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 The appeal sat alongside, but had a contrary thrust to, an appeal by Federated Farmers which has now been withdrawn.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