BEFORE THE BAY OF PLENTY REGIONAL COUNCIL

Independent Hearing Commissioner(s)

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER Lake Rotorua Nutrient Management – Proposed Plan Change 10 to the Bay of Plenty Regional Water and Land Plan.

SUMMARY OF EVIDENCE OF Bethany Bennie

Planner

3 April 2017

QUALIFICATIONS AND EXPERTISE

1. My name is Bethany Bennie, and I have been employed as a Planner at Boffa Miskell Limited (BML) for the past three years. I hold the qualification of Master of Planning Practice from the University of Auckland and I am an Intermediate Member of the New Zealand Planning Institute.

2. In this matter, I was engaged by The Fertiliser Association of New Zealand (FANZ) to prepare a submission on the Proposed PC10 (Lake Rotorua Nutrient Management) to the Bay of Plenty Regional Water and Land Plan (PC10) in April 2016 and a further submission in September 2016.

CONTEXT FOR THIS SUPPLIMENTARY EVIDENCE

3. Evidence in Chief was presented to the Hearing Panel on 16 March 2017. The approach taken in presenting the evidence was that recommendations from the Officers' Report and Rebuttal Evidence from the Officers may or may not be accepted by the Hearings Panel.

4. It is acknowledged that a significant number of submission points raised in the original submission of FANZ were accepted and satisfactorily addressed by the Officers' Report recommendations. In response to my Evidence in Chief, the Rebuttal Evidence of the Officer has also accepted a number of submission points and recommended further amendments.

5. In this supplementary evidence, it is assumed that the recommendations of the Officers' Report and recommendations arising from the Rebuttal Evidence will by and large be accepted by the Hearing Panel, and so there is now focus on those matters still outstanding.

6. I have read the rebuttal evidence of Ms Rebecca Burton, Mr Simon Park and Ms Sharon Wooler. I am supportive of the majority of their recommendations as outlined in Appendix A.

SUMMARY OF OUTSTANDING MATTERS

7. The outstanding matters where I do not support Council's recommendations relate to:

- Reference to ongoing requirement to use OVERSEER® Version 6.2.0;
- Use of the word 'Avoid" in Policy LR P11;
- Using Certified Nutrient Management Advisers for consistency in establishing nitrogen loss values based on OVERSEER Nutrient Budgets and preparing Nutrient Management Plans;
- Definition of 'Significant Farm System Change';
- The wording of Schedule LR Two.

COUNCIL RECOMMENDATIONS TO THE PANEL

8. Appendix A to this summary of evidence outlines in a table format the Council recommendations to the Panel and whether or not I support the recommendations. Where I state support for the recommendations, these are in addition to the supported recommendations outlined in Appendix A of my Evidence in Chief (dated 22 February 2017).

OVERSEER® VERSION 6.2.0

9. I note Mr Park has sought to address the issue raised about using OVERSEER 6.2.0 with recommended amendments to Policy LR P3 (c). These amendments are as follows:

> *"The most current version of OVERSEER®, ~~6.2.0~~ except for nitrogen discharge allocation purposes where version 6.2.0 applies, and…"*

10. Ms Burton added to the above amendment recommending the following in LR P3 (c) and LR P12:

> *The most current version of OVERSEER®, except for initial allocation purpose where OVERSEER® 6.2.0 applies…*

11. I support this recommendation in part as I believe it is helpful, except that by referring to the present tense, it implies version 6.2.0 is can be still used. Further improvement of this wording may be achieved by being clear that the use of OVERSEER 6.2.0 applied to the initial nitrogen discharge allocation. Suggested wording is as follows:

The most current version of OVERSEER®, except for the initial nitrogen discharge allocation purposes where OVERSEER® 6.2.0 ***was*** ~~*applies*~~ ***applied****...*

12. Furthermore, I am still uncomfortable with the manner in which the plan references OVERSEER 6.2.0 in Schedule LR One as it appears that it will continue to be used, even though version 6.2.0 is no longer accessible.

13. Mr Park acknowledges in para 8 of his rebuttal summary that OVERSEER 6.2.0 would not need to be run again to determine a new Nitrogen Discharge Allocation (NDA) under Rule LR R10 as a NDA can be determined using (quote) 'the relevant combination of v6.2.0 allocation spreadsheet data, reference files and GIS'. However, as recommended by Ms Burton's Rebuttal Evidence, Rule LR R10 (b) (transfer of NDA or MRT) requires a new NDA to be determined for both the source and destination land in accordance with Schedule LR One.

14. Schedule LR One (A) states that (quote) '*all benchmark information is converted to OVERSEER 6.2.0 for the purpose of calculating NDAs'*, and again the introduced amendment in part B states '*NDA's are calculated in kg/N/ha/yr using Overseer 6.2.0 and are then expressed as a percentage of the relevant reference file*'. This appears to require that the plan user would have to use OVERSEER 6.2.0 to calculate their NDA.

15. If it is possible to calculate a new NDA using the excel spreadsheet, reference files and GIS described in Mr Park' rebuttal evidence, I suggest that Schedule LR One is worded slightly differently to state that OVERSEER 6.2.0 values have already been calculated and sit outside the plan in a spreadsheet. In my opinion, this would provide clarity for the plan user that OVERSEER 6.2.0 does not have to be used per se, rather existing values from OVERSEER 6.2.0 will be used to calculate a properties new NDA. I suggest that the following wording could be included after the second sentence of Schedule LR One and before point A:

Initial Start Points, Managed Reduction Targets and Nitrogen Discharge Allocations were calculated in OVERSEER® 6.2.0 following the below methodology. These values are recorded in a spreadsheet held by Regional Council and will inform any future Start Points, Managed Reduction Targets and Nitrogen Discharge Allocations.

16. If it is not possible to calculate a new DNA using the excel spreadsheet, reference files and GIS as described in Mr Park's evidence, I recommend

the amendments I sought in my Evidence in Chief; the deletion of any 6.2.0 reference in Schedule LR One and LR Five.

NEW POLICY LR R11

17. My evidence and FANZ submission sought to replace or amend Policy LR P12 (now Policy LR P11) to provide for a restricted discretionary or discretionary activity status to apply to activities that cannot meet the permitted and controlled activity standards. This was particularly because of concern with Schedule LR Six that required farmers to 'demonstrate managed reductions to achieve the MRT and 2032 NDA'. The amendments to Schedule LR Six as per Ms Burton's Rebuttal Evidence are supported.

18. The replacement wording of what is now new LR P11 (as detailed in Ms Burton's Rebuttal Evidence) is not supported due to the use of the word 'avoid'. My reasoning for this draws from two recent High Court decisions related to non-complying activities and plan drafting.

19. The most recent case is relevant to non-complying activities when drafting objectives and policies. The case, *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 was in relation to a resource consent application. The High Court concluded that plans should already reflect the requirements of Part 2 of the RMA and as such there is no need to specifically refer to Part 2 of the RMA in consent applications.

20. Commentary on the case by Kensington Swan Lawyers[1] states "(the case) …*will mean that objectives and policies in plans… will assume greater importance for resource consent applications… resource consent could become much harder to obtain where there are strong or unqualified policy directions, such as to 'avoid' specified effects… More than ever, it will be vital to ensure that objectives and policies strike the right balance and 'say what they mean'. Matters of discretion and assessment criteria will also become more important and will need to be more comprehensive'*.

21. Section 104D(b) of the RMA is one of the 'gateway tests' for non-complying activities and states that 'the application if for an activity that will not be contrary to the objectives and policies of... the relevant plan'. The use of the word 'avoid' in new Policy LR P11 is a 'strong policy direction'

[1] https://www.kensingtonswan.com/Legal-Updates-And-Events/Newsflashes/High-Court-case-changes-how-resource-consent-appli.aspx

and would close the s104D(b) gateway test leaving the decision on a non-complying activity up to the other gateway test; whether or not the adverse effects of the activity are minor (s104D(a)).

22. 'Minor adverse effects' have been addressed in the High Court case *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815; *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817. This case was discussed in para 62-70 of my Evidence in Chief. In summary, the High Court determined that '*the statutory test of "minor" needs to be understood in context and applied within the policy framework. The purpose of section 104D(1)(a) is to allow applications for non-complying activities where the adverse effect on the environment is so minor "that it is not likely to matter", even though the activity may be contrary to the operative and/or proposed plans. Assessing whether an effect is minor for the purposes of section 104(1)(a) involves both a quantitative and qualitative analysis*'. The High Court considered that a minor effect is "a very small eye in the needle". This implies that any adverse effects of a non-complying activity would need to be so minor 'that it is not likely to matter'. In relation to new Policy LR P11, as discussed the use of the word 'avoid' closes one of the gateway tests (s104D(b)). So for a non-complying activity to be granted resource consent any adverse effects of the activity would have to be such that they are 'not likely to matter'.

23. Under PC10 a non-complying activity status would apply to an activity that does not comply with LR R2 or an activity that does not comply with controlled activity conditions by not having a NDA, MRT or a NMP. As NDAs and MRTs are issued by Council, the non-compliance of the land user would relate to not having a NMP. FANZ support the use of NMP but also support innovation in the management of nutrient run-off.

24. In light of the current wording of Policy LR P11, the standard set by the two high court cases would make a non-complying activity application difficult to achieve. Consequently, I suggest the following further amendment to Policy LR P11:

> *Manage by way of resource consent, ~~avoid~~ ~~the establishment or continued operation of~~ farming activities within farming/property enterprises within the Lake Rotorua groundwater catchment that are not permitted and ~~have no identified or agreed Nitrogen Discharge Allocation and Managed Reduction Targets or~~ have not provided Council with a Nutrient Management Plan. Resource consents for such activities need to consider adverse cumulative*

effects on the sustainable load to Lake Rotorua, and where appropriate, any alternative nutrient management approach.

25. In light of the above discussion I recommend the deletion or rewording of new Policy LR P15 as it closes the gateway test by requiring both:

- the effects of an activity to be minor, **and**
- an activity not contrary to the objectives and policies.

The policy is therefore more stringent that Section 104D of the RMA. If the policy is not deleted, the following wording is suggested:

Only provide approval to non-complying farming activities and/or bush/scrub and/or plantation forestry where assessment has shown adverse effects to be minor ~~and~~ or will contribute to the Lake Rotorua Water Quality Objectives and Policies being met.

26. I consider I have scope to make the above recommendation (submission reference 70:45).

DEFINITION OF SUITABLY EXPERIENCED AND QUALIFIED PERSON

27. On further consideration, I seek the following changes to the definition of 'Suitability Qualified and Experienced Person':

Implements OVERSEER® input best practice and uses standard protocols recognised and approved by the Bay of Plenty Regional Council including those specific to the Lake Rotorua groundwater catchment; and

~~has completed both the "Intermediate" and the "Advanced" courses in "Sustainable Nutrient Management in New Zealand Agriculture" conducted by Massey University and has at least five years' work experience in a land use/farm advisory role; or~~ Is a Certified Nutrient Management Adviser, certified under the Nutrient Management Adviser Certification Programme Ltd; and…

28. Greg Sneath of FANZ provides detail on the Nutrient Management Advisor Certification Programme Ltd in para 6-9 of his Statement of Evidence (dated 6 March 2017). In summary, the Nutrient Management Advisor Certification Programme Ltd was established to ensure a transparent set of standards for advisers to meet, so that they can provide nationally consistent advice in the implementation and interpretation of Nutrient Budgets and Nutrient Management Plans. The 'Intermediate' and 'Advanced' courses from Massey University are prerequisites under the

Certification Programme. The Certification Programme also requires two years' experience in the industry, completion of five NMPs within two years (one of which within the previous six months), and the successful completion of an on-line assessment. To retain the certification, advisers are required to complete fifteen hours of professional development each year (including compulsory learning modules).

29. The current definition, as recommended in Ms Burton's Rebuttal Evidence, allows for a broader group of people to be considered as suitably qualified and experienced persons, which in my opinion does not ensure the robust implementation of Nutrient Budgets and Nutrient Management Plans. As PC10 is reliant on the successful implementation of said budgets and plans, it would make sense to ensure a Suitably Qualified and Experienced Person has been certified by a nation-wide programme.

DEFINITION OF SIGNIFICANT FARM SYSTEM CHANGE

30. The rebuttal evidence did not specifically address my request to amend the definition of 'Significant Farm System Change' as follows:

> Amendment of the definition of 'Significant Farm System Change' to refer to farm '*system*' rather than '*practice*' and '*annual average nitrogen loss*' instead of *'discharge'* and use this term consistently throughout the Plan (i.e. in Schedule LR One).

31. I note Ms Burton's rebuttal evidence track changes version of the Plan Change recommended the word 'system' replace the word 'practice' in the definition of Significant Farm System Change, and I support this amendment. However, Ms Burton's recommendations did not include 'annual average nitrogen loss' in place of 'discharge'. The term discharge could be interpreted to be an application onto the land (as an input) so as a matter of clarity, the inclusion of 'annual average nitrogen loss' in place of 'discharge' is still sought.

SCHEDULE LR TWO

32. In my Evidence in Chief (para 76 -77) I proposed amendments to Schedule LR Two and these have not been addressed in Ms Burton's rebuttal evidence. I sought the following changes to Schedule LR Two in the tracked changed version of my Evidence in Chief:

> *Schedule LR Two – Default Nitrogen Loss Representation through Stocking Rates*

The following stocking rates represent as estimate of default nitrogen loss. The table shows how many animals are allowed per hectare of effective area at any point in time to comply with the permitted activity rule LR R4. The below table provides for efficiencies in administration where detailed nutrient modelling of farm system nitrogen losses is not necessary. For mixes of stock classes, the total hectares required must sum to less than or equal to the property's effective area (in hectares). The below stocking rates comply with the permitted losses provided and definition of low intensity farming activity.

33. My recommended amendments to Schedule LR Two sought to clarify that Stocking Rate limits are default representations of the nitrogen loss value and have been introduced for efficiencies in administration and capability to manage small properties. Also to provide the nitrogen loss value which provides for permitted activity land use under LR R4 and LR R7 using Schedule LR TWO.

Bethany Bennie

Planner

Boffa Miskell Limited

3 April 2017

Appendix A to Summary of Evidence

Council Recommendations to the Panel

Ms Burton's Rebuttal Evidence Reference	FANZ Comments
Control of inputs vs outputs Para 4-8.	Accept the officer's recommendation.
Consent Pathway Para 17-18.	Accept the officer's recommendation.
Non-complying activities Para 19-21	I do not support the officer's recommendation for the reasons outlined para 17-26 of my summary of evidence.
Schedule Six Para 22-24.	Accept the officer's recommendation.
Definitions of Suitably Experienced and Qualified Person Para 25-29.	I do not support the officer's recommendation for the reasons outlined in para 27-29 of my summary of evidence.
Revised Policy LR P6 and LR P11 Para 30-31.	I support the officer's recommendation that 'not permitted' be included in Policy LR P11 however, I still recommend further changes to Policy LR P11 as per para 17-26 of my summary of evidence.
Interpretation of Rule LR R2, LR R7 and LR R8(iii)-LR R11(iii) Para 32-41.	Accept the officer's recommendation.
Mr Park's Rebuttal Evidence Reference	
The Use of Overseer and Reference Files Para 5-11.	I partly support Mr Park's recommendation for the reasons outlined in para 9–16 of my summary of evidence.