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
AND	
IN THE MATTER OF	Directions regarding evidence and hearing procedure

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MEMORANDUM TO THE CHAIR OF THE HEARING PANEL BY COUNSEL FOR THE BAY OF PLENTY REGIONAL COUNCIL
DATED 7 March 2017
CONCERNING MEMORANDUM 1, 4 and 5 OF THE HEARING COMMISSIONERS AND EVIDENCE RECEIVED FROM SUBMITTERS

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MAY IT PLEASE THE HEARING COMMISSIONERS

Introduction

1. We refer to Memorandum No. 4 of the Hearing Commissioners dated 1 February 2016, and to Memorandum No. 1 dated 11 October 2016. We also refer to paragraph [9] of Memorandum 5 date 1 March 2017.

2. The Panel issued directions for the exchange of evidence being 'general directions' in Memo 1 and further directions in Memo 4. Notable aspects of those directions were

   (a) Memo 1 [16]: that expert evidence (evidence in chief) would be filed 22 February 2017 with rebuttal by Council on 6 March 2016. That other evidence, being printed or electronic copies of material in support of submissions would be provided to the Committee on 6 March 2016.

   (b) Memo 1 Schedule of time limits: That submitters were to provide 'evidence in chief' 22 February and copies of evidence, representations and other materials by 6 March 2017.

   (c) Memo 4: that evidence is either expert evidence (covered under M1[16] and due 22 February 2017 or evidence in support of a submission (M4[11]).

3. 6 March 2017: The Regional Council filed rebuttal addressing the witness statements that were circulated on 22 February 2017.

4. 7 March 2017: A large amount of detailed technical evidence has now been received that addresses numerous technical points of the expert witness evidence in chief that was circulated on behalf of the Bay of Plenty Regional Council but which does not provide an opportunity for response or fairly identify the status of the author.

   (a) In some cases the authors state they are undertaking compliance with the Code of Conduct for Expert Witnesses but did not provide evidence under such heading on 22 February 2017 and are clearly not within the confines of that code. An example of that is the 'draft' evidence provided by Colin Maunder for Timberlands Ltd (see paragraph 4), which would be 27 pages long had it not been single spaced, and which criticises economic and technical evidence at great length and details from a technical perspective. Much of this type of evidence would in the usual course of things have been

properly put to the expert witnesses that it references and a fair opportunity for a response provided.

(b) Other evidence is received from witnesses that are clearly technical experts, again addressing numerous technical points, but under the guise of general evidence too. An example of this is the evidence of Ballance Agrinutrients Ltd: Kevin Wood. Mr Wood qualifies himself as an expert in paragraph 1.1 via his experience and qualifications and proceeds to provide a technical analysis of the application of OVERSEER and version control within Plan Change 10. It is acknowledged at paragraph 3.3 he says "I am not a technical expert'. Likewise Kevin Allen of Fonterra; Mr Allen says at 2.6: he is 'not offering evidence as an expert, although I do have considerable practical experience in the use of the OVERSEER model…" and then provides evidence on the OVERSEER model and the use of reference files.

(c) Other evidence is clearly the type of evidence that would have been envisaged as being the sort of 'evidence' expected to be filed in support of submissions, providing for the most part extra details supporting lay submissions, about which no issue is taken.

5. A further matter of concern is that there is an expansion of the submissions as filed and some of the matters traversed in evidence. By way of example: the submission filed by Timberlands Ltd (003) sought limited changes to 5 matters and bears little resemblance to the extraordinary detail and focus provided in the evidence received today by me that leaves no technical stone unturned and which now appears to argue an entirely different set of matters, including allocation, market economics, a "polluter pays" regime, a concerted attach of the StAG process, allegations of industry capture and an overall request to replace the entire Plan Change 10 policy regime with one utilising polluter pays or LUC and with a zero base rather than Rule 11 benchmarking.

6. Having briefly scanned the large volume of technical evidence circulated today it is evident that industry groups and others are availing themselves of the loophole in Memorandum 1 and 4 by now circulating expert evidence outside of the intent of those procedural directions.

7. With respect, the fair process has been subverted so that the Regional Council's expert witnesses have not had an opportunity to have expert evidence from submitters fairly put to them and a fair opportunity to consider it and respond.

8. The remaining time prior to the hearing is very short and was allocated to preparation. This short time is now syphoned off out of necessity to attempt to read and respond to that material. It should have been properly put to the witnesses and time provided to respond to it in rebuttal.

9. We refer to Memorandum 5, paragraph [9] and the assurance provided by the Hearing Commissioners to all submitters that "*we will endeavour to put in place a schedule that gives them every opportunity to adequately present their cases to the Panel in accordance with natural justice*." The current situation has, for the reasons set out above, severely disadvantaged the Regional Council and its witnesses in the preparation and presentation of the case for Plan Change 10. They have been deprived of the opportunity to respond to technical material, and also deprived of a proper opportunity to prepare for the hearing (having now to cease that in order to read this large amount of extra technical material that is directed at their evidence.)

10. Given the short time prior to the hearing beginning it is difficult to prose an adequate remedy to the Hearing Commissioners to restore the Council witnesses to a fair position, and to recognise the natural justice requirement as outlined in paragraph 9 which apply to all parties. One option would be to delay the hearing and provide for a further round of rebuttal evidence. At this late stage that option is not supported by the Regional Council, as countervailing issues of fairness and efficiency suggest that proceeding is preferable to allowing such disruption to prevail.

11. Under section 41C RMA the Commissioners have a variety of options as to the evidence to be heard. This includes limitation to the matters in dispute, or a direction that the whole or part of any submission be struck out as an abuse of the hearing process to be taken further (s41C(4)(7)(c)).

12. Evidence that has been circulated as 'lay' evidence obviously raises an issue as to the appropriate weight of that evidence (whether it claims to accord with the Code of Conduct or otherwise).

13. But the overall fairness of the situation and the impact on the preparation for hearing is a factor that requires recognition. A direction as to limitation to the submission and relief sought is available to the Commissioners on such matters.

14. It is respectfully suggested that, as a minimum, the Hearing Commissioners limit questions 'in clarification' from Counsel and representatives that relate to any such evidence, and that such witnesses be excluded from caucusing, if any. The Council's

expert witnesses should not be required to respond to technical evidence that has not been fairly put to them as part of the exchange and rebuttal process.

7 March 2017

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