

**BEFORE THE INDEPENDENT HEARINGS PANEL  
AT ROTORUA**

**IN THE MATTER:** of the Resource Management Act 1991

**AND**

**IN THE MATTER:** of submissions on Plan Change 10 to the  
Bay of Plenty Regional Water and Land

---

**LEGAL SUBMISSIONS ON BEHALF OF  
BAY OF PLENTY REGIONAL COUNCIL**

**PLAN CHANGE: LAKE ROTORUA**

**6 March 2017**

---

---

**CooneyLeesMorgan**  
.....

247 Cameron Road  
P O Box 143  
TAURANGA  
Telephone: (07) 578 2099  
Facsimile: (07) 578 1433  
Lawyer Acting: S E Wooler

**MAY IT PLEASE THE PANEL****INTRODUCTION - purpose and context of PPC 10**

1. Proposed Plan Change 10 ("PPC 10"), notified 29 February 2016, is about reducing the level of nitrogen lost from farming activities (via leaching) reaching Lake Rotorua so that a sustainable steady state Lake load limit of 435 t/N/yr is reached, and allocating that limited amount of nitrogen capacity among land uses<sup>1</sup>. Associated with this is a reduction in phosphorous (via the integrated framework). It applies to rural land uses within the Lake Rotorua groundwater catchment. It is about enhancing poor water quality, but its drivers epitomise Te Mana o te Wai<sup>2</sup>.
2. PPC 10 is part of the Bay of Plenty Regional Water and Land Plan<sup>3</sup>. This regulates (i.e. by rules) regional activities on land/water and addresses issues of the use, development and protection of land resources and freshwater resources<sup>4</sup>. The PPC 10 rules are section 9 matters relating to land use<sup>5</sup>, and as such run with the land.
3. Lake Rotorua is identified as a 'Catchment at Risk' in the Regional Policy Statement<sup>6</sup>, and is the only such catchment to have its own identified limit for sustainable nitrogen set out in the RPS. It is not hard to understand that the reason for this is twofold:
  - 3.1 Firstly: its immense significance across all levels (district, region and national): It is a taonga: covered by the Te Arawa Lakes Settlement Act 2006; the largest Lake in the District; the most productive trout fishery in Aotearoa; a site of great cultural and historical heritage significance<sup>7</sup>. It is identified as an Outstanding Natural Landscape and Feature in the operative Rotorua District Plan<sup>8</sup>. In short, Lake Rotorua ticks most of the Matters of National Importance boxes in section 6 of the Resource Management Act 1991 (RMA), and many others in Part 2 of the RMA too. It is an important part of the tourism drawcard for international and national tourism.
  - 3.2 Secondly: the need to get a sustainable clean Lake. The need is notorious, nationally known, and well covered in the evidence of Mr Lamb. The history has been that of a lake plagued with algal blooms<sup>9</sup>, unpleasant and offensive

---

<sup>1</sup> Lamb explains components of PC 10.

<sup>2</sup> National Policy Statement - Fresh Water 2014

<sup>3</sup> June 2016

<sup>4</sup> Also geothermal.

<sup>5</sup> With one aligned discharge rule.

<sup>6</sup> See Polices WL2B-6B

<sup>7</sup> [www.tearawa.iwi.nz/lakes](http://www.tearawa.iwi.nz/lakes), as identified in the evidence of Mr Lamb.

<sup>8</sup> June 2016 [http://geo.rdc.govt.nz/images/plotfiles/DP/2016\\_Operative/214\\_ONFL\\_LF.pdf](http://geo.rdc.govt.nz/images/plotfiles/DP/2016_Operative/214_ONFL_LF.pdf)

<sup>9</sup> Hamilton, Bruere

culturally and socially<sup>10</sup>, with the potential for imposing economic costs through lost income and remediation<sup>11</sup>. This is caused by too much nutrient (nitrogen (N) and phosphorous (P)) entering into the lake<sup>12</sup> and the underlying geology of a warm shallow lake<sup>13</sup> situated in a geothermal area<sup>14</sup>. Although in recent times the lake has been cleaner, this would not have occurred without the artificial dosing of aluminium sulphate<sup>15</sup>, an interim intervention<sup>16</sup> while the levels of nutrient inputs to the Lake are reduced to a sustainable level.

4. The overall aim is a simple one, a cleaner sustainable lake by reducing the nutrient inputs into that lake<sup>17</sup>.
5. The Regional Council has prepared a s32 evaluation report and a further report pursuant to section 42 A (dated 20 January 2017). It has provided an updated track changes version of PC 10 that includes all recommended amendments arising as a result of submissions and expert evidence, including that of the submitters and rebuttal provided by the experts called by the Regional Council.
6. These submissions set out an overview road map of points and questions and address legal issues that have arisen to date. Further legal points may arise in the hearing of these submissions.
7. Subject to this, and the Panel's acceptance of that evidence; it is my submission that the proposed plan change, (as amended in the s42A report, and via further suggested changes in the rebuttal), is appropriately supported in the evidence the Regional Council has filed and will present today. Plan Change 10 gives effect to the RPS, NPS-FM<sup>18</sup>, is the most appropriate way to achieve the relevant objectives, accords with Part 2 of the Act and will assist the Regional Council in its functions in order to achieve sustainable management.

### **Consultation and Development:**

---

<sup>10</sup> Barns, Lamb

<sup>11</sup> Smith, Barns

<sup>12</sup> Hamilton

<sup>13</sup> Hamilton, Bruere

<sup>14</sup> Tempero (as discussed in evidence of Bruere and Hamilton re anthropogenic and natural loading of P).

<sup>15</sup> Hamilton

<sup>16</sup> Bruere, Lamb, Hamilton

<sup>17</sup> There is no new objective proposed. Existing RPS objective 28 and RWLP objective 11 establish the freshwater objectives for Lake Rotorua: see page 6 PC 10. Section 32(6) RMA provides that the 'objective' of the Plan Change is the purpose (see section 32 report, page 47).

<sup>18</sup> This is explained in full below at paragraph 77 onwards, including the extent to which the NPS is given effect to and the process going forwards towards giving full effect (implementation strategy).

8. As set out in Mr Lamb's evidence, there has been a long process of consultation and collaboration, testing and reviewing to get to here: PC 10 as now proposed via the s42A report<sup>19</sup>. He explains from a planning perspective how the process he oversaw has resulted in the proposed solution to the RPS requirement to reach a set Nitrogen limit in Lake Rotorua that is supported by expert evidence that, if accepted by the Panel, confirms it is the most appropriate way forward, taking into account all of the relevant factors and guidelines.
9. Mr Lamb addresses tangata whenua consultation and input to the development of PC 10 in detail, and notes the importance of the partnership relationship with the Te Arawa Lakes Trust (TALT) in the Lakes Programme and Deed. His evidence takes the Panel through the relevant other statutes and Iwi Management Plans and Statutory Acknowledgements. The role of Te Arawa is recognised as being of utmost importance here, as owners of the Lake Bed<sup>20</sup>, and as partners with the two Councils<sup>21</sup> in recognising and protecting the Lake<sup>22</sup>.
10. A particularly full consultation and development process underpins PC 10: starting from 2000 with the development of the Lakes Strategy, before the notification of the Regional Policy Statement in 2010, there has been ongoing indepth consultation, research<sup>23</sup> and a unique collaborative process spanning the Lakes partnership between TALT, RLC and BOPRC; the StAG process (Stakeholders Group) stemming from the Otoroa Agreement<sup>24</sup>; and including an update in 2014 to the 2006 Crown Funding Agreement (committing \$72.2 million to the \$144.4 million Rotorua Lakes Programme) that allowed \$45.5 million to provide for change in the farming sector. It included the release and consultation on draft rules in June 2014, and again in September 2015<sup>25</sup>.

### **Integrated Framework**

11. PC 10 is just one part of the Integrated Framework and other (non-regulatory) methods have been adopted by the Regional Council to ensure that the overall RPS limit is achieved. The Integrated Framework is shown at page 2 of PPC 10 and explained in the evidence of Mr Lamb. PPC 10 provides for the required reduction of 140t/N/y by on-farm reductions required by rules, using sector averaging. This was contemplated in the RPS at Policy WL 6B "*Require, including by way of rules, the*

<sup>19</sup> And rebuttal evidence: see Track Changes Version dated 6 March 2017, Rebecca Burton

<sup>20</sup> Returned in 2006

<sup>21</sup> Rotorua Lakes Council and Bay of Plenty Regional Council

<sup>22</sup> Rotorua Te Arawa Lakes Strategy Group, Rotorua Lakes Programme

<sup>23</sup> See for example the research programme outlined in the EIC and rebuttal evidence of Mr Bruere, and Professor Hamilton.

<sup>24</sup> Part of the RPS appeal resolutions on the N limit and reduction requirement.

<sup>25</sup> See Lamb, EIC para 37-57 for full details.

*managed reduction of any nutrient limits that are in excess of the limits established under Policy WL 3B...*". (That policy contemplated that reductions could be required by rules, but did not require that it only occur by way of rules.)

12. A further 180 t/N/yr is to be reduced by non-regulatory means that sit outside of the rules in PC 10: (see information Table LR 1 PC 10: this includes purchasing 100t/N/yr (Incentives Scheme) reducing 50 t/N/yr via engineering solutions and 30t/N/yr from the removal of gorse.) Those figures are 'in Lake' figures in that they are the amount of nitrogen that enters the lake rather than the nitrogen that leaves a property's root zone (that is subject to attenuation).
13. The Integrated Framework originated from the Primary Producers Collective presentation to the Stakeholder Advisory Group<sup>26</sup> in 2013, amended and endorsed by StAG and then approved and endorsed by the Regional Council (through the Strategy Policy and Planning Committee) on 17 September 2013<sup>27</sup>. Thereafter it was adopted by Council resolution and forms part of the policy context, but originated from the collaborative enquiry undertaken to work out what was the 'best way' to allocate the reduced capacity of the Lake to assimilate Nitrogen<sup>28</sup>. It represents the cost and effort sharing that will go into achieving the RPS limit for N, which includes regional and national contributions of *many millions*<sup>29</sup>.
14. PC 10 provides for adaptive management and regular reviews (see methods LR M2 and LR M3). It is anticipated that it will become part of the NPS-FM work for the Water Management Areas of the Rotorua Lakes (see NPS-FM implementation strategy and timeframes, see evidence Lamb and Bruere).

#### **The evidence:**

15. **The s42A report** (primary author [Senior Planner, Water Policy] Rebecca Burton) gives a thumbnail sketch of the main points about the development and content of PC 10 and where the details can be found; it also sets out the recommendations that Council staff make in response to the submissions and includes a track changes version of PC 10 showing proposed changes. Ms Burton has also provided rebuttal planning evidence that addresses some further suggested minor amendments and a full copy of the Regional Council's tracked changes as recommended by her and other Council witnesses is **attached**.

<sup>26</sup> See S42A section 3.1.2 and Lamb.

<sup>27</sup> S42A section 3.1.3 at page 10

<sup>28</sup> The Integrated Framework allocates costs of meeting the RPS nitrogen limit, including national contributions – see Barns, Smith, Lamb. There are sector reductions with variable cost impacts, (Doole) and, in some cases 'loss of a chance' costs. Benefits include avoidance of loss (Smith; Barns).

<sup>29</sup> See the evidence of Dr Smith and Ms Barns regarding this, and the detail provided by Mr Lamb.

16. Ms Burton notes new information that has been obtained since the comprehensive section 32 report, and how this has either supported PC 10 as notified or supports the recommended amendments in response to submissions that is shown in the track changes version. This includes the new ROTAN-Annual modelling undertaken by Dr Rutherford from NIWA and the reviews of the method to update allocations in line with updates to the OVERSEER model provided by Mr Matheson (Perrin Ag), Mr MacCormick (BOPRC) and Mr Park (LandConnect). (These reports were uploaded on 20 January 2017.) The rebuttal evidence of Mr Bruere addresses the ongoing and recent work that complements Council's opinion that PC 10 is the best way to address the task of attaining a sustainable level of nutrients in Lake Rotorua.

### **Nutrient Management Plans**

17. Nitrogen Management Plans (see Schedule LR Six) are required in order to show the proposed management of nutrient reduction to meet the allocation (a pathway of mitigation and management actions determined by the consent holder that demonstrates the managed reduction of nitrogen and the management of Phosphorous, including from within critical source areas (see Schedule LR Six paragraph 5(b)). They allow the consent holder to determine and respond to the management of nutrients required to reach their allocation, and provide a flexible framework of 5 year actions and the ability to review these if circumstances change. The Regional Council does not tell farmers how to farm, but does require compliance with the set limits on nutrient output and the farmer's management actions set out in their management plan<sup>30</sup>.

### **Submissions re this framework**

18. There are any number of ways that the pie could have been sliced to get to the required number at the set time. The RPS set out guideline matters to consider in reaching the decision on what this should be Policy WL 5B<sup>31</sup>. Some submitters would like to see another way of doing things that perhaps they perceive will have less impact on them. The s42A report has considered and responded to those submissions and the rebuttal evidence has provided further details. The important principles in interpreting the RPS principles and considerations were developed in consultation.
19. Council have considered whether it is within the scope of PPC10 to propose an entirely new way to give effect to the RPS limits and effectively require the process to start again.

---

<sup>30</sup> Lamb

<sup>31</sup> Lamb, s32

20. It is my submission that there are scope issues raised in such proposals, and that it would be possible for the panel to rule on this under section 47C RMA. This is signalled in the s42A report where it is recommended that the Panel makes directions under s47C RMA. *However, the Council is cognisant that the hearing process is important in testing the evidence that it brings to support the chosen process and proposed provisions and so has also addressed the merits.*
21. This is without prejudice to the wider issue of whether there is scope to challenge the entire approach of PC 10 and adopt an entirely new way of addressing the need to reduce N within the set timeframes, which is touched upon below.

**Scope:**

22. The purpose of the Plan Change is not to fully give effect to all of the requirements of the National Policy Statement Fresh Water, or to reflect all of the requirements of the Regional Policy Statement in terms of the management of nutrient/contaminants. It is a more limited project (as explained above) and has expressly been presented as the way in which the RPS limit of Nitrogen in Lake Rotorua will be met by undertaking reductions in losses from pastoral farming. It also addresses the management and reduction of Phosphorous, via policy and management (but not via express rules).
23. Alternative ways to achieve this limited aim were considered during the development of the plan change, including removing all current utilisations of nitrogen from the pastoral sector and reallocating this across the catchment according to land use capacity/capability<sup>32</sup>. The economic and planning evidence explains why this method (and others) were discounted in favour of the sector allocation approach. It is not a 'grandparenting' approach: it is based upon the land uses in the period 2001 and 2004 (as benchmarked and required under operative Rule 11 of the Regional Water and Land Plan) but run through a further refinement that reduces the range by requiring high leaching properties to confirm to the upper limit of the sector average range, and providing for low leaching properties to move to the bottom of the averaging range. This is explained in the evidence of Alistair MacCormick and Stephen Lamb.
24. The High Court<sup>33</sup> has recently reviewed the law on scope and confirmed the application of the *Clearwater*<sup>34</sup> test to a plan change. The relevant paragraphs of that decision are appended at the close of these submissions for ease of reference. On the basis of the legal position set out there it is clearly arguable that there are

<sup>32</sup> LUC and NC are used interchangeably in some submissions.

<sup>33</sup> Albany North Landowners v Auckland Council [2016] NZHC 138

<sup>34</sup> *Clearwater Resort Ltd v Christchurch City Council*, at [66].

numerous matters raised in submissions that are somewhat questionable on the issue of scope. This might well include de-allocation of nitrogen allocation from the pastoral sector to provide for any number of new things, such as the projected future needs for urban wastewater treatment (and tourism), or to change existing forest land to intensive dairy, or to compensate underdeveloped land, or newly returned land from Crown ownership. It is to be remembered that PC 10 is aimed at ensuring the sizable reduction of existing leaching from pastoral land.

### **Role of science evidence in planning response and PPC10**

25. Science evidence plays a large part in supporting the logic of PPC 10: the Council position is that PPC 10 is built upon the 'best science' and that there is a robust platform of enquiry and response. This applies to the science programme and the technical measurement of nutrients (including via the OVERSEER tool, explained below).
26. Mr Bruere explains the science programme for the Rotorua Lakes and positions the modelling work and scientific enquiry in context so that you will see what has been done and how the Council has dealt with uncertainty and complex catchment modelling. The science programme has directed enquiry at emerging issues in the development of PPC 10. This includes looking at whether or not there is an easier answer than what PPC 10 requires, which is the staged reduction in the amount of N from land use entering Lake Rotorua. Professor David Hamilton, Waikato University Chair of Lake Sciences will tell you how he has amassed one of the most comprehensive data sets and complete understandings of a single lake anywhere in the world. He comprehensively addresses the issues/allegations of uncertainty or that the Lake is phosphorous limited and that another approach solely focussing on that contaminant should be used.
27. The evidence of Professor Hamilton addresses the outcomes of the modelling<sup>35</sup> undertaken on Lake Rotorua water quality in relation to nutrients nitrogen and phosphorous and addresses these questions:
  - (a) How might changes in external (catchment) loads of N and P affect water quality in Lake Rotorua?
  - (b) What effects have in-stream interventions (such as alum dosing for phosphorus removal) had on observed water quality at Lake Rotorua?
  - (c) What are the sources of N and P in the catchment and the sustainable load?

---

<sup>35</sup> DYRESM-CAEDYM model, Hamilton: the "Lake Model"  
SEW-133911-559-785-2:sew/clm



28. Professor Hamilton summarises other major reports including that of Grant Tempero and explains the science around why the Council can't view alum dosing as a "silver bullet". He rebuts the approach that the Lake target can be reached by the reduction of phosphorus alone (the second silver bullet idea) and explains the robust science that requires the dual reduction of contaminants/nutrients N and P.
29. With regard to this: In simple terms alum dosing reduces the level of P (and N) in the Lake and this contributed to temporarily reaching the Lake TLI in 2012<sup>36</sup> (although currently the Lake TLI is higher<sup>37</sup>), but alum dosing is not risk free<sup>38</sup> and is a temporary external intervention<sup>39</sup> until the nutrient levels into the Lake are reduced enough so it can safely cease. Without the dosing the true TLI would be about 5.57<sup>40</sup>. While drastically reducing the level of P to replicate the action of the alum dosing, without requiring any N reductions (including land use changes and impacts) might *in theory* work to achieve the TLI it simply is not possible to achieve in the real world<sup>41</sup>. This is because only about half of all P received in the lake comes from human sources and the rest is natural<sup>42</sup>. As explained in [Bruere re Tempero][Hamilton] it is not possible to reduce enough P to replicate the effects of alum dosing, because of the limited amount of anthropogenic P, and so both N and P inputs need to be managed. At the same time the science conclusion is robust that what is required is to reduce both N and P, and this is achievable to reduce both N and P<sup>43</sup> via PPC 10 to achieve the sustainable lake load.
30. Dr Rutherford's evidence explains the ROTAN modelling that supports Council understanding of how much N flows into the Lake from the catchment and how this changes in response to land use changes.
31. Dr Rutherford updates the ROTAN model used in the original modelling that supported the operative RPS figure and explains the new model ROTAN-Annual. This is an update and simplified model that includes changes to OVERSEER<sup>44</sup>.
32. The outcome of the ROTAN-Annual modelling is that the PPC 10 N reductions are confirmed as likely to reach the lake load of 435tNyr by 2032 – in statistical probability terms there is a 'negligible likelihood' that PPC10 will have required more reductions in N than are needed, compared to a 12-20% likelihood that the lake level reached

---

<sup>36</sup> Hamilton, Bruere

<sup>37</sup> Hamilton, Bruere

<sup>38</sup> Tempero Ecotoxicological report [cite] Hamilton, Bruere

<sup>39</sup> Bruere, Lamb

<sup>40</sup> Hamilton

<sup>41</sup> Hamilton

<sup>42</sup> Tempero, explained in Hamilton, Bruere

<sup>43</sup> Professor R McDowell; Professor Hamilton.

<sup>44</sup> Rutherford re ROTAN modelling and ROTAN-Annual, Park, MacCormick re OVERSEER updates  
SEW-133911-559-785-2:sew/clm

with all reductions applied still will be higher than 435 in 2032, although with *certainty* of reaching that state by 2100. This confirms that PPC 10 does not ask too much N reduction to be undertaken, and that it might not ask enough<sup>45</sup>. (The Panel may remember that concerns about the (then unseen) outcomes of this modelling were a factor in some of the submitters seeking to defer the hearing.) (Method 2 of PPC 10 will address such a situation, and it is noted that future responses could be wider, and do not all have to require rules.)

33. Economic enquiry and modelling also support the decision making that led to PPC 10. This is set out in the evidence of Council economist Sandra Barns and technical details about the work undertaken are explained in the evidence of Lee Matheson, Dr Smith, and Professor Doole.
34. The modelling looks at the costs of various allocation methods, whether trading of N allocation assists in reducing those costs, and what the cost spread is between district, regional and national levels after N reduction to the (NDA) has occurred. It also considers the costs of not undertaking the reduction of N<sup>46</sup> (status quo).

#### **OVERSEER<sup>®</sup>**

35. PPC 10 uses the OVERSEER model in a variety of ways, including allocation, baseline, supporting the nitrogen (nutrient) management plans. This tool is commonly used for these tasks<sup>47</sup> and is the best<sup>48</sup> method at present<sup>49</sup>. Updating and changes are an integral part of this and PPC 10 is based on using the most recent versions of OVERSEER and provides a 'reference file' methodology<sup>50</sup> to update the percentage reductions required in the consent framework and NMPs. This methodology has been reviewed and refined and an updated version is proposed in the recommendations. This is explained in the evidence of Lee Matheson, Alastair MacCormick and Simon Park.
36. As a consequence of the proposed amendments these witnesses confirm their opinion that the use of OVERSEER is appropriate and robustly tied into PC10 in a way that allows for updating and certainty, and capable of addressing issues re modelling bugs as they arise. There is a constant flow of communication between the OVERSEER model owners, technical management groups and these witnesses. in

---

<sup>45</sup> Rutherford: see summary EIC at 22.

<sup>46</sup> Smith

<sup>47</sup> Park

<sup>48</sup> Park, MacCormick

<sup>49</sup> PC 10 also provides for the situation where OVERSEER is not suitable to use: Lamb

<sup>50</sup> Matheson, MacCormick, Park

my submission they are well-placed technical experts that establish a high standard of comfort/knowledge around the use of this model in PPC 10.

**Status of Rules: what applies and when**

37. This is an opportune moment to cover the issue of **non-complying status, and the legal effect of rules.**
- 37.1 Under section 86B(1)(3)(a) RMA the rules in PPC 10 came into legal effect upon notification, as they expressly relate to achieving the protection of water.
- 37.2 PPC 10 includes consequential changes that will remove the boundaries of PC 10 from the operation of Rule 11 of the RWLP.
- 37.3 For those properties that are covered by operative Rule 11 in the RWLP (surface water catchment of Lake Rotorua) **and** PPC10 (ground water catchment): Operative Rule 11 continues to apply as well, and will do so until it is *either* treated as inoperative under **Section 86F** (where no submissions or appeals have been made against the replacement rule in the proposed plan) **or** falls away once the replacement proposed plan provision is approved under **clause 17 Schedule 1** (becoming operative in its turn). So in this situation and over this period of time, consent will be required under both the operative and proposed plan. In some situations this will mean that **both** a controlled activity consent is required under PPC 10 and a Restricted Discretionary Consent (RDA) under Rule 11.
- 37.4 PPC 10 Rule LR R1 is the transitional rule (between 29 February 2017 and 30 June 2017) that ensures that current legally permitted activities continue as such until the rest of the rules came into play on the relevant dates set out therein. LR R1 standards requires no change from the status quo that would increase effective area, nitrogen inputs or stocking rates. Under PPC 10 it is non-complying to depart from those conditions during that period: LR R12. At the same time consent is required under R 11 for an RDA activity (as a breach of the permitted activity in LR R1 covers matters set out in the Rule 11 standards) while that rule remains in place.
- 37.5 After 30 June 2017 the effect of Rule LR R1 is spent and the permitted activity LR R2, 3, 4, 5, 6 or 7 will apply. A breach of the standards in those rules leads to the requirement of a controlled activity consent under LR R8, 9, 10, or 11 (requiring the property to obtain an NDA and operate under NMP

requirements) **or** an election (if not wanting to do this) to seek a non-complying consent under LR R12. At the same time there will remain the requirement to **also obtain RDA consent under Rule 11** where those matters apply (and within that R 11 catchment<sup>[1]</sup>) and until Rule 11 no longer applies to the PPC 10 Lake Rotorua catchment (i.e. once PPC 10 approved under clause 17 Schedule 1).

- 37.6 In the case of the Wastewater Treatment Plant: Currently consent is required under both Rule 37 and Rule 11(f) of the operative RWLP. Once Rule 11(f) ceases to apply to that Lake Rotorua catchment there will only be Rule 37 RWLP applying to the WWTP. Rule LR R12 of PPC 10 (non-complying activities) will not apply to the WWTP as it is limited in its application to farming activities.
38. If the non-complying pathway is intended to address ‘true exceptions’<sup>51</sup>: here, it is provided for those farming properties that *opt out* of undertaking a controlled status managed reduction pathway to achieve a lower nitrogen discharge allocation. By providing for short term trading the rules provide flexibility where a managed reduction target cannot be met (within the controlled activity rules). In this regard, PPC 10 provides for a shorter period non-complying activity consent, with the intention that the property return to the framework of managed reductions over that time. This reflects the overall strategy to reduce N losses across the entire pastoral sector. It would be inconsistent with this aim and policy framework to provide a lesser status of consent to depart from this process. Indeed, it could be argued that would have been entirely consistent to have made pastoral activities without NDA and NMP prohibited<sup>52</sup>.

### Sub-catchment

39. Some submitters seek a ‘sub-catchment’ approach that again focusses on the potential of the land and the leaching rate to minutely craft very localised rules within the already limited catchment area. *That would require a level of detail at a false degree of scientific certainty as to the exact inputs to the Lake from every part of the*

<sup>[1]</sup> **Noting** that PC 10 is the ground water catchment and R11 the surface water, so that for some PPC 10 properties R 11 will not apply.

<sup>51</sup> Although it is noted that this is not a mandatory part of a non-complying activity set out in the RMA: “[101] ... The other point we must bear in mind is that neither expression "precedent" or "true exception" occurs in the RMA, and that too much weight should not be placed on the concepts: see *Gould v Rodney District Council. ...*” *Saddle Views Estate v Dunedin City Council* [2014] NZEnvC 243.

<sup>52</sup> See for example the reasoning of the Environment Court as set out in the decision *TKC Holdings Ltd v WBOPDC* 100, at [79]-[90]. In a situation analogous to here there was a limited area, a small amount of development capacity, numerous Part 2 matters in play, and a risk that the departure from a carefully constructed framework would undermine the entire future limit it set out to achieve. A prohibited activity exceedance of the development cap was confirmed.

*sub-catchment*. And it would not be a distribution upon **land use** as required by the RPS but upon the various soil types and flows of water (and nitrates) to the Lake.

40. Existing investment in those sub catchments that have modelled as higher or faster leaching rates or flow rates would be adversely impacted at a rate beyond that of other sub-catchments. On the swings and roundabouts of those who lost or gained this approach would run contrary to most of the guiding principles of Policy WL 5B would be met (including “(f) resource use efficiency” as this encompasses not just the resource of the (efficient sharing of assimilative capacity) or the resource of (land productive capacity x nitrogen capture) but all other resources too, including rural infrastructure and sunk investment). This is set out in the economic evidence of Sandra Barnes and Graeme Doole.
41. The submissions that the sector averaging approach enshrines the existing high polluter models of farming land use and that existing uses should not have been taken into account overlook the following allocation principles at **Policy WL 5B: (b) extent of the immediate impact; (c) public and private benefits and costs; (g) existing land use; (h) existing on farm capital investment; and (i) ease of transfer of the allocation**. Clearly these are all valid and important considerations in terms of ‘giving effect’ to the RPS. It is also relevant that allocation was to be “**amongst land uses**” - not land or geological types, sub-catchments, past wrongs, or aspirational / potential development capacity hopes. And the principle of not rewarding the high polluter or penalising the low level uses was also factored into this equation. [See Mr Lamb].

#### **Te Ture Whenua Bill:**

42. Some submissions have suggested that the limitations on the development of forestry and underutilised land are contrary to the policy in the Te Ture Whenua Bill<sup>53</sup> (due to be enacted in April and in effect October 2018). With respect, the enablement of use of Māori land under that Bill is a move from the previous difficulty in developing that land because of the ownership constraints. The Bill does not seek to address the application of land use constraints that stem from the operation of Schedule 1 RMA. Likewise the tools online in association with that reform appear to provide information to assist landowners to know more about the physical characteristics, constraints and potential of Māori landblocks: these do not consider the additional layers of zoning and land use rules. It therefore cannot be ‘contrary to’ these matters. The Bill does not suspend the operation or application of the RMA or the RPS.

<sup>53</sup> <http://www.tpk.govt.nz/en/a-matou-mohiotanga/land/guide-to-te-ture-whenua-maori-reforms>

### Providing for new science and the reviews and Methods 2 and 3

43. PPC 10 provides for adaptive management in much the same way as the Lakes Programme has proceeded to date, and is firmly centred in the approach of best science. This is explained in the evidence of Professor Hamilton and in that of Mr Bruere, as well as in planning terms by Ms Burton.

### Consideration questions for the Panel: legal issues

44. The main legal issues are:
- 44.1 - The Panel's task in evaluating and making recommendations regarding PPC 10 (section 32 RMA, s63-68, giving effect to NPS-FM and RPS)
  - 44.2 - Giving effect to the limit in RPS Policy WL 3B(c) for nitrogen entering Lake Rotorua
  - 44.3 - The framework for PPC 10 (Integrated Framework, status of rules, relationship of PPC 10 and operative RWLP)
  - 44.4 - Allocation methodology (in line with RPS including WQ 5B) (including challenges to sector allocation)(efficiency?)(Other regional plans)
  - 44.5 - Use of OVERSEER<sup>®</sup> model and variation updating (appropriateness, certainty, future improvements)
  - 44.6 - Incorporation of the reference files in PPC 10 (equity and certainty)

### The Panel's task in evaluating<sup>54</sup> and making recommendations regarding PC 10

45. *Environmental Defence Society v New Zealand King Salmon Limited & Ors*<sup>55</sup> is the overarching authority in how the process of considering a plan change should be undertaken:

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan in accordance with its functions under s 30, the provisions of Part 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

<sup>54</sup> Section 32, 63-68, Part 2, RPs, NPS-FW.

<sup>55</sup> [2014] NZCSC 38

46. Although it does not skirt the importance of the matters in Part 2 of the Act<sup>56</sup> it does require a focus on the specific provisions in the superior instruments that a plan change is to give effect to<sup>57</sup>. In this case those are the Regional Policy Statement and (to a more limited extent in this case<sup>58</sup>) the National Policy Statement on Freshwater 2014.
47. The Regional Council in proposing PPC 10 is acting under its functions in section 30 RMA (including s30(1)(a): the establishment, implementation, and review of policies and methods to achieve integrated management of the natural and physical resources of the region; s30(1)(c): the control of the use of land for the purpose of ... maintenance and enhancement of the quality of water and water bodies ...; s30(1)(f): The control of discharges of contaminants into or onto land, air, or water and discharges of water into water.
48. In proposing the plan change it was guided by the jurisdiction / statutory requirements of RMA sections 63 -68 (matters that Council must change its regional plan in accord with), as set out in Part [4] of the section 42A report. This includes matters under section 66, including its duty under section 32, and under s67(1) taking into account any relevant planning documents recognised by an iwi authority. Overall it is acting to carry out its functions to achieve the purpose of the RMA (see section 63).
49. My submission is that the panel needs to satisfy itself of these broad things:
- 49.1 - having heard the evidence and considered the reports and submissions: **whether the proposed provisions are the most appropriate way<sup>59</sup> to achieve the objectives** (no new objectives are proposed, instead the intention of PPC 10 is to achieve part of Regional Policy Statement Objective 28 (insofar as it applies to Lake Rotorua) being “Enhance the water quality in the lakes of the Rotorua District and other catchments at risk”; and Regional Water and Land Plan Objective 11 “The water quality in Lake Rotorua is maintained or improved to meet the Trophic Level Index of 4.2 for Lake Rotorua.” Those operative objectives can be presumed to meet the purpose of the Act (having previously been accepted under a Schedule 1 and section 32 analysis as such.)

---

<sup>56</sup> (see for example paragraphs 146, 148, 151, 105)

<sup>57</sup> Except for 3 caveats as set out in [88], being validity of the Policy Statement; a gap where it does not cover the field; and uncertainty as to meaning.

<sup>58</sup> As explained below, this Plan Change is only a small part of the process for giving effect to the NPS-FW and there is a large programme of work underway.

<sup>59</sup> S32(1)(b) RMA

- 49.2 - in terms of that evidence: **whether the evidence and analysis is adequate to underpin the proposed provisions**; in light of the *scale* and *significance* of the environmental, economic, social and cultural effects that are expected from the implementation of the proposal (s32(1)(c));
- 49.3 - **whether the proposed change gives effect to the RPS and any relevant NPS and is not inconsistent with “any other regional plan” for the region**. [I have taken this to also require internal consistency with the rest of the RWLP, which is achieved by way of the consequential amendments that are filed concurrently with the notified plan change]; and
- 49.4 - **whether PC10 assists the regional council in carrying out its functions in order to achieve the purpose of the Act** (s63(1)).

#### **The RPS:**

50. The 435 t/N/yr figure is from the operative Bay of Plenty Regional Policy Statement<sup>60</sup>, and reflects the aim of a cleaner Lake Rotorua, as measured by the Trophic Lake Index (TLI) figure of 4.2 as set out in Objective 11 of the operative Regional Water and Land Plan. The TLI is the primary tool used by Council to assess and report on water quality in the lakes and is a result of the components chlorophyll a, total phosphorous, total nitrogen and transparency<sup>61</sup>.
51. The RPS requires a reduction of 320 t/N/yr entering the Lake, with 70% of that amount to be reduced by 2022 and the new sustainable lake level reached by 2032. Phosphorous is also managed (see PC 10 Schedule LR Six 5(b) for example).

#### **The set targets in PC 10 from RPS and RWLP: Legal submissions re giving effect to the RPS:**

52. As noted in the Panel’s Memorandum dated 14 November 2016 (declining the application to defer the hearing), PC 10 is required to give effect to the limit as set by the operative RPS, and “This hearing is related solely to the provisions of PC 10”.

<sup>60</sup> Policy WL 3B(c): Policies WL 3B, WL 5B, WL 6B Regional Policy Statement: Evidence of Lamb appends and explains, Hamilton refers.

<sup>61</sup> Bruere, Hamilton. An accepted tool for measuring water quality throughout the country. Used by Ministry for Environment: <http://www.mfe.govt.nz/more/environmental-reporting/fresh-water/lake-water-quality-indicator/water-quality-indicators-lakes>; [http://www.stats.govt.nz/browse\\_for\\_stats/environmental-reporting-series/environmental-indicators/Home/Fresh%20water/lake-water-quality.aspx](http://www.stats.govt.nz/browse_for_stats/environmental-reporting-series/environmental-indicators/Home/Fresh%20water/lake-water-quality.aspx)



53. The 435t limit (and timeframes for reductions<sup>62</sup>) has already been set through an RMA process and does not need to be re-assessed or justified in terms of the section 32 tests:
54. A regional council must amend a regional plan to give effect to a regional policy statement if the statement contains a provision to which the plan does not give effect and the statement is reviewed, changed and becomes operative. It must do this as soon as reasonably practicable.<sup>63</sup> It must also give effect to a regional policy statement under s67(3)(c).
55. To “give effect to” simply means to “implement”. The Supreme Court has looked at this requirement in the *King Salmon* case,<sup>64</sup> in the context of the requirement to give effect to the New Zealand Coastal Policy Statement. It cited the decision of the Environment Court in *Clevedon Cares Inc v Manukau City Council*.<sup>65</sup>
- [51] The phrase “*give effect to*” is a strong direction. This is understandably so for two reasons:
- [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
- [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.
56. Regional policy statements can contain policies which have the effect of “rules” in that they must be implemented. An example is the Auckland rural / urban boundary, which was set through the RPS. The RPS effectively drew a line around where activities could and couldn’t occur which regional and district plans then had to operate within. The territorial authorities sought a declaration that the RPS was trespassing into rule-making and that it was *ultra vires* to be so prescriptive and directive in an RPS. The Court of Appeal ultimately held that a policy could be highly specific and directive.<sup>66</sup>
57. The Supreme Court in *King Salmon* drew a distinction between specific and unqualified policies and those that are worded at a higher level of abstraction, and said that in the former case a requirement to give effect to a policy with the former

---

<sup>62</sup> Agreed via the Oturoa Agreement, resolving appeals to the RPS on these points.

<sup>63</sup> Section 65 RMA.

<sup>64</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] NZRMA 195

<sup>65</sup> *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211, cited in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77].

<sup>66</sup> *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18; [1995] NZRMA 424.

characteristics may be more prescriptive than in the latter instance.<sup>67</sup> The RPS in this instance contains a very specific and directive policy. The requirement to give effect to it is more prescriptive and there is less discretion than there may be with other RPS policies.

58. As signalled above, the RPS has been through a public process and is deemed to meet the requirements of section 32<sup>68</sup> and Part 2 of the Act.<sup>69</sup> Mr Lamb provides details of that process, including the Otoroa Agreement and resolution of appeals on the RPS direction re nitrogen reduction and timeframes.
59. The RPS process also established that there would be a need for more than ‘better management’ or ‘best practice’ and that land use change would be required. For example, the section 32 analysis for the water quality provisions of the RPS said “It is explicit that land use change is necessary to achieve desired Lake Rotorua water quality” and the RPS itself acknowledges that current on-farm best practice alone will not achieve the nitrogen load reduction and land use change that will be necessary.<sup>70</sup>
60. Notwithstanding the submissions above, the Council has provided additional evidence from Dr Rutherford (regarding the ROTAN-Annual model) that confirms that the sustainable lake RPS N limit remains at 435t/N/yr and that the reductions managed via PPC 10 provisions and the integrated framework should achieve that figure<sup>71</sup>, and Professor Hamilton’s evidence confirms that this figure (in association with the reductions in P<sup>72</sup>) is modelled as achieving the TLI, and that it remains an appropriate limit.

---

<sup>67</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [80].

<sup>68</sup> The 2013 changes to the section 32 requirements do not apply retrospectively and do not trigger a need to reassess any existing superior planning documents under the new requirements. The changes to section 32 took effect on 4 December 2013 and only apply to proposed policy statements and plans that are notified beyond that date (or on a limited basis to those that were notified prior to that but are early in their process). It is submitted that there is no scope to directly challenge the RPS process through the regional plan change process to implement that operative direction.

<sup>69</sup> See for example *Minister of Conservation v Otago Regional Council* EnvC 71/2001 at [85] “To that end we have concluded that the starting point is to examine the RPS, the terms of which are settled. As we understand it the provisions of this operative plan are accepted as meeting the requirements of section 32 and Part II of the Act. Furthermore, on re-examination of the RPS we have concluded that the provisions are clear and directive and form an excellent context in which to examine this water plan.”

<sup>70</sup> The explanation to Policy WL 6B.

<sup>71</sup> More on this below

<sup>72</sup> See NMP requirements re reduction of P and see Bruere and Lamb re planning responses on reducing P.

**Giving effect to RPS via allocation by land use: Allocation of assimilative capacity amongst land uses: RPS Policy WL 5B**

61. **RPS Policy WL 5B** provides principles by which the Regional Council is to consider how allocation of the assimilative capacity amongst land uses will occur. These came out of the settlement of appeals on the RPS and form part of the operative framework within which PPC 10 sits.
62. The 3 *main challenges* that have been levelled against PPC 10 relate to those principles:
- 62.1 - Why the pastoral sector has not been required to reduce its leaching to a much lower level than as set out in the Integrated Framework sector averages: the evidence of Mr Lamb sets out the background of the IF and how it meets the RPS principles, including as developed via the collaborative StAG process.
- 62.2 - Why the process has not been used to undertake 'blue skies' N allocation that would allocate N away from existing uses more: this is covered in the economic evidence, and that of Mr Lamb and Ms Moleta.
- 62.3 - Why Natural Capital<sup>73</sup> (LUC) has not been used to decide where N allocations sit as that may provide for more efficiency in the use of the nitrogen if it is tied to the land's ability to use it.
- (a) Aligned to the NC debate is an assertion (via submission but mostly via the evidence) by Rotorua Lakes Council that:
- (i) The Wastewater Treatment Plant should be assigned more allocation of N (below);
- (ii) A land use capital approach should have been used rather than the pastoral farming sector allocations, and forestry (not farming) would ultimately benefit from this;
- (iii) That PPC 10 does not take into account the effect on development, including on the development of the urban area or underdeveloped Māori land.

---

<sup>73</sup> The natural capital in the Doole report was based on dry matter/production.  
SEW-133911-559-785-2:sew/clm

## Māori land

63. With regard to the issue of whether Māori land should be treated differently under PPC10: Section 8 RMA directs persons exercising functions and powers under it to take into account the principles of the Treaty of Waitangi. It is submitted that the statement of the law in the recent Environment Canterbury recommendations<sup>74</sup> is correct on this matter in that: “[w]e understand this direction does not extend to principles that are not consistent with the RMA, not does it provide for allocating resources to Māori<sup>75</sup>. It does not impose a duty on functionaries to take into account past wrongs, or to be open to ways to restore imbalance<sup>76</sup>.”
64. It is my submission that this same reasoning applies to the situation where the Crown has reached agreement with claimants on an appropriate package to resolve claims against the Crown – such as the so-called “**Tree Lords**” settlement and the CNI **Forestry** lands, (emphasis added). Where forest land was given (and no doubt valued) as such it seems that it is an issue between the Crown and Iwi whether that land should have been differently valued; exempted from the provisions of the RMA or not made subject to the same rules as other forestry land in the catchment; or free from the existing provisions of regional rules such as Rule 11 that held the land use and nitrogen levels static.
65. This principle/consideration is expressly referred to in the RPS allocation guidelines under **Policy WL 5B** “Allocating the capacity to assimilate contaminants” at “(d): **Iwi land ownership and its status including any Crown obligations**” – i.e. this was a matter for the Crown and Iwi to negotiate in settlement, ensuring that full value was used to meet Crown obligations.
66. To the extent that a small portion of overall returned land that is located in this spatially discrete catchment remains subject to regional planning requirements that require consent for intensification away from forestry or new land uses/development - this is more of an issue at the level of the Crown obligation to give appropriate value in returned land. (A similar matter might be the return of National Park or a Significant Natural Area – in all of these situations it is my submission that it would

<sup>74</sup> Report and recommendations of the Hearing Commissioners 7 September 2016 – Plan Change 3 [181].

<sup>75</sup> *Minhinnick v Minister of Corrections* NZEnvC A043/2004

[215] We do not belittle the claims of past breaches of the Treaty. However we accept the Minister's submission that this Court is not the forum for such claims to be examined, and we hold that it is not the business of this Court to form an opinion on their validity, <sup>[48]</sup> let alone presume that they deserve to be accepted by the Crown.

<sup>[49]</sup> An appeal to the Environment Court against a requirement for a designation does not provide an appropriate opportunity for obtaining a decision on grievances that the Crown has not in the past fulfilled its obligations under the Treaty of Waitangi. <sup>[50]</sup>

<sup>76</sup> *Waikanae Christian Camp v Kapiti Coast District Council* (HC Wellington 27/10/2004 McKenzie J) SEW-133911-559-785-2:sew/clm

not be for the Regional Council to retrospectively address these situations by reallocating nutrient allocations, and that direction is reflected in the RPS.) At the same time enablement of the use of multiple owned Māori land<sup>77</sup> is considered – and this extends to that under pastoral farming use and covered by the Te Ture Whenua Act.

67. Notwithstanding this, Council staff have given careful consideration to the issues raised regarding underutilised Māori land and forested land and whether there should be a further or different allocation or even an exemption. As set out in the rebuttal evidence on this matter provided by Ms Moleta<sup>78</sup>, there was a consideration of further relevant options raised by submitters and analysis of the outcomes.
68. In legal terms, the purpose of PPC 10 was never to provide for more land development and more intensive uses of existing forestry and underutilised land, or to address inequities stemming from Crown settlements or earlier - rather it was considered that those land uses could not increase N leaching/outputs further under existing Rule 11 and so were exempted from the new reductions or consenting requirements required in PC 10 on the basis that they retained that level of output. The trading mechanism allows for some reallocation of nitrogen allocations via a market methodology.

### **Natural Capital**

69. As noted above Council could have chosen to undertake allocation using a variety of methods, including 'Land Use Capability' or 'Class'. It considered these natural capital options during the development of the PPC 10 provisions and concluded that, in line with the evidence of the economists, the method with the least social and economic disruption was sector averaging based on benchmarking. LUC had the most impact, being a move furthest from the status quo. (This is set out in the evidence of Stephen Lamb, Sandra Barns and Graham Doole.) (Land capability represents the general capability and versatility). Nor would the LUC method meet the RPS principles for allocation developed with the community and as reiterated and refined via the collaborative StAG process<sup>79</sup>.

---

<sup>77</sup> RPS, rebuttal evidence Ms Moleta.

<sup>78</sup> And in the section 42A report of Ms Burton

<sup>79</sup> See EIC Mr Lamb.

70. While some regions<sup>80</sup> have adopted this methodology in the context of their nutrient management and reduction processes<sup>81</sup> it is not a mandatory tool<sup>82</sup>, nor a simple or efficient<sup>83</sup> one.
71. As noted by the High Court in the decision *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 at [104] “*The NPSFM does not identify an allocation mechanism*”. For these reasons it was not considered to be the most appropriate way to meet the objectives.

### **Sewage and the urban catchment**

72. The late opposition of Rotorua Lakes Council (RLC) to Plan Change 10 is addressed in detail in the rebuttal evidence of Ms Burton. As noted above, both Councils are partners with TALT (Te Arawa Lakes Trust –and work together in conjunction with the Lakes Programme (as set out in the rebuttal evidence of Mr Bruere), (Ms Burton).
73. RLC is concerned that the allocation of nitrogen amounts via NDA figures, (i.e. the level that the pastoral sector is required to reduce to), has *by implication* limited its own ability to undertake urban growth with commensurate discharge of Nitrogen from wastewater treatment, (because of the limited amount of nitrogen assimilative capacity as set out in the sustainable limit in the RPS).
74. Although the Regional Council does not consider that it is the place of PPC 10 to provide for expansion in future wastewater treatment plans (as the focus of PPC 10 is on pastoral reductions of existing levels of N losses) it has agreed that some recognition of the relationship between urbanisation of rural land in the catchment<sup>84</sup> and the methodology of transfer of rural allocations of N to provide for those resulting new urban or rural/residential uses is part of the overall equation. I refer to Ms Burton’s evidence in this regard (rebuttal). It is her evidence that this satisfies the requirement to provide for integrated management.
75. Aligned to that, it is my submission that, beyond the point addressed by Ms Burton, this hearing is not the appropriate place to litigate the outcomes or conditions of the upcoming (not yet filed) resource consent application for a future waste water treatment plant, or to link the future of possible reticulation of other catchments to obtaining nitrogen allocations via the planned reduction process of PPC 10. The

---

<sup>80</sup> For example, the Horizons One Plan and as described in the evidence of Mr Fuller (RLC).

<sup>81</sup> *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182, providing for the restoration of the notified LUC system there (proposed One Plan), which was the notified methodology that had been removed via decisions on the proposed plan.

<sup>82</sup> See for example paragraph 32 of the evidence of Mr Osborne (RLC)

<sup>83</sup> See rebuttal of Ms Barns

<sup>84</sup> Land use change from rural uses to lower nitrogen losses.

economic and planning evidence has addressed the extent to which there is a reasonable relationship between future new consent conditions for discharges and PPC 10. Providing further may raise the issue of predetermination of the conditions of any consent and unreasonably limit the full consideration required under Rule 37 of the RWLP in the future.

76. It is relevant to note that RWLP Rule 11(f) also continues to apply in the interim period until PC 10 is made fully operative and its consequential changes to the RWLP then mean that Rule 11 no longer applies to the Rotorua Catchment<sup>85</sup>.

## **NPS FM**

77. The purpose of the NPS-FM is about recognising the national significance of fresh water for all New Zealanders and Te Mana o te Wai (the mana of the water).
78. The NPS-FM was gazetted on 4 July 2014 and came into force on 1 August 2014. From 1 August 2014 the NPS-FM 2011 was revoked. Development of PPC 10 occurred under the NPS-FM 2011 and the 2014 NPS. Consideration was given to whether a new or different process should occur following August 2014.
79. (Although the RPS and TLI requirement of the Operative RWLP was not developed under this NPS, this has not prevented it from giving effect to the NPS, because the process to set and develop the RPS limit and TLI objective has been consistent with the requirements of the NPS-FM too.)

### *National Objectives Framework*

80. Values have been considered throughout the development of the Nitrogen Framework, including of course ecosystem health and human health for recreation, as well as others including natural character, mahinga kai, and Rotorua's economic development.<sup>86</sup>
81. Local and regional circumstances have been taken into account, including matters such as the significance of Lake Rotorua - including in particular to Te Arawa, the value of tourism to the local and regional community, the value of farming and the Oturoa Agreement, and the characteristics of the land and aquifers around Lake Rotorua.

---

<sup>85</sup> The status of rules through time is addressed at [37] above.

<sup>86</sup> The Council has considered the compulsory values under the NPS Freshwater in the context of PC10 and this is included in the section 32 report (for example refer page 171 in relation to ecosystem health and 178 in relation to human health for recreation).  
SEW-133911-559-785-2:sew/clm

82. At all stages of the process of developing the Nitrogen Framework the Council has considered all of the matters described in Policy CA1(a)-(e). For example the timeframes and implications of the 435tN/yr nitrogen limit (or “target”, being defined in the NPS as a limit to be reached at some point in the future), were key matters considered during appeals on the RPS.
83. Councils are to include other values or attributes they consider appropriate, again having regard to local and regional circumstances. Council has done this via developing a target for the sustainable load of nitrogen to land.

*Other objectives and policies*

84. Objectives and limits are to be set under the NOF process in order to give effect to the objectives of the NPS (Policy A1(a)).
85. The Nitrogen Framework of Objective 11 RWLP (TLI) and the RPS target of 435 tN/yr provides for the safeguarding of the life-supporting capacity, ecosystem processes and indigenous species, including their associated ecosystems, and the health of people and communities, at least as affected by secondary contact with freshwater, by putting in place a regime that manages the use and development of land and discharges of contaminants into Lake Rotorua in a sustainable manner - Objective A1.
86. The Nitrogen Framework ensures the maintenance or improvement the overall quality of freshwater, in particular while improving the quality of freshwater in Lake Rotorua, which has been degraded by human activities to the point of being over-allocated (i.e. the objectives are not being met, at least not in a sustainable or reliable manner) – Objective A2. Here we also note the comments of the Environment Court in *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 that:

[73] What we can predict, and can, and should, be planning for, by way of objectives and policies, is the effects of current anthropogenic activities affecting waterbodies.

[74] If the *load to come* argument has any superficial appeal, it cannot succeed against the truth that we know what makes the quality of groundwater worse – ie putting pollutants into it. So, if we appropriately manage potential pollutants entering it now, its quality at least will not get worse (ie it will be maintained) and, as the inherited pollutants slowly work their way out of it, it will get better (ie it will be improved). Having a sub-optimal



present is not an excuse for failing to strive for an optimal (or, at least, closer to optimal) future.

87. Lake Rotorua is in a degraded state (which would be worse absent alum, but is still not at the TLI), and continued alum dosing is only an interim approach that simply provides time to addresses the issues in a sustainable way. The Nitrogen Framework specifies a target and implements methods (either or both regulatory and non-regulatory) to assist the improvement of water quality in the Lake to meet that target in the defined timeframe (Policy A2).
88. PPC 10 contains rules for both permitted and consented activities that ensure the limit and target can be met and require the best practicable option to prevent or minimise effects on the environment from discharge of contaminants to land from where it will enter Lake Rotorua (Policy A3).

*What it does not give effect to in the NPS-FM*

89. The Nutrient Framework does not include objectives and limits for all of the attributes required under the NPS Freshwater for Lake Rotorua. The NOF requires Council to develop objectives and limits for total phosphorous, total nitrogen, phytoplankton, ammonia, e-Coli and cyanobacteria as well, along with any other attributes Council considers necessary.
90. The Council is well aware of this, and has stated in its Section 32 Report that objectives based on selected values and the attributes to achieve those values will be incorporated into the RWLP via future plan changes (refer page 11 of the report). In a similar vein, the Government has signalled that additional attributes will continue to be added over time, meaning the NOF itself is not yet complete and further changes will be required<sup>87</sup>. An iterative process is intended, and there is nothing in the NPS Freshwater that suggests that all attributes or waterbodies need to be addressed at the one time. An interim approach has just been endorsed by the Hearing Panel on the Proposed Unitary Plan in Auckland, and by the Independent Hearing Commissioners in Canterbury.
91. Council has until 2030 to implement the NPS in full, and will continue it under the Rotorua Lakes WMA process. It has notified and adopted an implementation policy<sup>88</sup> to do so, and keeps this implementation plan under review.

---

<sup>87</sup> A new discussion document has just been released on further changes.

<sup>88</sup> Originally in November 2012, and a new implementation policy in December 2015: <https://www.boprc.govt.nz/environment/water/freshwater-futures/> (link accessed 3 March 2017)  
SEW-133911-559-785-2:sew/clm

**Conclusions:**

92. The Regional Council (in its evidence) has explained how it has undertaken a thorough, iterative and collaborative approach, and now seeks that the independent hearing panel **recommends** that PC 10, as proposed to be amended, be approved and a decision made accordingly.

**Witnesses**

93. Council will call 12 witnesses:

- (a) Stephen Lamb;
- (b) Gemma Moleta
- (c) Andrew Bruere
- (d) Professor David Hamilton
- (e) Sandra Barnes
- (f) Professor Graeme Doole
- (g) Dr Nicola Smith
- (h) Lee Matheson
- (i) Alastair MacCormick
- (j) Simon Park
- (k) Dr Kit Rutherford
- (l) Rebecca Burton

94. The first witness to address the Panel is **Stephen Lamb**, Manager of the Natural Resources Team, Bay of Plenty Regional Council. He has had the overall responsibility for the development of PC 10. Although this is not an Environment Court hearing, he, like all of the witnesses, has confirmed his agreement to comply with the Code of Conduct for Expert Witnesses, and is here primarily to help the Panel in coming to its recommendations regarding PC 10.

Dated 6 March 2017

**Sharron E Wooler**

## Appendix

### Appendix: excerpt: *Albany North Landowners v Auckland City*, [2016] NZHC 138

(Whata, J. )

...

[120] The *Clearwater* case concerned whether a submission was “on” a variation to the noise contour polices of the then proposed Christchurch District Plan. William Young J identified his preferred approach as:<sup>135</sup>

1. A submission can only fairly be regarded as “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.

2. But if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly “on” the variation.

[121] A variation, as distinct from a full plan review, seeks to change an aspect only of a proposed plan and in the *Clearwater* case, the Council sought to introduce a variation (Variation 52) to remove an incongruity between policies dealing with urban growth and protection of the Christchurch airport. The proposed plan placed constraints on residential development within specified noise contours. Variation 52 contained no proposal to adjust the noise contours, but the submitter, Clearwater, wanted to challenge the accuracy of the contours on the planning maps. The Court was not concerned with whether the scope of the submission was broad enough to include a particular form of relief (as was the case in *Countdown, Royal Forest, Shaw* and *Westfield*). Rather, the Court was literally concerned with whether the submission was “on” the variation at all.

[122] Relevantly, William Young J also stated in relation to the second *Clearwater* step:<sup>136</sup>

It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely differently from the envisaged by the local authority. It may be that the process of submissions and cross submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have the opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of “left field”, there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is “on” the variation.

[123] William Young J went on to hold that assuming Clearwater’s submission sought a change to the 50 dBA contours, it would have been “on” the variation because “[t]he class of people who could be expected to challenge the location of this line under [the notified proposed plan] is likely to be different from the class of people who could be expected to challenge it in light of Variation 52.”<sup>137</sup> By contrast, Clearwater’s submission on the 55dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours was not “on” the variation because it was clear that “the relevant contour lines depicted on the planning maps in the pre-Variation 52 proposed plan were intended to be definitive”.<sup>138</sup>

<sup>135</sup> *Clearwater Resort Ltd v Christchurch City Council*, above n 113, at [66].

<sup>136</sup> At [69].

<sup>137</sup> At [77].

<sup>138</sup> At [80].

[124] Ronald Young J applied the *Clearwater* steps in *Option 5 Incorporated*, noting that the first point may not be of particular assistance in many cases, but that it is highly relevant to consider whether the result of accepting a submission as on a variation would be to significantly change a proposed plan without the real opportunity for participation by affected persons.<sup>139</sup> In this case the Judge placed some significance on the fact that at least 50 properties would have their zoning fundamentally changed without any direct notification “and therefore without any real chance to participate in the process by which their zoning will be changed.”<sup>140</sup> Ronald Young J added that there was nothing to indicate to that “the zoning of their properties might change.”<sup>141</sup> In concluding that the submission was not on the variation Judge observed that the Environment Court correctly took into account:<sup>142</sup>

- a) The policy behind the variation;
- b) The purpose of the variation;
- c) Whether a finding that the submission on the variation would deprive interested parties of the opportunity for participation.

[125] The Court also noted the appellant’s submission was to be contrasted with the more modest intention of Variation 42 which was to support the central Blenheim CBD and to avoid commercial developments outside the CBZ.

[126] More recently, the *Clearwater* test was applied by Kós J, in *Motor Machinists*. This case concerned a plan change about the distribution of business zones. The appellant had sought extension of the “Inner Business” zone to its land. The Environment Court rejected this submission as out of scope. Kós J agreed, observing that a very careful approach must be taken to the extent to which a submission may be said to satisfy both limbs one and two of the *Clearwater* test. The Judge emphasised the importance of protecting the interests of people and communities from submissional side-winds. The absence of direct notification was noted as a significant factor, reinforcing the need for caution in monitoring the jurisdictional gateway for further submissions.<sup>143</sup>

[127] The first limb was said to be the dominant consideration, namely the extent to which there is a connection between the submission and the degree of notified change

<sup>139</sup> *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 at [34].

<sup>140</sup> At [35].

<sup>141</sup> At [36].

<sup>142</sup> At [41].

<sup>143</sup> *Palmerston North City Council v Motor Machinists Ltd*, above n 109, at [43].

proposed to the extant plan. This is said to involve two aspects: the breadth of the alteration to the status quo entailed in the plan change and whether the submission addressed that alteration.<sup>144</sup> The Judge noted that one way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If not the submission is unlikely to fall within the ambit of the plan change.<sup>145</sup> The Judge added that incidental or consequential extensions of zoning change proposed in the plan change are permissible provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. The second limb is then directed to whether there is a real risk that persons directly affected by the additional change, as proposed in the submission, have been denied an effective response.<sup>146</sup>

[128] Kós J also disapproved the approach taken by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*<sup>147</sup>, noting that *Countdown* was not authority for the proposition that a submission “may seek fair and reasonable extensions to a notified variation or plan change”.<sup>148</sup>