

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

**AND**

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

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**SYNOPSIS OF LEGAL SUBMISSIONS FOR FEDERATED FARMERS**  
**19 April 2017**

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**FEDERATED  
FARMERS**  
OF NEW ZEALAND

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## **SYNOPSIS OF LEGAL SUBMISSIONS FOR FEDERATED FARMERS**

### **May it please the Hearing Panel**

#### **Introduction**

1. Federated Farmers proposes substantial amendments to Proposed Plan Change 10 (“PPC10”) to facilitate a comprehensive regulatory and non-regulatory framework for nutrient management. The purpose of this synopsis of legal submissions is to:
  - a. Explain Federated Farmers’ interpretation of how the Bay of Plenty Regional Policy Statement (“RPS”) and National Policy Statement for Freshwater Management 2014 (“NPS-FM”) are to be given effect to.
  - b. Explain the how the key elements of Federated Farmers’ proposal give effect to the RPS and enable the NPS-FM to be given effect to by reference to the track changes document.<sup>1</sup>
  - c. Identify similarities, consistencies and support with other submitters.
2. Elizabeth McGruddy will also present on the context for PPC10, provide more detail about the relief sought and the reasons for it.

#### **Preliminary issue – closing legal submissions**

3. Counsel has been working with Counsel for Bay of Plenty Regional Council (“BOPRC”) on a draft list of questions of law and fact to be determined by the Hearing Panel.
4. In order to focus on Federated Farmers’ proposal, these submissions do not directly address that draft list. Federated Farmers seeks leave to file closing legal submissions on the questions of law and fact in that draft list.
5. It is respectfully submitted that an opportunity to file closing submissions is necessary in the circumstances of this hearing to ensure that Federated Farmers has a fair opportunity to be heard. Those circumstances include:
  - a. Federated Farmers has an interest in the whole of the Plan Change. Federated Farmers is the only party to have proposed a

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<sup>1</sup> Filed by Memorandum dated 17 March 2017.

comprehensive and integrated framework and it is the only party that has been present for every day of the hearing.

- b. Federated Farmers is the only party that has engaged with BOPRC on all of the proposed issues for determination.
  - c. The draft list of issues is not finalised (and is evolving as the hearing progresses) and it is submitted that it is neither realistic nor constructive to address it in this synopsis of submissions. Some of those issues include the WWTP, integrated framework and allocation regime. They are not directly relevant to Federated Farmers' proposed framework (which proposes no allocation regime) but they are directly relevant to PPC10 (and any conclusion as to whether it is appropriate or whether fundamental amendment is required as proposed by Federated Farmers).
  - d. There has been a significant volume of documents that have been filed during the hearing which Federated Farmers seeks an opportunity to address through submission. By way of example, BORPC filed a further 62 page memorandum (with additional appendices) that was only made available to parties on Easter Monday. This raises legal issues such as scope e.g. whether there is scope to include NOF attributes, address the WWTP and urban issues, and include the integrated framework as a policy.
  - e. BOPRC will present rebuttal evidence on 3 May 2017. It is anticipated that that evidence will be directly relevant to the appropriateness of PPC10. In order to properly present its case (and address the evidence in the round), Federated Farmers seeks an opportunity to address that evidence in closing submissions.
6. It is respectfully suggested that a timetable for closing submissions could be set such that Federated Farmers is to file written submissions within one week of the adjournment of the hearing and BOPRC is to file written submissions within two weeks of the adjournment of the hearing (or alternatively both parties could file contemporaneously). The hearing could then be closed upon receipt of those submissions.

## Giving effect to RPS

7. There is no dispute that PPC10 (any alternatives or amendments) must give effect to the RPS. However, the issue is how the RPS is to be given effect to.
8. The analysis of Federated Farmers' interpretation of how the RPS is to be given effect to is set out in detail in paragraphs 30 to 47 of the Legal Submissions on behalf of Federated Farmers.
9. In summary, it is submitted that "giving effect" to the RPS does not require the imposition of stringent nitrogen reduction rules on the rural sector at this stage to lock a trajectory to achieve a limit of 435t of nitrogen by 2032. It is submitted that to do so gives paragraph (c) of Policy WL 6B priority over paragraphs (a) and (b) and fails to adequately consider the other water quality policies. It also imposes the responsibility for ensuring that discharges do not exceed 435t on the rural sector, when Policies WL 5B and WL 6B(c) do not discriminate in this way.<sup>2</sup>
10. In contrast to PPC10, Federated Farmers' proposal gives effect to the RPS and achieves harmony both within and among the water quality policies as follows:
  - a. The Rule 11 benchmark is retained to prevent nitrogen discharges from increasing (i.e. a "regulatory backstop" to ensure we do not regress during 2017 to 2022).
  - b. Rural activities implement industry agreed good management practice to do what is reasonable, practical and affordable to reduce nitrogen (the rural sector's commitment in Policy WL 6B(a)).
  - c. Resource consents may be sought for activities that increase nitrogen discharges (Rules 4 and 5), giving effect to Policy WL 4B.

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<sup>2</sup> As explained in paragraph 91 of the Legal Submissions on behalf of Federated Farmers, Policy WL 5B states "land use activities" not "**rural** land use activities" and Policy WL 6B(c) states "no discharges" not "no **rural** discharges."

- d. Subcatchment action plans are prioritised to target hot spots and to provide for an integrated approach (in terms of nutrients, land uses and source/transport/sink pathways).
- e. The 2017 science review is undertaken to identify and confirm the most effective combination of sustainable nitrogen and phosphorous loads to the Lake to achieve the TLI (thereby giving effect to all paragraphs of Policy WL 3B and making the improvement of lake water quality the overarching objective).
- f. The implementation of the NPS-FM for the Rotorua Lakes Water Management Area (“WMA”) (scheduled for 2020/24 but could occur in 2017/18<sup>3</sup>) is the stage at which the science, community values, targets, allocation, methods, rules and public/private partnerships are evaluated.

#### **Giving effect to NPS-FM**

- 11. It is submitted that the NPS-FM must be given effect to and it cannot be assumed that giving effect to the RPS will give effect to the NPS-FM (particularly when it pre-dates the NPS-FM).<sup>4</sup> It is submitted that BOPRC’s proposal to implement the NPS-FM by locking in historic nitrogen targets in PPC10 and not allowing them to be considered as part of the WMA consideration of National Objectives Framework (“NOF”) attributes, does not give effect the NPS-FM.<sup>5</sup>
- 12. In contrast to PPC10, it is submitted that Federated Farmers’ framework enables the NPS-FM to be given effect to:<sup>6</sup>
  - a. It provides for the integrated assessment of all of the NOF water quality attributes that are contemplated by the NPS-FM.

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<sup>3</sup> In a report to the BOPRC Regional Direction and Delivery Committee, staff recommend bringing forward the Rotorua Lakes WMA to 2017/18 (page 76 <https://www.boprc.govt.nz/media/605198/public-regional-direction-and-delivery-committee.pdf>). A decision is to be made at the May 2017 RDD Committee meeting.

<sup>4</sup> Legal Submissions on behalf of Federated Farmers dated 6 March 2017 at [99].

<sup>5</sup> Legal Submissions on behalf of Federated Farmers dated 6 March 2017 at [111] to [124].

<sup>6</sup> Legal Submissions on behalf of Federated Farmers dated 6 March 2017 at [124].

- b. It provides for an iterative community process where the values, attributes, objectives and limits for water quality and quantity can be considered in the round.
  - c. It is not constrained by historical decisions or limitations (unlike StAG or PPC10) and can be informed by the science review.
13. A consistent theme in the hearings to date has been the lack of consultation and community involvement. All sectors of the community have expressed their concerns about not having an opportunity to be heard or about having limited or constrained involvement. It is submitted that the robust community process anticipated by the NPS-FM is the only way to ensure community support of the resulting nutrient management framework.

#### **Federated Farmers' proposal**

14. Federated Farmers' proposal attempts to strike a better balance between a clean lake and allowing economic, social and cultural development for iwi, rural, forestry and urban sectors of the community. It aims to do so in a way that is cost effective, efficient, has the least risk and achieves the greatest certainty. Ms McGruddy distils the proposal as being integrated, comprising three key stages and reliant on three tiers of responsibility.<sup>7</sup>
15. An explanation of how the key elements of Federated Farmers' proposal give effect to the RPS and enable the NPS-FM to be given effect to is provided below by reference to the track changes document.<sup>8</sup>

#### **1. Objectives**

16. PPC10 has adopted Objective 28 from the RPS and Objective 11 from the Bay of Plenty Regional Water and Land Plan ("RWLP") as the objectives for the plan change. Federated Farmers' submission identifies other objectives in the RPS that are also relevant and ought to be referred to in the introduction of PPC10 (if the other two are to be cited).<sup>9</sup> There are

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<sup>7</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [3.4].

<sup>8</sup> Filed by Memorandum dated 17 March 2017.

<sup>9</sup> Federated Farmers' Submission 075 pages 56 and 73.

likely to be additional objectives that would also benefit from insertion, such as Objective 16 (which relates to multiple owned Maori land).<sup>10</sup>

17. In addition, Federated Farmers proposes two new objectives to give effect to RPS objectives and policies about rural land use:<sup>11</sup>
  - a. Sustaining the rural land resource and providing for growth and efficiency.
  - b. Recognising the multiple values of resources by aligning interventions to achieve multiple objectives in a long term strategic approach. This is consistent with Rotorua Lakes Council's ("RLC") sustainable catchment plan.

## **2. Policies**

18. How the track changes to the policies give effect to the RPS and NPS-FM are explained below in the context of the key elements of Federated Farmers' proposal.

### **Science review and no allocation**

19. Federated Farmers supports the principle of reducing nitrogen losses to support the achievement of the TLI but considers that there is too much uncertainty to confirm and allocate the sustainable load at this stage. The science review ought to be prioritised to confirm the sustainable load, subcatchment action plans developed to understand subcatchment patterns and an NPS-FM community process to identify the appropriate nutrient management framework.
20. This is the rationale for the track changes to the policies to remove references to NDAs, allocation, targets and sustainable lake loads (e.g. in Policy LR P1) and refocusing on "best science and good environmental data" (e.g. Policy LR P3).
21. The need to prioritise the science review was confirmed in the recent science caucus. The scientists are in agreement that:

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<sup>10</sup> This was raised by Commissioner Sweetman with Mr Lamb on 13 March 2017.

<sup>11</sup> Federated Farmers' Submission 075 pages 56 to 59 and 74.

- a. There is a “need for a comprehensive science review, to ensure adaptive nutrient management achieves and sustains a TLI  $\leq 4.2$  in Lake Rotorua.”<sup>12</sup>
  - b. “The balance of N and P reductions might change through improved understanding of algal-nutrient dynamics and specific knowledge about P-management strategies.”<sup>13</sup>
  - c. “Whilst we agree managing P-alone could plausibly and effectively deliver the same outcome as managing N and P together for a TLI of  $\leq 4.2$  we disagree on the loading of P required to do so.”<sup>14</sup>
22. In addition to the uncertainty regarding sustainable loads, the evidence on attenuation illustrates that there are strong subcatchment patterns but that attenuation processes and pathways are still poorly understood.<sup>15</sup> In these circumstances it is submitted that there is too much risk and uncertainty to lock in an allocation mechanism at this stage.
23. Instead, what is needed is a robust evidential foundation (it is anticipated that the science review will provide that), to support a fresh way of thinking that takes into account the strong subcatchment patterns (as opposed to a “one size fits all” or generic rules framework) and flexible solutions on a farm, township and incentives fund level.
24. This is not dissimilar to the sustainable catchment plan approach advocated for by RLC.<sup>16</sup> This is also not dissimilar to CNI Iwi Holdings Limited’s (“CNI”) view that there is insufficient data to commit to any particular regime and proposal that Method 41 is adopted to develop a new action plan with all stakeholders.<sup>17</sup>

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<sup>12</sup> Summary of Expert Evidence of Dr Thomas Stephens updated to include outcome of water quality expert caucusing dated 3 April 2017 at [2.1].

<sup>13</sup> Summary of Expert Evidence of Dr Thomas Stephens updated to include outcome of water quality expert caucusing dated 3 April 2017 at [2.3].

<sup>14</sup> Summary of Expert Evidence of Dr Thomas Stephens updated to include outcome of water quality expert caucusing dated 3 April 2017 at [3.3].

<sup>15</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [5.20].

<sup>16</sup> Affidavit of Geoffrey Murdoch Williams on behalf of Rotorua Lakes Council dated 5 April 2017 at [22].

<sup>17</sup> CNI power point presentation pages 6 and 10.



## Targets

25. Federated Farmers' proposal is that targets are not hardwired into rules at this stage. Accordingly, the track changes delete references to the 2022 managed reduction target and the 2032 sustainable lake load (for example Policy LR P3).
26. Federated Farmers' view is that 2022 targets are broadly consistent with industry good management practice.<sup>18</sup> Ms Muller's evidence is that two of the three dairy farms she studied had achieved their 2022 targets.<sup>19</sup> This is supported by the economics caucus stating that three quarters of farms that have established current state discharges are meeting their 2022 targets.<sup>20</sup> It is also supported by industry evidence of the strength of their farm management plan programmes and sustainability accords.<sup>21</sup>
27. It is submitted that this provides a level of confidence that the 2022 pastoral managed reduction targets can be achieved and that industry has the systems to report progress. Federated Farmers supports sector aggregate reporting toward the catchment intermediate target as opposed to the imposition of specific obligations on individual farms.
28. Federated Farmers' concern is that in circumstances where many or most farmers are at or near their 2022 targets, the additional transactional costs associated with a controlled activity status do not justify the imposition of a controlled activity rule to meet 2022 targets.<sup>22</sup> In addition, imposing targets means adopting an allocation regime in circumstances where there is insufficient certainty.
29. For the period through to 2022, Federated Farmers proposes that the continued downward trajectory is maintained through responsibility at three different levels – individual, subcatchment and management of in lake issues.<sup>23</sup>

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<sup>18</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [3.12].

<sup>19</sup> Statement of Evidence of Carla Frances Muller dated 22 February 2017 at [7.2].

<sup>20</sup> Joint Statement of Economic Experts (revised) dated 18 April 2017 at [42].

<sup>21</sup> Statement of Evidence of Richard Allen dated 3 March 2017 at [6.3]; Hearing Statement by Corina Jordan on Behalf of Beef + Lamb New Zealand Limited at [40].

<sup>22</sup> Federated Farmers Submission 075 page 76.

<sup>23</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [3.9] to [3.14].

30. Federated Farmers' proposal provides for the development of future managed reduction targets at a range of scales and across all contributing sectors (including urban and point source discharges) and subcatchments.<sup>24</sup> This is reflected in the track changes to Policies LR P3 and P5.
31. Achieving the 2032 target requires significant farm system changes with severe impacts on operating profit.<sup>25</sup> It is submitted that such changes are beyond good management practices and accordingly beyond the requirements in RPS Policy WL 6B(a) that farmers do what is reasonable, practical and affordable. Federated Farmers' proposal is that the obligations beyond 2022 are not imposed on farmers until the sustainable lake load is confirmed and limits are confirmed through the Rotorua Lakes WMA community process.<sup>26</sup>

#### **Integrated nutrient framework**

32. Federated Farmers' proposal provides for an integrated nutrient management framework. This means recognising phosphorous alongside nitrogen (which is provided for in the track changes to Policy LR P2). This gives effect to RPS Policy WL 3B.
33. However, this does not mean putting in place specific limits or obligations at this stage (save for the requirement to obtain a "nutrient benchmark" as explained in the context of Rule 3 below). It is submitted that there is a need to:<sup>27</sup>
- a. Undertake the science review to better understand phosphorous.
  - b. Develop freshwater accounting methodology to account for all sources of phosphorous (and nitrogen) to the lake.
  - c. Undertake the NPS-FM implementation process to enable the community to set the values, objectives and limits.

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<sup>24</sup> Federated Farmers' Submission 075 page 76.

<sup>25</sup> Statement of Evidence of Carla Frances Muller on behalf of Dairy NZ and Fonterra dated 22 February 2017 at [5.9c].

<sup>26</sup> Federated Farmers Submission 075 page 76.

<sup>27</sup> This is supported by the science caucus at [2.8].

### **Prioritise subcatchment action plans**

34. A key aspect of Federated Farmers' proposal is the development of subcatchment action plans to:
  - a. Ensure an integrated framework (in terms of all contributing sources of nitrogen and phosphorous).
  - b. Prioritise interventions to ensure the downward trajectory in nitrogen and phosphorous (and the improvements in lake water quality) are maintained.
35. This is provided for in the track changes to Policies LR P3 and LR P8.

### **Recognition of management practices and innovations which are not in Overseer**

36. Federated Farmers proposes changes to ensure that management practices and innovations not in Overseer are recognised and provided for. It is submitted that this will continue progress with water quality improvements, particularly while the science review is completed. This is enabled by track changes to Policy LR P7, LR P16, a new method and Rules 4 and 5. This also gives effect to RPS Policy WL 4B.
37. It is submitted that this would provide for the likes of dairy farmers Jack, Shelley and John Butterworth, or drystock farmer Neil Heather. Their evidence was that they have undertaken various mitigation actions to reduce nitrogen and phosphorous but had been penalised because this was not recognised in Overseer.

### **Transfers and trading**

38. PPC10 proposes that trading occur after 2022 (with the incentives fund buying nitrogen prior to 2022). Federated Farmers supports that proposal but has made changes to Policy LR P7 to be more explicit about the flexibility, trading and transfer mechanisms.
39. It is submitted that the period to 2022 provides opportunity to explore options, including consideration of mechanisms to support trading, be it rules or covenants.

### **Rule 11 benchmark**

40. Federated Farmers proposes the continuation of the Rule 11 benchmark to provide assurance that we will not move backwards. It is proposed that this is extended to properties between 10 and 40ha. This is reflected in the track changes to Policy LR P10 and the rationale is explained in more detail in the context of Rule 3 below.

### **Overseer**

41. Federated Farmers does not support the use of Overseer version 6 numbers in PPC10 until the load estimates have been properly re-evaluated to take attenuation factors into account. Accordingly, the track changes delete references to Overseer version 6.2.0 and replace them with 5.4 (e.g. policy LR P13).
42. Overseer is supported as a farm decision support tool and to assist in tracking progress relative to nutrient benchmarks and managed reduction targets.<sup>28</sup>

### **Treasury principles**

43. Federated Farmers supports the Treasury principles for best practice regulation. It is submitted that Federated Farmers' proposed rules respect the Treasury principles of flexibility, proportionality, certainty and growth supporting. To enable and encourage rules in accordance with these principles, Federated Farmers proposes a new Policy LR P18.

## **4. Methods**

44. The rationale for amendments to the methods is explained below in the context of each method.

### **Method LR M1**

45. Federated Farmers seeks the deletion of Method LR M1 on the basis that a requirement for RLC to include information about regional council nitrogen management rules in a Land Information Memorandum ("LIM") would be ultra vires.

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<sup>28</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [3.12d].

46. Section 44A of the Local Government Official Information and Meetings Act 1987 sets out territorial authority obligations in respect of LIM reports (the section is set out in full in **Appendix A** of these submissions). Subsection (2) sets out matters that must be included in LIM reports and subsection (3) gives territorial authorities the discretion to include any other matters concerning the land that they consider relevant.
47. In terms of the mandatory matters listed in subsection (2), it is arguable that information regarding nitrogen management is “information relating to the use to which land may be put and the conditions attaching to that use.”<sup>29</sup> Counsel is not aware of any cases that assist in interpreting the application of this particular paragraph.
48. However, it is submitted that the issue is not whether the information falls within one of the categories of mandatory information but that RLC’s discretion as to the form in which the information is included, along with the decision as to whether it is captured by section 42A(2)(f), is fettered.
49. It is submitted that this is a significant issue when the fact that territorial authorities have no immunity for information that is included or omitted from a LIM report is considered.<sup>30</sup> Territorial authorities ought to exercise caution in the decision about what and how information is included and to do that they need to retain their unfettered discretion.
50. If the information does fall within section 42A(2)(f) then RLC will include it and there is no need for Method LR M1. But importantly, it will have discretion as to the form of that information. Alternatively, if the information does not fall within this section, RLC needs to retain discretion as to whether to include it.
51. For these reasons, it is submitted that Method LR M1 ought to be deleted and RLC ought to retain its discretion as to what and how information is included in a LIM report.

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<sup>29</sup> Section 42A(2)(f).

<sup>30</sup> *Marlborough District Council v Altmarloch Joint Venture Ltd* [2012] NZSC 11.

### **Methods LR M2 and M3**

52. The science caucus strongly supports Methods LR M2 and M3 to resolve the disagreement about whether P-limitation is sufficiently widespread and consistent to be definitive.<sup>31</sup>
53. Federated Farmers seeks changes to Method LR M2 to ensure that the science review is robust and that it occurs in 2017. This involves including phosphorous and subcatchments, and requiring specific consideration of changes to the RPS and RWLP as a result of any material changes to targets or loads.
54. Importantly (in the context of questions from the Panel about phosphorous), Federated Farmers seeks amendments to footnote 68 to clarify that 37tP/yr is the nominal phosphorous load first determined in 1989. Federated Farmers' view is that this ought to be reviewed as part of the science review and any limit ought to be set through the WMA community process.

### **Method LR M5**

55. Federated Farmers seeks changes to Method LR M5 to focus on properly resourced subcatchment action plans and on achieving the TLI (an integrated nutrient approach as opposed to solely focusing on nitrogen). The subcatchment action plans are explained by Ms McGruddy as the second tier of the three tiers of responsibility and a central part of Federated Farmers' proposed alternative.<sup>32</sup>

### **Method 41**

56. Method 41 is contained in the RWLP. Federated Farmers' proposal is that it is applied at a subcatchment scale to ensure that robust, effective and properly resourced subcatchment action plans are developed.
57. The need and motivation for properly resourced subcatchment action plans was highlighted by Neil Heather in his presentation on 21 March 2017. He explained how prior to Christmas 2016 farmers had approached

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<sup>31</sup> Summary of Expert Evidence of Dr Thomas Stephens updated to include outcome of water quality expert caucusing dated 3 April 2017 at [3.4].

<sup>32</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [3.10].

BOPRC to establish an upper Ngongotaha catchment group as a proactive step to address water quality. He expressed his frustrations that this had not yet been able to be sufficiently progressed and provided video footage of significant flooding as a result of the weather bomb earlier in March 2017. It is understood that BOPRC is supportive of such steps and there have since been constructive discussions.

58. Method 41 is also an important part of RLC's and CNI's submissions on PPC10:
- a. RLC focuses on sustainable catchment plans that are aligned with the incentives fund. It supports an integrated, proactive and systematic approach to achieving the catchment objectives.<sup>33</sup>
  - b. CNI proposes that method 41 is adopted to develop a new action plan with all stakeholders.<sup>34</sup>

## 5. Rules

59. Federated Farmers' proposal is that, for the time being, regulation ought to be on the basis of the Rule 11 benchmark.
60. Federated Farmers' primary concern with the PPC10 rules is that they are predicated on out of date science and an allocation mechanism that is not supported by proper freshwater accounting disciplines and has not been considered in a NPS-FM community process.
61. A flow diagram illustrating Federated Farmers' rules framework is contained in **Appendix B** to these submissions.

### **FF Rules 1 and 2: properties up to 10ha**

62. Rules 11B and 11C of the RWLP required all properties over 4,000m<sup>2</sup> to obtain a nutrient benchmark and not exceed it. In contrast, PPC10 proposes that:
- a. Properties under 5ha are permitted.<sup>35</sup>

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<sup>33</sup> Annexure H to the Affidavit of Geoffrey Murdoch Williams dated 5 April 2017, email dated 26 November 2015, track changes to proposal for a Lake Rotorua protection trust.

<sup>34</sup> CNI Iwi Holdings Ltd power point presentation page 6, slide 12.

<sup>35</sup> Rule LR R3.

- b. Properties between 5 and 10ha are permitted if they comply with the stocking rate table.<sup>36</sup>
  - c. Properties between 10 and 40ha are permitted until 2022 at which time they are required to obtain a 2032 NDA and resource consent as a controlled activity.<sup>37</sup>
63. Federated Farmers' proposal for properties up to 10ha is based on PPC10 but its proposal for over 10ha is based on Rule 11 as follows:
- a. FF Rule 1 – properties under 5ha remain permitted. FF Rule 1 is largely based on Rule LR R3.
  - b. FF Rule 2 – properties between 5 and 10ha are permitted if they comply with the stocking rate table in Schedule LR Two. FF Rule 2 is largely based on Rule LR R4.
  - c. FF Rule 3 – properties between 10 and 40ha are required to obtain a nutrient benchmark and are permitted if they remain within it i.e. they are treated the same as properties over 40ha. FF Rule 3 is largely based on Rule 11C.

### **FF Rule 3: Rule 11 benchmark**

64. Federated Farmers proposes to regulate all properties over 10ha on the same principles as Rule 11 i.e. farming is permitted if it does not exceed its nutrient benchmark (FF Rule 3) and if it does exceed that resource consent can be obtained if offsets within the catchment are provided (FF Rules 4 or 5).
65. FF Rule 3 and Schedule AA are largely based on Rule 11C and Table 40:
- a. FF Rule 3 is a simplified version of Rule 11C with the requirement that properties over 10ha obtain or maintain a nutrient benchmark and do not exceed it. "Nutrient benchmark" has the same meaning as in Rule 11C, save that the benchmarking period is the agreed period and not 2001 to 2004.

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<sup>36</sup> Rule LR R4.

<sup>37</sup> Rule LR R5 until 2022 then Rule LR R8 from 2022.



- b. Items 1 to 20 in Schedule AA are identical to items 1 to 20 in Table 40.
66. The main criticism in the Section 42A report with this approach is that Rule 11 only capped nutrient losses and “has no requirement for reduction to ensure the sustainable target of 435t/N/yr is met.”<sup>38</sup> It is important to note that the intention of Federated Farmers’ proposal is not to ensure that 435t/N/yr is met by 2032. The intention instead is to provide a framework within which the downward trajectory in nitrogen is maintained and the NPS-FM can be given effect to. It is the WMA community process (informed by the upcoming science review) that will confirm the values, objectives, limits and nitrogen management regime.<sup>39</sup>
67. The intention is also to provide a framework that gives effect to the RPS requirements to establish limits for all contaminants,<sup>40</sup> require consent for increased discharges,<sup>41</sup> the allocation principles and considerations in Policy WL 5B, and ensures the rural sector minimises losses as far as reasonable, practical and affordable whilst anything over and above that is appropriately funded.<sup>42</sup>
68. It is submitted that the section 42A report then mistakenly asserts that Federated Farmers’ proposal “does not align with the intent of the RPS to only manage losses from rural production activities.”<sup>43</sup>
69. It is submitted that PPC10 adopts a flawed interpretation of the RPS by honing in on Policy WL 6B(c) and reading “rural” into that paragraph. In contrast Federated Farmers’ proposal gives effect to the RPS in a way that achieves harmony within and among the relevant RPS policies.
70. A further criticism in the Section 42A report is that the proposed rules do not involve nitrogen management plans and this prevents BOPRC from collecting information on progress, and monitoring and enforcing any

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<sup>38</sup> Section 42A report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 153, page 54.

<sup>39</sup> That includes revisiting RPS Policy WL 6B(c).

<sup>40</sup> Policy WL 3B.

<sup>41</sup> Policy WL 4B.

<sup>42</sup> Policy WL 6B.

<sup>43</sup> Section 42A report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 154, page 54.

benchmark allocated to each enterprise.<sup>44</sup> Federated Farmers supports Schedule LR Six (with amendments) but does not support regulated nitrogen management plans. Rule 11 did not regulate on this basis and the intention of FF Rule 3 is to maintain the status quo for the period to 2022.

71. Indications are that farmers have achieved more than Rule 11 and are on track for the 2022 targets. Industry groups have given evidence of the progress they are making with sustainable milk plans<sup>45</sup> or land and environment plans.<sup>46</sup> Concerns have been raised by farmer submitters and rural professionals about farm management plans being used to control inputs, restrict how they farm and stifle innovation.<sup>47</sup>
72. Accordingly, it is submitted that in circumstances where progress has been made over and above Rule 11 (without regulated farm plans), industry is motivated to assist farmers and the continuation of Rule 11 is intended to be an interim measure to 2022, there is no need to consider regulated nitrogen management plans for the period to 2022.
73. Federated Farmers' proposal does not take its eye off the 2032 target. From 2022/23, the Rotorua Lakes WMA is scheduled to implement the NPS-FM (this may be brought forward to 2017/18<sup>48</sup>) and a consequence of that process will be a further plan change. That will provide the opportunity to review and confirm targets and limits beyond 2022, alongside methods and rules for achieving them. This will give effect to RPS Policy WL 6B(c) (or result in a plan change to amend it).
74. CNI (and forestry submitters) has raised concerns about the use of the Rule 11 benchmark as the basis of the grand parenting/sector averaging

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<sup>44</sup> Section 42A report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 153, page 54.

<sup>45</sup> Statement of Evidence of Richard Allen dated 3 March 2017 at [6.2].

<sup>46</sup> Hearing Statement by Corina Jordan on behalf of Beef + Lamb New Zealand Limited at [40].

<sup>47</sup> Lake Rotorua Primary Producers Collective Further Submission Pursuant to Memorandum 4 pages 5; Statement of Evidence of Sharon Morrell dated 5 March 2017 at [3.5]; Lachlan McKenzie Further Submission Pursuant to Memorandum 4 page 6.

<sup>48</sup> In a report to the BOPRC Regional Direction and Delivery Committee, staff recommend bringing forward the Rotorua Lakes WMA to 2017/18 (page 76 <https://www.boprc.govt.nz/media/605198/public-regional-direction-and-delivery-committee.pdf>). A decision is to be made at the May 2017 RDD Committee meeting.

model for allocation. Federated Farmers' intention is that Rule 11 is retained as an interim measure to maintain the status quo to 2022. It is submitted that this is not at odds with CNI concerns because any allocation model will be properly addressed in the WMA community process and future plan change, properly supported by the results of the 2017 science review.

75. Federated Farmers strongly supports the continued downward trajectory to the 2022 targets.<sup>49</sup> It has carefully considered whether to incorporate the 2022 targets or industry agreed good management practice into the permitted activity rules. It has refrained from doing so because:
- a. The indications from BOPRC and Dairy NZ are that most landowners are at or close to their 2022 targets. This is without the need for rules and most likely as a result of industry commitments e.g. Sustainable Dairy Accord and longstanding farmer commitments to the health of the Lake.
  - b. The 2022 targets cannot be confirmed until the science review confirms the sustainable load and the WMA community process confirms the values, objectives, limits, methods and rules.
  - c. Rules are well-suited to proscribing "bad" activities but they are ill-suited to prescribing "good" or "best" management practices.<sup>50</sup> Obligations to adopt good management practice and enforcement of farm plans is a blunt and inflexible tool that will likely stifle innovation and progress.<sup>51</sup>
76. It is submitted that regulation will not drive the uptake of industry best practice to meet the 2022 pastoral MRT. The balance required from the pastoral sector to get to 2022 is relatively modest (compared with 100t for the incentives fund) and does not justify the transaction costs.<sup>52</sup>

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<sup>49</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [3.7e].

<sup>50</sup> Statement of Evidence of Elizabeth McGruddy dated 6 March 2017 at [4.30].

<sup>51</sup> This was explained by Sharon Morrell in her presentation on 17 March 2017 and in her Statement of Evidence at paragraph 3.5 where she explains how she observed the frustrations of farmers in various EU countries because regulation of farm plans meant that they had to farm by calendar dates rather than soil moisture conditions.

<sup>52</sup> Federated Farmers' Submission 075 page 76.

77. In addition, the focus ought not be solely on the individual level (the first tier of responsibility). Federated Farmers' proposal is based on three tiers of responsibility. The subcatchment action plans (the second tier of responsibility) will, for example, help to drive improvements through targeted actions.

#### **FF Rule 4 – controlled activity if offsets in catchment**

78. FF Rule 4 is based on Rule 11D. It provides for the use of offsets within the catchment as a controlled activity where a property cannot comply with FF Rule 3. The matters of control are largely based on Rule 11D, with the exception that a slight amendment has been made to condition (f) to clarify that the rule can be applied to offsets within the property or across multiple properties within the catchment.
79. This rule provides for situations like Mr Heather or the Butterworths. It is submitted that this kind of solution (which arguably achieves greater environmental benefits) can be considered within an integrated nutrient management framework and without an allocation approach.

#### **FF Rule 5 – restricted discretionary**

80. FF Rule 5 is based on Rule 11E. The effect is that any activity that does not comply with the rules (i.e. nitrogen is higher than the nutrient benchmark and cannot be fully offset) defaults to restricted discretionary. This was the same outcome under Rule 11 and accordingly maintains the status quo.
81. The matters of discretion are largely based on Rule 11E, with the exception that condition (f) has been added. Condition (f) is identical to that used in FF Rule 4 and the intention is to provide for a situation where the nitrogen increase is not fully offset on another property (or properties) in the catchment.

#### **Parties who support Federated Farmers' proposal**

82. The panel has heard from many parties over the last few weeks who oppose PPC10 and who have criticised the lack of consultation and community involvement. In contrast, many submitters have expressly supported Federated Farmers' proposal or sought a similar outcome.

83. The Collective, Beef and Lamb,<sup>53</sup> Deer<sup>54</sup> and the various individual farmers have stated that they support the Federated Farmers' proposal and seek to have it adopted. Dairy NZ's proposal is not dissimilar to Federated Farmers' proposal in that it proposes a permitted activity rule to 2022 (save that we do not agree with the 2022 managed reduction target) and prioritises the science review in Methods LR M2 and M3.<sup>55</sup>
84. While RLC has taken a different approach to PPC10 and seeks different relief, there are areas of alignment with Federated Farmers' proposal.<sup>56</sup> During recent discussions between Federated Farmers and RLC the parties have identified the following areas of agreement:
- a. PPC10 in its current form is not supported because it is not the most efficient, equitable or effective way to achieve the community aspirations for Lake Rotorua.
  - b. In order to develop an appropriate nutrient management regime, there is a need to:
    - i. Undertake the science review in order to better understand the importance of P and how both N and P can be best addressed together.
    - ii. Undertake a community process with engagement with all catchment stakeholders to develop an integrated approach to nutrient management.
    - iii. An integrated approach is important i.e. urban and rural, nitrogen and phosphorous, source, transport and sink pathways, regulatory and non-regulatory methods.

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<sup>53</sup> Hearing Statement of Corina Jordan on behalf of Beef and Lamb at [51].

<sup>54</sup> The Deer Industry New Zealand's submission 074 specifically supports Federated Farmers' submission at paragraphs 3.1 to 3.4 and the New Zealand Deer Farmers Association's submission 055 seeks a similar approach by advocating for an accord in place of rules.

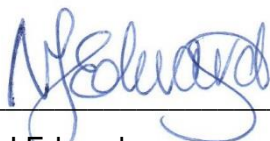
<sup>55</sup> Statement of Evidence of Justine Young dated 6 March 2017 at [4.3].

<sup>56</sup> Affidavit of Geoffrey Murdoch Williams dated 5 April 2017 at [22].

- c. We support the continued work to achieve the 2022 catchment targets through industry agreed good management practice and best practicable option (“BPO”).
  - d. We agree that land suitability for nutrient intensive practices varies considerably across the catchment. While there are important differences by sub catchment, there are also differences by site that should be considered in a catchment sustainability plan. This plan should be prioritised and used to plan land use and nutrient mitigation (this could include N allocation depending on the outcome of the science review and if an allocation approach is confirmed through the community process).
  - e. We support an expanded focus for the incentives fund(s) because it is currently unlikely to deliver the best outcome for the Lake and the catchment economy.
85. There is also significant common ground with CNI who are advocating for a new regime based on a review under method 41.
86. While we disagree on a “polluter pays” principle, there are also similarities with forestry who seeks a new regime that will “set a trend in the desired direction and measure progress, rather than setting a fixed target based on inaccurate data now.”<sup>57</sup>

### **Conclusion**

87. In conclusion, Federated Farmers proposes a comprehensive regulatory and non-regulatory framework that will give effect to the RPS and enable the NPS-FM to be given effect to. It provides for many of the concerns raised by submitters in opposition to PPC10.



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N J Edwards

Counsel for Federated Farmers

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<sup>57</sup> Statement of Evidence of Colin William Maunder for Timberlands Limited at [24].

## **Appendix A – section 44A of the Local Government Official Information and Meetings Act 1987**

### 44A Land information memorandum

(1) A person may apply to a territorial authority for the issue, within 10 working days, of a land information memorandum in relation to matters affecting any land in the district of the authority.

(2) The matters which shall be included in that memorandum are—

(a) information identifying each (if any) special feature or characteristic of the land concerned, including but not limited to potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation, or likely presence of hazardous contaminants, being a feature or characteristic that—

(i) is known to the territorial authority; but

(ii) is not apparent from the district scheme under the Town and Country Planning Act 1977 or a district plan under the Resource Management Act 1991:

(b) information on private and public stormwater and sewerage drains as shown in the territorial authority's records:

(ba) any information that has been notified to the territorial authority by a drinking-water supplier under section 69ZH of the Health Act 1956:

(bb) information on—

(i) whether the land is supplied with drinking water and if so, whether the supplier is the owner of the land or a networked supplier:

(ii) if the land is supplied with drinking water by a networked supplier, any conditions that are applicable to that supply:

(iii) if the land is supplied with water by the owner of the land, any information the territorial authority has about the supply:

(c) information relating to any rates owing in relation to the land:

(d) information concerning any consent, certificate, notice, order, or requisition affecting the land or any building on the land previously issued by the territorial authority (whether under the Building Act 1991, the Building Act 2004, or any other Act):

(da) the information required to be provided to a territorial authority under section 362T(2) of the Building Act 2004:

(e) information concerning any certificate issued by a building certifier pursuant to the Building Act 1991 or the Building Act 2004:

(ea) information notified to the territorial authority under section 124 of the Weathertight Homes Resolution Services Act 2006:

(f) information relating to the use to which that land may be put and conditions attached to that use:

(g) information which, in terms of any other Act, has been notified to the territorial authority by any statutory organisation having the power to classify land or buildings for any purpose:

(h) any information which has been notified to the territorial authority by any network utility operator pursuant to the Building Act 1991 or the Building Act 2004.

(3) In addition to the information provided for under subsection (2), a territorial authority may provide in the memorandum such other information concerning the land as the authority considers, at its discretion, to be relevant.

(4) An application for a land information memorandum shall be in writing and shall be accompanied by any charge fixed by the territorial authority in relation thereto.

(5) In the absence of proof to the contrary, a land information memorandum shall be sufficient evidence of the correctness, as at the date of its issue, of any information included in it pursuant to subsection (2).

(6) Notwithstanding anything to the contrary in this Act, there shall be no grounds for the territorial authority to withhold information specified in terms of subsection (2) or to refuse to provide a land information memorandum where this has been requested.



## Appendix B: Federated Farmers' proposed rule framework

Land used for farming activities in the Lake Rotorua groundwater catchment

