. Noting in passing that the *Rio Declaration* itself uses both terms, without distinction, we shall not add to that debate. But as has been noted by the Court in, eg, *Jackson Bay Mussels Ltd v West Coast RC* (C077/2004), the concept of *precautionary* has moved from the *Rio Declaration* sense of not using a lack of full scientific certainty as a reason to avoid or postpone measures to prevent or mitigate adverse effects on the environment, to that of taking steps in advance to prevent something undesirable from happening. But, cutting through all of that, the short point is that what is required, if there is an unknown degree of risk, but possible significant adverse effects if the risk comes to pass, is that those undertaking whatever it is should be very careful.

[17] In the realm of genetic modification, taking a cautious approach is hardly a new concept. For instance, the report of the *Royal Commission on Genetic Modification* (2002) is replete with references to controls and a cautious approach.

[18] The HSNO Act addresses the issue directly, in s7

> 7 Precautionary approach
>
> All persons exercising functions, powers, and duties under this Act, including but not limited to, functions, powers, and duties under sections 28A, 29, 32, 38, 45, and 48 of this Act, shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

[19] While the concept is not mentioned in so many words in the RMA, it is useful to remind ourselves of the definition of the term *effect* in s3 RMA. It 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.

At the very least, subpara (f) most certainly points to taking a precautionary approach – indeed it may go further than a precautionary approach would ordinarily be thought to require because it is premised on a given effect having a known low probability of occurrence, and an unknown likelihood of a possibly high impact.

Is this a scientific issue, a planning issue, or both?

[20] The Royal Commission, in its Chapter 13 – *Major Conclusion: preserving opportunities*; has the following paragraphs, which do bear on the issues presented in this appeal:

> 38. The concept of regional genetic modification-free zones was raised with the Commission. Such a proposal might be achievable under the Resource Management Act 1991. We discussed this idea extensively but saw difficulty in its implementation. First, it would require widespread acceptance in a given region before it could be put in place without impinging unduly on the rights of those who wished to avail themselves of selected genetic modification technologies. Second, and for the same reasons that we found an "all or nothing" approach to be too inflexible, a blanket ban on applications of genetic modification would be a blunt instrument when a genetically modified form of Crop A might be quite compatible with a non-genetically modified form of Crop B.
>
> 39. The Commission also discussed a more selective concept relating to the Resource Management Act provisions for different land uses. Genetically modified and non-genetically modified crops might be permitted or prohibited on a crop-by-crop and region-by-region basis. This would require a genetically modified crop to be designated as a different use from a non-genetically modified crop of the same species. It may also be that over a period of time an aggregation of genetic modification or non-genetic modification uses became characteristic of particular regions and that identifiable regional differences emerged. These distinctions in land use might be written into regional or district plans, just as industrial use is separated from residential use. At the same time, the Commission acknowledges there are considerable practical difficulties with such proposals, which have the potential for dividing communities. Because of these difficulties the Commission is unable to reach a decision but notes the possibilities.

[21] As one would expect, the issue of GMOs has been wrestled with in other parts of the country, and at least one Council has seen the *possibilities* noted by the Royal Commission, but not found the *difficulties* insuperable. Our attention was drawn to the Proposed Hastings District Plan. Rule HS6 assigns a *discretionary* activity status to *The Field Trialling of Genetically Modified Organisms*, and Rule HS7 makes *The Release of Genetically Modified Organisms* a *prohibited* activity.

[22] In its explanation of the objectives and policies, the proposed Hastings Plan says this:

> The export of high value produce is critical to Hastings District as one of New Zealand's most significant horticultural and viticultural areas; agriculture is also an important component of the District's economy. Providing for the wellbeing of the community by giving certainty in prohibiting the release of GMOs is therefore justified. Although regulating GMOs in the District Plan could be considered a duplication of the HSNO Act, the Hastings District community in seeking a precautionary approach has requested greater certainty than can be provided by HSNO. ... that legislation does not have an ability to make the applicant financially accountable for any damages arising in the event of an escape of GMO material. The Discretionary activity category is therefore applied to field trials to address the financial risk to the community in the event of a mishap from field trials.

In short, the Hastings Plan adopts the very arguments put forward by the s274 parties in this appeal, and would satisfy many of their concerns. Of course, in doing so, it has brought about the very situation that Scion says it fears most – a District Council assigning restrictive activity categories to the trialling and use of GMOs.

[23] The Northland Regional Council has taken an approach similar in some respects to that proposed for the BOP RPS. Its proposed RPS has these provisions:

> 6.1.2 Policy – Precautionary approach
>
> 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.
>
> Explanation:
>
> Climate change and the introduction of genetically modified plant organisms to the environment have a greater potential for significant but scientifically uncertain adverse effects than other natural processes and activities.

> 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.

Notably, the Northland proposal stays away from liability issues, something though of fundamental importance in the Hastings proposal. Nevertheless, the precautionary approach to possible adverse effects is clear in the Northland provisions, although both documents are still subject to potential challenge.

[24] In advancing the argument that an RMA consenting process (ie as well as an application under the HSNO) should be required, Mr Vernon Warren, the consultant planner engaged by the Soil and Health Association, makes this point, at para 37 of his brief:

> GMO projects require approval from the Environmental Protection Authority ("EPA"). This consenting process gives particular attention to the technical aspects of managing an individual project. It does not, however involve:
>
> - consideration of regional distributions of GMO projects;
> - consideration of the need to protect areas of particular value for organic farming;
> - consideration of the preferences of a regional community; or
> - integration of the management of natural and physical resources on a regional basis.

We accept that point but also need to be conscious that sections 4, 5 and 6 of the HSNO Act strongly echo their counterparts in the RMA; eg

> 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 purpose of 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 Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga:

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

(f) New Zealand's international obligations.

[25] We have already mentioned the explicit adoption of the precautionary approach in s7, and there is also the now standard requirement to take into account the principles of the Treaty in s8.

Summary thus far

[26] To summarise to this point:

- The Council did not set out to create a duplicative or directive regime at either the regional or district level – but wished to flag the GMO issue as one requiring careful thought.
- The demonstration of that wish is that the Council did not, and does not seek to, set out on the type or course of GMO control shown in the examples from Hastings and Northland drawn to our attention.
- In that respect, the positions of the Council and Scion are quite reconcilable.
- The s274 parties do not shy away from acknowledging their wish to see GMO release and use tightly managed, but accept that RMA controls, as distinct from the existing EPA control under the HSMO, will not be achieved under the proposed provisions of this Regional Policy Statement.

- The precautionary approach is explicit in the HSNO, and implicit in the RMA. Under either piece of legislation GMO release and use would qualify as an activity having unknown but, in the worst case, possibly catastrophic economic, biological and social outcomes.

[27] At para [11] we mentioned the proposed amended version of Section 1.7 put forward by Mr Makgill at the hearing. The parties took time after the hearing to consider that, and the Council and the s274 parties were content with a further amended version in these terms:

> *Section 1.7 – Precautionary approach*
>
> The ability to manage activities can be hindered by a lack of understanding about environmental processes and the effects of activities. Therefore, an approach which is precautionary but responsive to increased knowledge is required. It is expected that a precautionary approach would be applied to the management of natural and physical resources wherever there is uncertainty, including scientific, and a threat of serious or irreversible adverse effects on the resource and the built environment. It is important that any activity which exhibits these constraints is identified and managed appropriately. Although those intending to undertake activities seek certainty about what will be required of them, when there is little information as to the likely effects of those activities, public authorities are obliged to consider such activities on a case-by-case basis. Such consideration could be provided for in regional and district plans, through mechanisms such as zoning or rules enabling an assessment of effects through a resource consent process, or through other regulation such as bylaws. Any resource consent granted in such circumstances should be subject to whatever terms, and conditions and/or reviews are considered necessary to avoid significant adverse effects on the environment and protect the health and safety of people and communities.
>
> *Section 1.7.1 – Emerging Issue: Genetically Modified Organisms*
>
> The existence of genetically modified organisms in the environment has generated community concern. Of particular concern is the placement and location of trial and containment facilities. The Bay of Plenty Regional Council promotes a precautionary approach to the release, control and use of genetically modified organisms within the region. The precautionary approach is a necessary response to unresolved issues relating to potential environmental risks, economic costs, and cultural and social effects. The Hazardous Substances and New Organisms Act 1996 ("HSNO Act") contains specific legislation for managing genetically modified organisms. These legislative functions are

carried out by the Environmental Protection Authority. Where appropriate the Resource Management Act may complement and supplement the HSNO Act to regulate in this area.

The identification of genetically modified organisms as an emerging issue under Section 1.7.1 does not have the status of an objective or policy under this Statement. If this issue is assessed to be of regional significance in the future, objectives and policies may be proposed using the process in Schedule 1 to the Act. It may nevertheless be appropriate to apply a precautionary approach on a case by case basis as envisaged by Policy IR1B.

There are other examples provided in this Statement of where a precautionary approach may be appropriate, including in relation to geothermal research systems and unknown but potentially significant adverse effects on ancestral taonga.

[28] While acknowledging that they do, at least, remove references to liability for damage caused by GMO escapes, Scion did not accept either revised version. Scion argues that the further version will undoubtedly still be read by district councils as a direction to include objectives policies and rules into district plans, and that it singles out GMOs for the application of a precautionary approach. It sees the proposed Section 1.7 as ... *a contradictory and misplaced direction to territorial authorities to regulate GMO activities* ... because it still exhibits an intention that it have some practical implementation. In doing so, Scion believes it would ... *have serious and significant effects on New Zealand's capacity and capability to maintain or develop GMO technology.*

Conclusions

[29] There is always a risk in attempting to achieve a compromise, but we do think that there is a formula which does not link the GMO issue to language in the RPS which might be seen as directive, but which still flags GMOs as an issue that may require, or at least repay, consideration in a further, and specifically focussed, plan or policy statement revision. We consider that the following provision, inserted after the first paragraph of the version of *Section 1.7 - Precautionary approach* set out at para [27] will de-couple the GMO issue from the precautionary approach and defuse the suggestion of *policy by stealth* through GMO issues being imported, intentionally or not, into the main part of the RPS by virtue of Policy IR1B.

Section 1.8 Emerging issues

> The existence of genetically modified organisms in the environment has generated community concern. Of particular concern is the placement and location of trial and containment facilities. The Hazardous Substances and New Organisms Act 1996 contains specific legislation for managing genetically modified organisms. These legislative functions are carried out by the Environmental Protection Authority. If this emerging issue is assessed to be of regional significance in the future, objectives and policies may be proposed using the process in Schedule 1 of the Act."

Section 290A – the Council's decision

[30] Section 290A requires the Court to *have regard to* the Council's decision. That does not create a presumption that the decision is correct, nor does it impose an onus on an appellant to demonstrate that it is wrong. Also, in this instance we had the Council supporting a post-mediation version of the provisions somewhat different from that originally decided upon, and that in turn was further modified over the course of the hearing. For the reasons we have attempted to set out, we think that the overall intention of the Council can be achieved, and without causing the concerns expressed by Scion, in the formula we have settled upon.

Result

[31] The council should incorporate the version of Section 1.8, as set out in para [29] into the RPS, in the place of the formerly proposed second paragraph of Section 1.7 as set out at para [3], and the version described as Section 1.7.1 set out at para [27].

Costs

[32] The Court's usual practice is to not award costs in plan appeals, and we do not encourage any application here. But if there is to be an application it should be lodged within 15 working days of the issuing of this decision, and any response lodged within a further 10 working days.

Dated at Wellington the 18th day of December 2013

For the Court

C J Thompson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND