AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau

Report to Auckland Council

Hearing topic 024

Genetically Modified Organisms

July 2016

Report to Auckland Council Hearing topic 024 Genetically Modified Organisms

Contents

1. Hearing topic overview

1.1. Topic description

Topic 024 addresses the regional coastal plan and district plan provisions of the proposed Auckland Unitary Plan relating to:

Topic	Proposed Auckland Unitary Plan reference	Independent Hearings Panel reference
024 Genetically modified organisms	C5.17 Genetically modified Organisms H4.19 Genetically modified Organisms	E37 Genetically modified organisms

Under the Local Government (Auckland Transitional Provisions) Act 2010, section 144 (8) (c) requires the Panel to set out:

> the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed plan to which they relate; or
>
> (ii) the matters to which they relate.

This report covers all of the submissions in the Submission Points Pathways report (SPP) for this topic. The Panel has grouped all of the submissions in terms of (c) (i) and (ii) and, while individual submissions and points may not be expressly referred to, all points have nevertheless been taken into account when making the Panel's recommendations.

1.2. Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan

The Panel recommends retaining provisions which regulate the use of genetically modified organisms in both the regional coastal plan and the district plan. These provisions should include controls on where they may be used and what controls should be imposed to avoid the release of them.

1.3. Overview

This report considers the jurisdiction to include controls on genetically modified organisms in the Plan and the classification of the particular activities that are expected to occur. Research in controlled environments and the use of vaccines under the control of a veterinarian are enabled as permitted activities, while field trials and the use of vaccines by people who are not veterinarians are to be considered as discretionary activities.

Releases of genetically modified organisms are prohibited activities which would require a plan change before being undertaken.

The provisions have been redrafted to make them clearer and better align with good drafting practice.

The extent to which any release is proposed by way of a plan change should involve greater consideration of matters of concern to Mana Whenua and of potential cross-boundary issues with neighbouring regions and districts.

1.4. Scope

The Panel considers that the recommendations in 1.2 above and the changes made to the provisions relating to this topic (see 1.1 above) are within scope of submissions.

For an explanation of the Panel's approach to scope see the Panel's Report to Auckland Council – Overview of recommendations July 2016.

1.5. Documents relied on

Documents relied on by the Panel in making its recommendations are listed below in Section 11 Reference documents.

2. Jurisdiction

2.1. Statement of issue

Is there jurisdiction under the Resource Management Act 1991 to control genetically modified organisms in regional or district plans?

2.2. Panel recommendation and reasons

The Panel accepts the authority of the Environment Court's decision in *Federated Farmers v Northland Regional Council* [1] that there is jurisdiction for a regional council to make provision for the control of the use of genetically modified organisms through regional policy statements and plans. That decision explains that genetically modified organisms may be controlled under both the Hazardous Substances and New Organisms 1996 and the Resource Management Act 1991: generally, control under the former is focussed on the assessment and approval for introduction and release of the organism itself at a national level, while control under the latter addresses the effects of storage, use, disposal and transportation of a hazardous substance on the regional or local environment and may restrict the locations where such use may occur.

While the decision specifically considers the position of a regional council in terms of its functions relating to hazardous substances,[2] the reasoning is the same in relation to territorial authorities.[3] As the Auckland Council is a unitary authority, the functional position is the same for it in any event.

The Court's decision addresses issues of potential duplication of regulation and the respective roles of the Environmental Protection Authority and regional councils. It considers the nature of the effects that may be managed under the Resource Management Act 1991. The Panel respectfully adopts the Court's reasoning.

[1] [2015] NZRMA 217; [2015] NZEnvC 89
[2] See section 30(1)(c)(v) and (d)(v), Resource Management Act 1991
[3] See section 31(1)(b)(ii), Resource Management Act 1991

2.3. Scope

The issue of jurisdiction was clearly raised in numerous submissions. As noted, the issue has been the subject of consideration by the Environment Court, whose decision has guided the Panel. The issue would require reconsideration in the event that either any contrary decision of a higher Court was delivered or if there were any change to the relevant legislation.

3. Status of activities

3.1. Statement of issue

What should the classification or activity status of activities relating to genetically modified organisms be? In particular, should the general release of such organisms be a prohibited activity?

3.2. Panel recommendation and reasons

The debate in this topic was among the most polarised before the Panel, with one group of submitters seeking broadly enabling provisions in the Plan to allow the development and use of genetically modified organisms and another group of submitters seeking greater restriction or prohibition of all genetically modified organisms.

The text of the proposed Plan as notified set out the relevant issues, noting that they are competing: while the use of genetically modified organisms can be beneficial in offering technological advances in the fields of farming (including silviculture) and medicine, it is a relatively new field and there is at least some uncertainty about its operation and effects.

The Panel heard evidence from a number of witnesses with the necessary scientific qualifications and records of experience to be considered as experts in this field. The Panel also heard from other expert witnesses in the fields of planning and economics who based their opinions on the evidence of those scientists. There was some cross-examination of certain witnesses. In summary, the scientific evidence and the policy conclusions that should be based on that science, were strongly contested both on the merits and in terms of whether certain witnesses lacked the necessary independence for their opinions to be treated as expert evidence.

It is unnecessary, given the issues to be addressed at this stage, for the Panel to resolve that contest. This is principally because at this time the activities involving genetically modified organisms are conducted within laboratories or in controlled field trials, or are vaccines used under veterinary supervision. As the Panel understood the evidence, there is no current proposal for the general release of genetically modified organisms anywhere in the Auckland region.

In these circumstances, the Panel considers that the classification of activities can properly distinguish between the contained activities presently being undertaken which ought to be permitted where the level of containment is high and discretionary where the requirements for containment, risk management and monitoring need to be evaluated.

For releases of genetically modified organisms, the issue was whether such activities should be classified as non-complying or as prohibited. The essential procedural difference is that an application for resource consent can be made for a non-complying activity while a plan change is required to alter the status of an activity classified as prohibited before that activity can be the subject of an application for resource consent. The substantive differences are more extensive. If an application is made for a non-complying activity, then it must be evaluated to determine whether the adverse effects of the activity on the environment will be minor or whether it will not be contrary to the objectives and policies of the relevant plan.[4] If it passes one of those thresholds, then it may be considered on a broadly discretionary basis.[5] A plan change (including an application for a private plan change) is considered through the process set out in Schedule 1 to the Resource Management Act 1991, including the requirement for an evaluation report of the appropriateness of the change, other reasonably practicable options and its efficiency and effectiveness.6

The Panel recommends, in the present circumstances that classifying the general release of genetically modified organisms as a prohibited activity is appropriate. The Panel accepts the submissions of the Council and submitters in support of the Council's position submission that a precautionary approach is appropriate given the scientific contest about the nature and extent of the risks associated with the general release of new organisms into the environment. The plan change process will provide an appropriate process for these risks to be examined and decisions made about the most appropriate methods of avoiding, remedying or mitigating any potential adverse effects. In making this recommendation, the Panel draws particular attention to the next issue, being the alleged inefficiency of the plan change process.

3.3. Scope

The issue of activity status was clearly raised in numerous submissions.

4. Inefficiency of plan change processes

4.1. Statement of issue

If an activity were to be prohibited, does that raise issues of efficiency and timeliness in dealing with plan changes?

4.2. Panel recommendation and reasons

The proposed provisions which classify the release of genetically modified organisms as a prohibited activity would mean that if any such organism were to be approved for introduction and release by the Environmental Protection Agency under the Hazardous Substances and New Organisms Act 1996, then there would need to be a plan change before that approval could be given effect. Submitters argued that this would be cumbersome and inefficient.

[4] See section 104D, Resource Management Act 1991
[5] See sections 104 and 104B, Resource Management Act 1991
[6] See section 32, Resource Management Act 1991

Classifying an activity as prohibited is a significant restriction because of the prohibition on making an application for resource consent for it. It is not, however, a classification that can only be used to stop an activity from ever occurring. In *Coromandel Watchdog Inc v Chief Executive of Ministry of Economic Development* [7] the Court of Appeal held that such a classification was not limited to situations where, in the timespan of a plan, the activity in question should in no circumstances be allowed in the area under consideration. The Court accepted that there could be a number of possible situations where prohibited activity status might be an appropriate method including where a council takes a precautionary approach or a purposively staged approach or where it is necessary to allow an expression of social or cultural outcomes or expectations.

The Panel considers that while in some cases the use of prohibited activity status might be inefficient in requiring a plan change process to be undertaken, in the present circumstances there was insufficient evidence to demonstrate that this is such a case. An important consideration is that the evidence indicated that there are no current proposals for the general release of genetically modified organisms in the Auckland region. This is an indication that the likely timeframes for seeking to make such a general release are consistent with a reasonable timetable for a plan change.

The Panel does wish to observe, however, that the Council must accept responsibility for ensuring that its processes for dealing with applications for private plan changes are responsive to the needs of applicants. While the process set out in Part 2 of Schedule 1 to the Resource Management Act 1991 is not subject to the same requirements for timeliness as applications for resource consent, nevertheless the robustness of using the prohibited activity classification depends on timely consideration of applications for private plan changes.

We record that the representatives of the Council at the hearing session for this topic assured the Panel that the need for such robustness was accepted.

4.3. Scope

The issue of the efficiency of a plan change process is consequential to the issue of activity status and therefore is within the scope of submissions.

5. Vaccines

5.1. Statement of issue

How should genetically modified vaccines be treated in the Plan? These can be administered by qualified veterinarians, but may also be administered in other ways and by other people.

5.2. Panel recommendation and reasons

As notified, the rules provided for all veterinary vaccines as permitted activities. By the time of the hearing, this activity had been amended to specify genetically modified veterinary vaccines as permitted. Importantly, the use of such vaccines is limited to non-

[7] [2007] NZCA 473, [2008] 1 NZLR 562, [2008] NZRMA 77; (2007) 13 ELRNZ 279 (CA)

viable vaccines administered in accordance with a dose specified and supervised by a veterinarian.

This leaves the situation of either a viable vaccine being administered or where the dose and method of administration is not under the control of a veterinarian. The Panel was informed that in some cases vaccines may be administered through feed, which would mean that there could be no close supervision. In such cases it is appropriate that the use of such vaccines be evaluated through a resource consent process.

This is now provided for as a separate discretionary activity so that appropriate controls may be imposed by way of conditions or the proposal may be declined consent.

The special information requirements for such a discretionary activity are the same as for field trials.

5.3. Scope

The issue of providing for vaccines that are not otherwise permitted is consequential to the redrafting of vaccines as a permitted activity and therefore is within the scope of submissions.

6. Conditions of consent

6.1. Statement of issue

What guidance about conditions of resource consents should the Plan contain?

6.2. Panel recommendation and reasons

The overall approach to the use of genetically modified organisms in the Plan is based on the scientific issues arising in this relatively new field of science. While the Panel accepts that the Council is not an appropriate organisation to mediate scientific issues, it is essential that the Council require appropriate monitoring and reporting from consent holders in order to inform its management of potentially affected land, water and air resources and to provide information that should be useful in the event of an application for a plan change to provide for the general release of a genetically modified organism.

A specific type of condition discussed in detail during the hearing session was that of bonds as a risk management method to ensure that the person who undertakes an activity that may cause adverse effects remains responsible for avoiding, remedying or mitigating those effects over time. The Panel recommends amendments to the plan provisions for such conditions.

A further risk management method which the Panel recommends retaining is to include specific special information requirements.

6.3. Scope

The issue of conditions is consequential to the issue of activity status and therefore is within the scope of submissions.

7. Significance to Mana Whenua

7.1. Statement of issue

Do the provisions take into account matters of concern to Mana Whenua?

7.2. Panel recommendation and reasons

The Panel heard from a number of Mana Whenua groups who supported the Council's position. The proposed provisions, however, contain limited reference to the consideration of their cultural well-being. At a late stage Policy 3 was amended to include consideration of the mauri of flora and fauna and the relationship of mana whenua with flora and fauna.

That addition is supported by the Panel. In the circumstances, the Panel does not consider that it ought to go any further in adding to the provisions.

In the event of any application for a plan change, or on the review of this section of the Plan, this issue will need to be revisited and the sufficiency of the provisions in this regard re-assessed.

7.3. Scope

The issue of significance to Mana Whenua is an over-arching one. No changes to the current provisions of the Plan are recommended and so no issue as to scope arises.

8. Cross-boundary issues

8.1. Statement of issue

Are there cross-boundary issues with neighbouring regions and districts that should be addressed?

8.2. Panel recommendation and reasons

The Council's position in this topic was supported by the Far North District Council and the Whangarei District Council, which presented a substantial case to the Panel.

Somewhat surprisingly, there were no submissions from the Waikato Regional Council or any of the district councils to the south of Auckland. The Waikato Regional Council did make a submission and did attend the hearing session on the issues in the Regional Policy Statement. It did not make any specific submission about genetically modified organisms.

In the circumstances, the Panel does not consider that it ought to go any further in adding to the provisions.

In the event of any application for a plan change, or on the review of this section of the Plan, this issue will need to be revisited and the sufficiency of the provisions in this regard re-assessed.

8.3. Scope

Consideration of potential cross-boundary issue is an over-arching matter. No changes to the current provisions of the Plan are recommended and so no issue as to scope arises.

9. Redrafting

9.1. Statement of issue

Do the provisions generally need redrafting?

9.2. Panel recommendation and reasons

As might be expected in relation to a technical subject, the wording of these provisions was potentially complicated. Based on the evidence presented and the answers to questions, the Panel has reviewed the text and made numerous amendments. Other than the particular matters referred to above, these have all been intended to clarify the text rather than to make any substantive amendment to it.

9.3. Scope

Numerous submitters in a number of topics requested that the text of the Plan be made clearer and easier to read. Where such amendments do not affect the substance of the Plan's provisions, there is no issue as to scope.

10. Consequential changes

10.1. Changes to other parts of the plan

There are no consequential changes to other parts of the Plan as a result of the Panel's recommendations on this topic.

10.2. Changes to provisions in this topic

There are no changes to provisions in this topic as a result of the Panel's recommendations on other hearing topics.

11. Reference documents

The documents listed below, as well as the submissions and evidence presented to the Panel on this topic, have been relied upon by the Panel in making its recommendations.

The documents can be located on the aupihp website (www.aupihp.govt.nz) on the hearings page under the relevant hearing topic number and name.

You can use the links provided below to locate the documents, or you can go to the website and search for the document by name or date loaded.

(The date in brackets after the document link refers to the date the document was loaded onto the aupihp website. Note this may not be the same as the date of the document referred to in the report.)

11.1. General topic documents

Panel documents

024 - Submission Point Pathway Report - 16 April 2015

024 - Parties and Issues Report - 13 April 2015

024 - Outcome of Facilitation Day (25 June 2015)

Auckland Council closing statement

024 Hrg - Auckland Council - Closing Remarks (12 October 2015)

024 Hrg - Auckland Council - Closing Remarks - Attachment A - Track Changes (12 October 2015)

11.2. Specific evidence

Far North District Council

024 Hrg - Whangarei DC and Far North DC (Dr Kerry Grundy) (13 August 2015)

024 Hrg - Whangarei DC and Far North DC (Dr Kerry Grundy) - Appendix A (13 August 2015)

024 Hrg - Whangarei DC and Far North DC (Dr Kerry Grundy) - Appendix B (13 August 2015)

024 Hrg - Whangarei DC and Far North DC (Dr Kerry Grundy) - Appendix C (13 August 2015)

024 Hrg - Whangarei DC and Far North DC (Dr Kerry Grundy) - Appendix D (13 August 2015)

024 Hrg - Whangarei DC and Far North DC (Dr Kerry Grundy) - Appendix E (13 August 2015)