

**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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**LEGAL SUBMISSIONS ON BEHALF OF FEDERATED FARMERS  
6 March 2017**

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**FEDERATED  
FARMERS  
OF NEW ZEALAND**

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## **LEGAL SUBMISSIONS ON BEHALF OF FEDERATED FARMERS**

### **Introduction**

1. These legal submissions are provided in support of Federated Farmers' opposition to and alternative proposal for Proposed Plan Change 10 to the Bay of Plenty Regional Water and Land Plan ("Plan Change 10").
2. Bay of Plenty Regional Council ("Council") has rejected Federated Farmers' alternative proposal (and others similar to it) on the basis that it does not give effect to the Bay of Plenty Regional Policy Statement ("RPS").
3. The purpose of these legal submissions is to address the preliminary legal issue of whether the Panel has jurisdiction to consider Federated Farmers' proposal i.e. does it give effect to the RPS? These submissions demonstrate that not only does this proposal does give effect to the RPS, but also Plan Change 10 does not give effect to the RPS or National Policy Statement for Freshwater Management ("NPS-FM").
4. The substantive reasons for Federated Farmers' alternative proposal and the concerns with Plan Change 10 are set out in the Statement of Evidence of Evidence of Elizabeth McGruddy.
5. Federated Farmers also intends to call oral evidence from a farmer and member at the hearing to provide further context for its proposal and analysis.
6. Federated Farmers supports and adopts the economic and science evidence filed on behalf of DairyNZ.

### **Summary**

7. It is submitted that the Council's interpretation of the RPS and its decision to impose an obligation to reach a 435t annual nitrogen load on the rural sector is flawed. It does not give effect to the RPS, the NPS-FM or Part 2 of the RMA.
8. In contrast, it is submitted that Federated Farmers' proposal:

- a. Gives effect to the RPS by considering all relevant objectives and policies and giving effect to them without creating conflict or giving one particular policy (or part of a policy) priority over another.
  - b. Gives effect to the NPS-FM by not constraining the implementation of the NPS-FM in 2020/22 to historic objectives or limits and by allowing it to be implemented in a holistic and integrated way.
  - c. Achieves a balanced approach to Part 2 matters without a narrow and inflexible focus on nitrogen. A downward trajectory in nitrogen is maintained, but water quality issues are considered in the round, informed by best science and informed by community decision making as to the values, objectives and limits.
9. Accordingly, it is submitted that not only does the Hearing Panel have jurisdiction to consider Federated Farmers' proposal but also there are substantive reasons to adopt Federated Farmers' proposal as achieving sustainable management.

### **Background**

10. Before turning to the preliminary legal issue about "giving effect to" the RPS, it is submitted that the background to Plan Change 10 is reasonably unusual and ought to be borne in mind when considering submissions on Plan Change 10.
11. The **policy context** for Plan Change 10 is somewhat unusual:
  - a. The water quality objective is expressed as a target lake trophic level index ("TLI") that has been treated as a "limit." The TLI is 4.2.
  - b. The water quality target or objective is found in Objective 11 of the Bay of Plenty Regional Water and Land Plan ("RWLP") as opposed to the RPS.
  - c. The RPS contains a very specific direction to ensure that no nitrogen discharges to the lake exceed 435t per annum by 2032 (Policies WL 3B and WL 6B). This is unusual in that no other nutrients or attributes are treated in this way and also in that such a specific direction is

contained in an RPS (no other catchment within the Bay of Plenty is treated this way).

- d. Rule 11 was introduced into the RWLP in 2005 to set a discharge limit or nutrient benchmark based on the nitrogen discharge and land use of each property during 2001-2004.<sup>1</sup>
  - e. The principles for Plan Change 10 were developed in the context of a consultation group (StAG), but in circumstances where the terms of reference were limited to providing advice on rules and incentives options to reduce rural nitrogen discharges to reach the 435t nitrogen limit.<sup>2</sup>
12. It is submitted that it would be more typical to find water quality objectives (not necessarily expressed as a TLI) in the RPS and the specifics of how to achieve that objective in a regional plan.
13. The **science context** for Plan Change 10 is equally unusual:
- a. The lake has achieved the TLI of 4.2 despite original modelling suggesting that nitrogen needed to be reduced to 435t per annum to achieve it.<sup>3</sup>
  - b. Nitrogen has not been reduced to 435t per annum and there is uncertain (and no observed) evidence that achieving this limit will result in the TLI being achieved (and robust evidence that controlling phosphorous will achieve the TLI).<sup>4</sup>
  - c. Instead of considering whether a limit of 435t of nitrogen per annum is appropriate or necessary, or whether other nutrients ought to be managed, Council's evidence solely considers how to reduce nitrogen to 435t per annum.

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<sup>1</sup> Statement of Evidence of Stephen Guy Lamb of the Bay of Plenty Regional Council dated 17 January 2017 at [14].

<sup>2</sup> Terms of Reference for the Lake Rotorua STAG Catchment Stakeholder Advisory Group, Annexure E to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017

<sup>3</sup> Statement of Evidence of Thomas Stephens on Behalf of DairyNZ dated 22 February 2017 at [4.1].

<sup>4</sup> Statement of Evidence of Thomas Stephens on Behalf of DairyNZ dated 22 February 2017 at [3.2] and [3.4].

- d. There is robust evidence that reducing phosphorous will achieve the TLI.<sup>5</sup>
  - e. The evidence as to the appropriate ratio of nitrogen to phosphorous is uncertain.<sup>6</sup>
  - f. All parties agree that there is a need to review the new science in 2017.<sup>7</sup>
14. The **economic analysis** confirms that the consequences of Plan Change 10 will be significant and irreversible:
- a. All parties agree that Plan Change 10 will have drastic and devastating implications for certain farms.<sup>8</sup>
  - b. Council anticipates that there will be significant land use change, including estimated reductions in dairy area by 43%, reductions in sheep and dairy area by 65% and increases in forestry by 51%.<sup>9</sup>
  - c. The changes will be permanent and irreversible. For example, conversion from dairy to forestry would mean not only infrastructure changes but also that the land would be subject to long term forestry agreements (25 years plus).
  - d. Over regulating nitrogen leaching will not achieve the desired water quality objectives in the most cost effective way.<sup>10</sup>
15. A further peculiarity is how this all fits with the **NPS-FM 2014**:

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<sup>5</sup> Statement of Evidence of Thomas Stephens on Behalf of DairyNZ dated 22 February 2017 at [5.8].

<sup>6</sup> Statement of Evidence of Thomas Stephens on Behalf of DairyNZ dated 22 February 2017 at [6.6].

<sup>7</sup> Memorandum of understanding on Lake Rotorua Science and Policy Reviews dated 9 August 2016 Annexure C to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017

<sup>8</sup> Minutes of a BOPRC RDD Workshop in December 2015 record that “Councillors agreed that the reductions are very significant to farmers and that although most will be able to carry on farming, there will be significant economic cost, and the impacts on some individual farmers could be devastating.”

<sup>9</sup> Section 32 report page 88.

<sup>10</sup> Statement of Evidence of Carla Frances Muller on Behalf of DairyNZ dated 22 February 2017.

- a. The RWLP was notified in 2002 and became operative in 2008. The RPS was notified in 2010 and became operative in 2014.
- b. The NPS-FM came into force in 2014 and contains an integrated freshwater quality and quantity, as well as community driven framework for establishing objectives for freshwater within national bottom lines.
- c. Council notified its NPS-FM implementation programme on 14 December 2015. This includes scheduling the implementation of the NPS-FM for Rotorua Lakes Water Management Area (“WMA”) for 2020 to 2024.<sup>11</sup>
- d. The RWLP adopted a TLI of 4.2, the RPS adopted a nitrogen sustainable load of 435t and a non statutory action plan adopted a phosphorous sustainable load of 37t based on a 1986 science report.<sup>12</sup> None of these numbers have been subsequently substantively reviewed.
- e. Council considers that this process is sufficient to discharge its obligations, under the NPS-FM 2014, to establish freshwater objectives and adopt plan changes to achieve them, as far as the TLI and sustainable nitrogen load to Lake Rotorua are concerned.<sup>13</sup>
- f. Council intends to identify the remaining attributes (other than nitrogen) listed in the NPS-FM 2014 through a separate community process between 2020 and 2025.<sup>14</sup>
- g. Council anticipates that the water quality objectives and TLI for Lake Rotorua will not be changed because these have been in place since the 1990s, were agreed with the community and uphold the intent of the NPS-FM.<sup>15</sup>

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<sup>11</sup>National Policy Statement for Fresh Water Implementation – Progress Report 2016, Annexure O to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017

<sup>12</sup> Statement of Evidence of Andrew Charles Bruere on Behalf of Bay of Plenty Regional Council dated 16 January 2017 at [21] and [24].

<sup>13</sup> Section 42A report, section 4.2, page 17.

<sup>14</sup> Section 42A report, paragraph 26, page 18.

<sup>15</sup> Section 42A report, paragraph 26, page 18.

16. Within this context, Plan Change 10 has been proposed as the answer to the question of “how” to achieve a nitrogen load of 435t by 2032. There has been no substantive consideration of “why” nitrogen must be reduced to 435t.<sup>16</sup> Put simply, we are doing it because part of one policy in the RPS says so.
17. It is submitted that it is also telling that the majority of the 92 submissions made on Plan Change 10 have been in strong opposition to the proposal. Many of the environmental groups that get involved in water policy have not submitted. And Fish & Game has not taken an active involvement – their submission supports the need for a fair and equitable approach to nitrogen allocation and they do not wish to be heard.

### **Preliminary legal issue – jurisdiction**

18. Plan Change 10 is predicated on the following approach:
  - a. Certain (and in our submission selective) objectives or policies have been adopted from the RPS and RWLP and they have been treated as being outside the scope of submissions:
    - i. Plan Change 10 states that it provides for the staged implementation of Policies WL 3B, 5B and 6B and that these policies are not open for submission.<sup>17</sup>
    - ii. Plan Change 10 states that no new objectives are required because the RWLP already establishes freshwater objectives for Lake Rotorua in Objectives 11 and 28. These objectives are also not open for submission.<sup>18</sup>
  - b. Stringent nitrogen controls on farming activities to ensure that the total nitrogen load to the Lake does not exceed 435t per annum by 2032. It is submitted that this is premised on Council’s literal and narrow interpretation of paragraph (c) of Policy WL 6B and decision

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<sup>16</sup> Section 32 Evaluation: Lake Rotorua Nutrient Management Rules Plan Change 10, December 2015, section 1.2, page 2.

<sup>17</sup> Plan Change 10, page 1.

<sup>18</sup> Plan Change 10, page 5.

to place the primary responsibility for reaching the nitrogen target on farmers.

19. Federated Farmers has proposed an alternative regulatory and non-regulatory approach that looks to maintain the downward trajectory of nitrogen but does so within an integrated framework for nutrient management. It includes phosphorous, looks at multiple scales (catchment, subcatchment, farm, city), monitors progress towards targets and incorporates iterative loops for science reviews and adaptive management.
20. Federated Farmers does not seek to change limits or targets through this Plan Change 10 process. It instead takes a broader interpretation or holistic approach to the existing objectives and policies.
21. Council has dismissed Federated Farmers' proposal (and all other proposals, save for one or two minor changes) on the basis that it will not ensure that the nitrogen load to the lake does not exceed 435t by 2032. It says that this is a requirement of Policy WL 6B of the RPS. Accordingly, Council's position is that alternative policies, regulatory and non regulatory approaches will not give effect to the RPS.<sup>19</sup>
22. Similarly, the section 32 report rejected alternatives to stringent nitrogen controls on farmers on the basis that there were no other effective options available to Council for meeting the direction of "requiring" the nitrogen reduction in Policy WL 6B.<sup>20</sup>
23. It is submitted that a preliminary legal issue arises as to whether or not the Hearing Panel has jurisdiction to consider Federated Farmers' proposal.
24. It is submitted that when viewed within the plan change statutory framework (including the relevant hierarchy) and in the context of the other policies in the RPS, Federated Farmers' proposal does give effect to the RPS (and the higher level documents).

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<sup>19</sup> Section 42A report at paragraphs 13, 22 and 49 on pages 24, 26 and 32.

<sup>20</sup> Section 32 report, section 4.2.3, page 25.



25. Further, it is submitted that when Plan Change 10 is viewed in this context it does not give effect to the RPS.

### **Regional Policy Statement**

26. Before considering the statutory framework for a plan change, it is submitted that it is important in the present situation to carefully read the RPS and the relevant objectives and policies.
27. In considering the RPS, it is submitted that it is important that the guidance contained in section 1.9 of the RPS is borne in mind (emphasis added):<sup>21</sup>

In order to achieve integrated management, **all relevant policies should be considered when giving effect to the Regional Policy Statement** in a particular situation, even if some of the policies appear to provide conflicting guidance. **No one set of policies has priority over another set of policies**, and as such, actual or potential conflicts need to be addressed on a case-by-case basis.

28. The relevant RPS objectives and policies are set out on pages 56 to 59 of Federated Farmers' submission (this is also attached as Appendix [insert number] to the Statement of Evidence of Elizabeth McGruddy dated 6 March 2017). These objectives and policies focus on integrated management, management of rural resources and water quality issues. Federated Farmers' position is that all of these objectives and policies must be considered when giving effect to the RPS.
29. Without limiting this submission, the focus of the analysis below is on Policies WL 3B, 5B and 6B to demonstrate that Council's narrow and singular focus on 435t of nitrogen in Plan Change 10 does not give effect to the RPS. This also demonstrates that Federated Farmers' proposal takes a broader and integrated approach that does give effect to the RPS.

#### **Policy WL 3B: Establishing limits for contaminants entering catchments at risk**

30. Policy WL 3B directs Council to "establish limits for the total amount of specified contaminants" within "at risk" catchments including:

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<sup>21</sup> RPS page 11.

- a. Contaminants to be managed to avoid compromising public health and each catchment's ecology, mauri, fishability, swimmability and aesthetics.
  - b. The amount of nitrogen and phosphorous that enter the Rotorua Te Arawa Lakes in order to achieve the target TLI.
  - c. For Lake Rotorua the total amount of nitrogen that enters the lake shall not exceed 435t per annum.
31. It is submitted that Plan Change 10 has honed in on paragraph (c) of Policy WL 3B without consideration of the implications for the other water quality attributes in paragraphs (a) and (b). It is submitted that:
- a. The nitrogen limit of 435t per annum cannot be considered in isolation from consideration of the implications for public health, ecology etc because that would not result in the management of contaminants in accordance with paragraph (a).
  - b. The purpose of managing nitrogen (and phosphorous) is to achieve the TLI target of 4.2 that is set in the RWLP. Paragraph (b) is clear that nitrogen and phosphorous are subordinate to the TLI.
32. The evidence indicates that Plan Change 10 will not give effect to paragraphs (a) and (b):
- a. Dr Stephens' evidence is that the 320t reduction in nitrogen required by Plan Change 10 (to reach the 435t target) "will likely degrade water quality further by promoting potentially toxic cyanobacteria dominance."<sup>22</sup> This would be a significant public health issue and the implication would be that the lake may not be swimmable or able to meet other water quality values in paragraph (a) of Policy WL 3B.
  - b. It is submitted that Plan Change 10 fails to consider the amount of phosphorous needed to achieve TLI and without consideration of both phosphorous and nitrogen relative to the TLI, Plan Change 10 does not give effect to paragraph (b) of Policy WL 3B.

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<sup>22</sup> Statement of Evidence of Thomas William Stephens on behalf of DairyNZ dated 22 February 2017 at [7.7].

- c. Dr Stephens' evidence is that we do not have a good understanding of the relationship between nitrogen and phosphorous. His evidence is that while there is robust evidence that reducing phosphorous will achieve the TLI, the evidence as to co-limitation is based on modelling as opposed to empirical evidence.<sup>23</sup> His concern is that a failure to achieve the sustainable phosphorous load would result in failure to achieve the TLI of 4.2<sup>24</sup> His conclusion is that it is important for the "science review to determine the potential for and efficacy of TP-management strategies in this catchment."<sup>25</sup>
33. In contrast to Plan Change 10, it is submitted that Federated Farmers' proposal gives effect to all paragraphs of Policy WL 3B. Federated Farmers' proposal makes the improvement of the Lake water quality and achievement of the TLI (as opposed to solely focusing on a nitrogen limit) the overarching objective. It is premised on an integrated nutrient management framework (which includes nitrogen and phosphorous) that takes a holistic approach to water quality improvement.

**Policy WL 5B: Allocating the capacity to assimilate contaminants**

34. Policy WL 5B requires council to allocate the ability of Rotorua Te Arawa Lakes to assimilate contaminants among land use activities by having regard to the following principles and considerations:
- a. Equity/fairness, including intergenerational equity;
  - b. Extent of the immediate impact;
  - c. Public and private benefits and costs;
  - d. Iwi land ownership and its status including any Crown obligation;
  - e. Cultural values;
  - f. Resource use efficiency;

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<sup>23</sup> Statement of Evidence of Thomas William Stephens on behalf of DairyNZ dated 22 February 2017 at [5.13]

<sup>24</sup> Statement of Evidence of Thomas William Stephens on behalf of DairyNZ dated 22 February 2017 at [6.5]

<sup>25</sup> Statement of Evidence of Thomas William Stephens on behalf of DairyNZ dated 22 February 2017 at [6.6]

- g. Existing land use;
  - h. Existing on farm capital investment; and
  - i. Ease of transfer of allocation.
35. The explanation to this Policy identifies that the allocation needs to be considered in the context of the catchment and for Lake Rotorua this includes the amount of nitrogen the Lake can assimilate without adverse effects on the whole of the catchment. Further, allocation decisions need to be undertaken in consultation with the affected community.
36. It is submitted that the critical words in Policy WL 5B are “land use activities.” Policy WL 5B is not limited to “rural activities” or “farming activities.” Likewise it is “resource use efficiency” that is relevant in paragraph (f) and not “farm use efficiency.”
37. However, Plan Change 10 solely regulates farming or rural activities. In doing so Plan Change 10 assumes that the ability of the Lake to assimilate contaminants is solely allocated to the rural sector and does not give effect to this Policy. This is a criticism that has been picked up on in the planning evidence for Rotorua District Council, with concern raised about the lack of consideration of non-rural nutrient sources (such as urban land uses) and the erroneous focus on just one part of the Lake Rotorua environment (rural activities).<sup>26</sup>
38. There are multiple land use activities that contribute to nitrogen discharges in the catchment e.g. dairy, drystock, forestry, urban. The latest evidence on attenuation is that there is a difference between estimated farm nitrogen losses and what reaches the lake i.e. not all nitrogen from farms reaches the lake, and the amount of attenuation differs from subcatchment to subcatchment.<sup>27</sup> Yet Plan Change 10 proposes to regulate all farm nitrogen discharges through nitrogen management plans. Even more telling is the economic evidence which

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<sup>26</sup> Statement of Evidence of Simon Douglas Banks dated 22 February 2017 at [ 25]; Statement of Evidence of Grant Robert Eccles dated 22 February 2017 at [16].

<sup>27</sup> Statement of Evidence of James Christopher Rutherford on Behalf of Bay of Plenty Regional Council dated 11 January 2017 at [18(f)].

shows that the proposed allocation and focus on nitrogen will not achieve the desired water quality objectives in the most cost effective way.<sup>28</sup>

39. In contrast to Plan Change 10, it is submitted that Federated Farmers' proposal does give effect to Policy WL 5B. In particular, it allocates nitrogen at a sub-catchment level to enable land use activities in each particular sub-catchment to be considered and to identify the nutrient hot spots. All of this with input from the community.
40. Federated Farmers' proposal integrates rural and urban land uses as well as source, transport and sink considerations. It proposes that all land use activities adopt industry good practice. By doing all of this it properly considers resource use efficiency.

**Policy WL 6B: Managing the reduction of nutrient losses**

41. Policy WL 6B requires, including by way of rules, the managed reduction of any nutrient losses that are in excess of the limits established by Policy WL 3B. It then lists the three ways that this is to be achieved:
  - a. Rural production land use activities are to minimise their loss of nutrients as far as is reasonably practicable by implementing on-farm best management practices;
  - b. Any land use change that is required within the Rotorua Te Arawa lakes catchments to achieve the limits takes into account an equitable balancing of public and private costs and benefits; and
  - c. No discharges shall be authorised beyond 2032 that results in the limit for Lake Rotorua being exceeded. A catchment intermediate target for the managed reduction of nitrogen loss is to be set to achieve 70% of the required reduction from 746t/yr to 4335t/yr by 2022.
42. It is submitted that the explanation is particularly important for interpreting this policy. In particular (emphasis added):

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<sup>28</sup> Statement of Evidence of Carla Frances Muller on Behalf of DairyNZ dated 22 February at [1.4]

- a. On-farm best management practices should be implemented to ensure that all rural production land use activities minimise their nutrient losses as far as is **reasonable, practicable and affordable**. The aim is to ensure that all rural production land users are operating in accordance with **industry best practice**.
  - b. For Lake Rotorua on-farm best management practices will not be sufficient to achieve the reduction to 435 tN/yr and further land use change will be necessary.
  - c. The cost of achieving any further reduction in nutrient losses over and above on-farm best practice in a particular catchment will have a mix of **public and private benefits** and should be **funded accordingly**.
43. It is submitted that when all of the aspects of Policy WL 6B are considered, together with the explanation, the effect of this policy is to set an upper limit to the nitrogen reductions expected from farmers, namely, the implementation of reasonable industry best practice. Beyond this the expectation is of public/private partnerships to achieve further reductions. As explained in Council's evidence, the wording of this policy was an product of mediation.<sup>29</sup>
44. It is submitted that Plan Change 10 does not give effect to Policy WL 6B because it seeks to allocate the bulk of the burden of nitrogen reductions to rural activities without consideration of private/public benefits and funding, and without consideration of "discharges" in the round. It has honed in on paragraph (c) without sufficient consideration of paragraphs (a) and (b). Further, it appears to have erroneously read the word "rural" into the opening sentence of paragraph (c) as follows "no **rural** discharges shall be authorised beyond 2032..." The result is that rural activities are lumbered with achieving the 2032 target.
45. In contrast, Federated Farmers' proposal gives effect to Policy WL 6B as follows:

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<sup>29</sup> Statement of Evidence of Stephen Guy Lamb on Behalf of Bay of Plenty Regional Council dated 17 January 2017 at [11].

- a. The rule 11 benchmark is retained to prevent nitrogen discharges from increasing.
- b. Rural activities are to implement industry best practice to do what is reasonable, practical and affordable to reduce nitrogen. Alongside other programmes, this is likely to achieve, or get very close to, the 2022 managed reduction target.<sup>30</sup>
- c. This leaves the remaining 30% to get to the 435t nitrogen target. The evidence is that this is where more than industry best practice is required and further reductions can only be achieved by land use change. It is submitted that if the science review and NPS-FM process confirms the remaining 2032 target, this is the stage that public/private partnerships (be it to purchase nitrogen or some alternative solution) come into play in accordance with Policy WL 6B.
- d. The implementation of the NPS-FM for Lake Rotorua WMA (planned for 2020/24) is the stage at which the science, community values, targets, allocation, methods, rules and public/private partnerships are evaluated.

### **Conclusion – RPS policies**

- 46. In conclusion, it is submitted that Plan Change 10 has adopted a very narrow approach to the RPS policies and in doing so fails to give effect to the RPS. In particular, Plan Change 10:
  - a. Places the bulk of the burden for achieving the 435t nitrogen limit by 2032 on rural activities. It is submitted that not only is this contrary to the RPS, but as explained below it is also contrary to the NPS-FM.
  - b. Solely focuses on nitrogen and in doing so compromises other water quality targets. This is also contrary to the RPS.
- 47. In contrast, Federated Farmers' proposal gives effect to the RPS and the NPS-FM:

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<sup>30</sup> See for example, Statement of Evidence of Carla Frances Muller on Behalf of DairyNZ dated 22 February 2017, table 1, pages 9-10.

- a. The downward trajectory of nitrogen is maintained by the adoption of industry best practice and the requirement for farmers to do what is reasonable, affordable and practical. This will likely achieve the 2022 management reduction targets i.e. 70% of the 435t nitrogen limit.
  - b. The integrated framework considers all nutrients and sources within sub-catchments to identify the appropriate allocation, mitigation and most cost effective use of public/private funding.
  - c. The proposal provides for the implementation of the NPS-FM to address all contaminants, incorporates the latest science and provides for community engagement and involvement.
  - d. The proposal provides for a “stock take” at the stage of the NPS-FM implementation at 2020/24. If the science and community values confirm the remaining 30% of the 435t nitrogen target, appropriate methods, rules and public/private partnerships can be adopted at this time to achieve this.
48. Against this policy background, the statutory framework is considered below.

### **Legal issues**

49. It is submitted that the drafting of Plan Change 10 raises the following legal issues:
- a. What are the statutory parameters for a plan change?
  - b. How are the statutory parameters to be applied to a plan change?
  - c. What is the outcome of an application of the statutory parameters for Plan change 10?
50. These issues are considered in more detail below.

### **First legal issue: What are the statutory parameters for Plan Change 10?**

51. Section 65 sets out the reasons for amending a regional plan. The relevant reasons for present purposes are:



- a. The implementation of a national policy statement.<sup>31</sup>
  - b. The RPS contains a provision the regional plan does not give effect to and the RPS is changed or varied and becomes operative.<sup>32</sup>
52. Having decided to amend a regional plan, sections 66, 67 and 68 set out the parameters for that plan change.

### **Section 66**

53. Section 66(1) states that a regional plan must be prepared “in accordance with”:
- a. Council’s functions in section 30.
  - b. Part 2 of the RMA.
  - c. Council’s obligations to prepare and have particular regard to a section 32 report.
54. Turning to each of these three obligations, the first is a regional council’s functions. The purpose of regional plans is to assist councils in carrying out their functions under the RMA.<sup>33</sup> Section 30 sets out the functions of regional councils. The relevant functions in respect of water quality are:
- a. The establishment, implementation and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region.<sup>34</sup>
  - b. The control of discharges of contaminants into or onto land, air, or water and discharges of water into water.<sup>35</sup>
  - c. If appropriate, the establishment of rules in a regional plan to allocate the capacity of water to assimilate a discharge of a contaminant.<sup>36</sup>

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<sup>31</sup> Section 65(3)(f) and also section 55(2B).

<sup>32</sup> Section 65(6).

<sup>33</sup> Section 63.

<sup>34</sup> Section 30(1)(a).

<sup>35</sup> Section 30(1)(f).

<sup>36</sup> Section 30(1)(fa).

55. The second obligation is Part 2 of the RMA. Part 2 sets out the purpose of the RMA (being the sustainable management of natural and physical resources) and the guiding principles.
56. The third obligation is a section 32 evaluation report. This involves an evaluation of whether the proposal is the most appropriate way to achieve the purpose of the act. This includes an assessment of the efficiency and effectiveness of the proposal in achieving the objectives and a comparison with other options for achieving the purpose of the objectives.

### **Section 67**

57. Section 67 sets out the contents of regional plans. The relevant requirements for present purposes are:
  - a. A regional plan must “give effect to” any national policy statement and any regional policy statement.<sup>37</sup>
  - b. A regional plan must “not be inconsistent with” any other regional plan for the region.<sup>38</sup>

### **Section 68**

58. Section 68 provides that a regional council may include rules in a regional plan for the purposes of carrying out its functions under the RMA or achieving the objectives and policies of the plan. In making a rule, the regional council must have regard to the actual or potential effect on the environment of activities.

### **Second legal issue: How are the statutory parameters to be applied to a plan change?**

59. It is widely accepted that the Supreme Court decision in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*<sup>39</sup> (“*King Salmon*”) has changed the interpretation and application of the statutory framework for plan changes. Before considering the approach adopted by the Supreme Court, it is submitted that any analysis

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<sup>37</sup> Section 67(3).

<sup>38</sup> Section 67(4).

<sup>39</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

of *King Salmon* in the context of anything other than the New Zealand Coastal Policy Statement (“NZCPS”) needs treated with caution.

60. While some of the principles in *King Salmon* have been applied to the consideration of other fact and policy scenarios (such as national policy statements), it is submitted that any such application needs to acknowledge that those principles were decided in the context of the NZCPS and the particular circumstances of that case (being the largely unmodified setting of the Marlborough Sounds and a private plan change to change the prohibited status of salmon farming).
61. By way of example, the principle that the NZCPS is “all encompassing” so there is no need to have regard to Part 2 has not been tested before the Courts in the context of a national policy statement. Counsel is not aware of any cases involving a national policy statement (or regional policy statement) where the Court has determined that, like the NZCPS, the document is all encompassing so there is no need to refer to Part 2.
62. It is also noted that there are subtle but important differences between a coastal policy statement and a national policy statement. These include that the purpose of a coastal policy statement is “to achieve the purpose of the Act”<sup>40</sup> whereas the purpose of a national policy statement is to state policies that “are relevant to achieving the purpose of the Act.”<sup>41</sup> Accordingly, it is at least arguable that, unlike a coastal policy statement, a national policy statement is not intended to be an all encompassing document and therefore it is appropriate to consider other relevant matters, such as Part 2, when applying a national policy statement.
63. What this means for a regional policy statement, which is also “to achieve the purpose of the Act,”<sup>42</sup> is uncertain (particularly if the regional policy statement does not give effect to a national policy statement). Notwithstanding this, there are still fundamental differences between the two documents including that a coastal policy statement is a national direction as to the meaning of Part 2.

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<sup>40</sup> Section 45.

<sup>41</sup> Section 56.

<sup>42</sup> Section 59.

64. In the cases subsequent to *King Salmon* that have involved consideration of a national policy statement, the Courts have considered Part 2 of the Act and not limited their consideration to the planning documents and/or the national policy statement. For example, in *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* (“*Ruataniwha*”)<sup>43</sup> the High Court endorsed the Board of Inquiry’s approach of assessing the NPS-FM and Part 2 of the Act.
65. With these caveats in mind, the *King Salmon* approach is set out below.

### **Application of *King Salmon* decision**

66. Prior to the Supreme Court decision in *King Salmon*, the judiciary’s approach was to interpret sections 66, 67 and 68 as requiring a regional council to traverse all of the higher order objectives and policies in the hierarchy of superior documents, including Part 2 of the RMA.<sup>44</sup> In this way, an “overall broad judgment” under Part 2 could, for example, trump a specific direction in a policy statement.
67. In 2014 the Supreme Court in *King Salmon* endorsed an alternative approach. It determined that if a regional council gave effect to the NZCPS, it would necessarily be acting in accordance with Part 2 and there was no need to refer back to Part 2 when determining a plan change (subject to several caveats which are set out below).<sup>45</sup>
68. This decision has subsequently been interpreted as emphasising the hierarchy of documents for any planning situation (not solely in the context of the NZCPS and a private plan change) and the degree of control higher documents have on the contents of lower ranking documents.<sup>46</sup>
69. Following *King Salmon*, the Environment Court has adopted a simpler approach to the range of obligations on councils under sections 74, 75 and 76 of the RMA (or the comparable regional council provisions in sections 66, 67 and 68). This has been described as the rebuttable

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<sup>43</sup> *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191 at [141] and [170].

<sup>44</sup> *Eldamos Investments Ltd v Gisborne District Council* W047/2005; *Long Bay -Great Park Society Incorporated v North Shore City Council* A078/08.

<sup>45</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [85].

<sup>46</sup> *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [16].

presumption that each higher document has been given effect to (or had regard to, depending on the statutory requirement) so there is no need to refer to it (or them) unless the immediately higher ranking document is invalid, incomplete, uncertain or pre-dated the higher ranking documents.<sup>47</sup>

70. In adopting this approach, the Courts have noted that the simplicity of the process may in practice be more theoretical than real because in the event of uncertainty, incompleteness of cover or invalidity it is necessary to traverse higher order documents.<sup>48</sup>

71. While the above principles were espoused in the context of a change to a district plan, the Court has taken the same approach to changes to regional plans.<sup>49</sup>

**Third legal issue: What is the outcome of an application of the statutory parameters for Plan change 10?**

72. Adopting the approach above, each of the documents ranking above Plan Change 10 are considered below.

**First document: RWLP**

73. The immediate document ranking higher than Plan Change 10 is the RWLP. The Council is required to have regard to the extent to which Plan Change 10 needs to be consistent with the regional plan.<sup>50</sup> One critical aspect is the TLI of 4.2 in Objective 11.

74. However, the RWLP needs to be approached with caution. It was notified in 2002 and became operative in 2008,<sup>51</sup> well before the RPS and before the NPS-FM 2014. Accordingly, it is submitted that the presumption that it gives effect to the higher ranking documents is rebutted and the next document in the hierarchy must be considered.

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<sup>47</sup> *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 196 at [43] and *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].

<sup>48</sup> *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 196 at [47].

<sup>49</sup> <sup>49</sup> *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50.

<sup>50</sup> Section 66(2)(d).

<sup>51</sup> Statement of Evidence of Stephen Guy Lamb of the Bay of Plenty Regional Council dated 17 January 2017 at [12].

## Second document: RPS

75. The next document in the hierarchy is the RPS. The RPS is one of the documents that a regional plan has to “give effect to.”<sup>52</sup> There is also an equal and equivalent requirement in the RMA to give effect to an NPS.<sup>53</sup>
76. The Supreme Court confirmed in *King Salmon* that:<sup>54</sup>
- ‘give effect to’ simply means ‘implement’. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.
77. However, this is not the end of the matter. *King Salmon* as well as subsequent cases applying *King Salmon* have established some important caveats or principles around this.
78. First, the wording of the particular policy to be given effect to is important. A specific and unqualified policy may be more prescriptive than a higher level or more abstract policy.<sup>55</sup> However, in “giving effect to” a policy, a regional plan is not required to “mimic” the policy.<sup>56</sup>
79. Second, the context of the particular policy in the regional policy statement (or planning document) is important. The objectives and policies in a regional policy statement must be taken as a whole or read together.<sup>57</sup> As identified above, the RPS specifically states that:<sup>58</sup>
- a. All policies should be considered when giving effect to the RPS, even if some policies provide conflicting guidance.
  - b. No one set of policies has priority over another set of policies.
80. This is consistent with a purposive approach to interpretation that has been endorsed by the Courts in the context of district plans. In particular,

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<sup>52</sup> Section 67(3).

<sup>53</sup> *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [17].

<sup>54</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [77].

<sup>55</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [80].

<sup>56</sup> *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [14].

<sup>57</sup> *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [14].

<sup>58</sup> RPS section 1.9, page 11.

while rules in a district plan are to be given their plain meaning this is not to occur in a vacuum:<sup>59</sup>

Regard must be had to the immediate context of the words, and sometimes where an obscurity or ambiguity arises, it may be necessary to refer to other sections of the Plan.

81. It is submitted that consideration of the context (in the case of Plan Change 10 the water quality purposes as a whole and the explanation) is fundamentally important when the peculiar circumstances of the drafting of planning documents is considered. In contrast to legislation, planning documents are typically the product of multiple authors that have been through multiple iterations in multiple contexts e.g. they may be drafted by a council planner, amended by commissioners at hearing, amended by parties at mediation and amended by the Environment Court.
82. It has long been recognised that “district schemes and district plans were not and are not drafted with the skill of a Chancery draftsman.”<sup>60</sup> This was cited by the Court of Appeal in *The Beach Road Preservation Society Inc v Whangarei District Council*<sup>61</sup>, as part of the rationale for needing “to look at the context in which words are used to enable one to isolate their true meaning.”<sup>62</sup>
83. Third, there are three situations where giving effect to a higher level statutory document may not equate with giving effect to Part 2:<sup>63</sup>
  - a. Invalidity – if there was an allegation about the lawfulness of the NZCPS that would have to be resolved before it could be determined whether a decision maker who gave effect to the NZCPS was acting in accordance with Part 2.

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<sup>59</sup> *Clevedon Cares Incorporated v Manukau City Council* [2010] NZEnvC 211 at [66].

<sup>60</sup> *Sandstad v Cheyne Developments* (1986) 11 NZTPA 250 (CA) at 256.

<sup>61</sup> *The Beach Road Preservation Society Inc v Whangarei District Council* 1 November 2000, CP27/00.

<sup>62</sup> *The Beach Road Preservation Society Inc v Whangarei District Council* 1 November 2000, CP27/00 at [27].

<sup>63</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [88].

- b. Incomplete cover – if the NZCPS does not cover the field a decision maker would have to consider whether Part 2 provides assistance in dealing with the matters not covered.
  - c. Uncertainty – if there was uncertainty as to the meaning of particular policies in the NZCPS, reference to Part 2 may be justified to assist in a purposive interpretation.
84. Fourth, the cases that have applied *King Salmon* have also identified that if a new statutory document becomes operative after documents that rank below it, it too will need to be considered and it cannot be assumed that it has been given effect to.<sup>64</sup> This was the rationale for the High Court directing the Board of Inquiry in the *Ruataniwha* case to take into account the NPS-FM 2014 (which had come into force after the Board’s initial decision) when it reconsidered rule TT1(j).<sup>65</sup>

#### **Analysis of RPS**

85. It is submitted that there are several flaws in Council’s interpretation of the RPS and accordingly the premise for Plan Change 10. It is further submitted that the result is that Plan Change 10 does not give effect to the RPS or the NPS-FM.
86. The first flaw is that the RPS pre-dates the NPS-FM. Accordingly, it cannot be assumed that the RPS gives effect to the NPS-FM (and as explained in more detail below it is submitted that the RPS, and in particular the Council’s interpretation of the RPS, does not give effect to the NPS-FM).
87. The second flaw is that Council has adopted a very narrow and selective interpretation of the RPS policies. As set out in paragraphs 30 to 47 above, Council has honed in on paragraph (c) of both Policies WL 3B and 6B and limited its interpretation of “discharges” to diffuse discharges from rural land. It is submitted that in doing so Plan Change 10 fails to give

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<sup>64</sup> *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 196 at [47].

<sup>65</sup> *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191.



effect to the other paragraphs of these policies and it has prioritised paragraph (c) over the other paragraphs.

88. It is submitted that (subject to a finding that the RPS does not give effect to a higher ranking document), Plan Change 10 is required to give effect to all policies in the RPS. Subject to the same proviso, it is further submitted that the policies in the RPS need to be interpreted in their context and that the explanation for each policy provides that context.
89. Importantly for present purposes, it is submitted that Federated Farmers' proposal does give effect to the RPS for the reasons set out in paragraphs 30 to 47 above. Further, for the reasons set out below it is submitted that Federated Farmers' proposal does so in a way that does not conflict with and gives effect to the NPS-FM
90. It is submitted that Council's interpretation and application of Policies WL 3B and 6B creates inconsistencies and uncertainties with these policies for the reasons set out in paragraphs 30 to 47 above. The result is that regard must be had to the higher ranking document (being the NPS-FM) must be considered because there can be no confidence that it has been given effect to.
91. Reading Policies WL 3B, 5B and 6B on their own, there is no apparent conflict, particularly if the word "rural" is not read into "land use activities" in Policy WL5B or into paragraph (c) of Policy WL 6B (as explained in paragraphs 30 to 47 above). It is submitted that Federated Farmers' proposal maintains the harmony both internally and between the water quality policies. Accordingly, Federated Farmers' proposal gives effect to the RPS.

### **Third document: NPS-FM**

92. It is submitted that an analysis of the NPS-FM further supports Federated Farmers' position that the Hearing Panel has jurisdiction to consider its proposal. In particular, it is submitted that Plan Change 10 does not give effect to the NPS-FM and Federated Farmers' proposal provides a framework that anticipates and provides for the on-going work necessary to give effect to the NPS-FM.

93. The RPS is required to “give effect to” the NPS-FM. Council’s position is that the RPS and Plan Change 10 give effect to the NPS-FM. Federated Farmers’ position is that neither document gives effect to the NPS-FM. Further, Federated Farmers’ position is that the NPS-FM provides helpful context that must be considered in developing water quality rules in a regional pan. Federated Farmers’ proposal has been informed by this context.

#### **RPS pre-dates NPS-FM**

94. The RWLP was notified in 2002 and became operative in 2008.<sup>66</sup> The RWLP contains the Rotorua Lake water quality objective of a TLI of 4.2.

95. This TLI is based on a recommendation by the Water Quality Technical Advisory Group (“WQTAG”) in 1986 that the water quality of the 1960s is a suitable and achievable target for Lake Rotorua and a TLI of 4.2 represents this target.<sup>67</sup>

96. On the basis of this TLI, it was recommended in 1986 that a annual nitrogen load of 435t and phosphorous load of 37t would be the most suitable to achieve and maintain a TLI of 4.2.<sup>68</sup> As a result, a nitrogen limit of 435t per annum was adopted in the RPS.<sup>69</sup>

97. The RPS was notified on 9 November 2010. It became operative on 1 October 2014.<sup>70</sup>

98. The NPS-FM came into effect on 1 August 2014. Council notified its NPS-FM implementation programme on 14 December 2015. This includes scheduling the NPS-FM process for Rotorua Lakes for 2020 to 2024.<sup>71</sup>

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<sup>66</sup> Statement of Evidence of Stephen Guy Lamb of the Bay of Plenty Regional Council dated 17 January 2017 at [12].

<sup>67</sup> Statement of Evidence of Andrew Charles Bruere on Behalf of the Bay of Plenty Regional Council dated 16 January 2017 at [21].

<sup>68</sup> Statement of Evidence of Andrew Charles Bruere on Behalf of the Bay of Plenty Regional Council dated 16 January 2017 at [24].

<sup>69</sup> Section 32 Evaluation: Lake Rotorua Nutrient Management Rules Plan Change 10, pages 2 and 21.

<sup>70</sup> Statement of Evidence of Stephen Guy Lamb of the Bay of Plenty Regional Council dated 17 January 2017 at [9] and [11].

<sup>71</sup> National Policy Statement for Fresh Water Implementation – Progress Report 2016, Annexure O to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017

99. The reason for setting out the history to the key decisions that led to the RPS adopting a nitrogen limit of 435t is to show that the thinking behind the nitrogen limit and the Schedule 1 processes all occurred before the NPS-FM 2014 came into force. Accordingly, it cannot be assumed that the 435t limit in the RPS gives effect the NPS-FM.
100. By way of further background it is important that the NZCPS came into effect on 3 December 2010. Council recognised that the RPS (which was notified on 9 November 2010) did not give effect to the NZCPS. Accordingly it notified Variation 1 (Coastal Policy) to the Proposed RPS on 31 May 2012 to give effect to the NZCPS. It is submitted that in circumstances where the RPS did not give effect to the NZCPS, it is likely that it also does not give effect to the NPS-FM.

#### **Analysis of “give effect to”**

101. Council’s view is that it has “given effect to” the NPS-FM in respect of nitrogen. In reaching this conclusion it appears that it has misunderstands the meaning of that obligation.
102. The section 42A report sets out various statutory documents and the consideration Plan Change 10 needs to give to them. In respect of the NPS-FM 2014, the report says (emphasis added):<sup>72</sup>

A regional policy and plan must **uphold the intent and direction** of the NPS. **Alignment** must be achieved with the objectives and policies of the NPS.

103. It is submitted that this is not the correct approach. Council’s approach is more akin to the approach taken where the direction is that a planning document must not be “inconsistent with” or must “have regard to” a statutory document, which has been interpreted as allowing a “degree of neutrality.”<sup>73</sup> This is not consistent with the “positive implementation” of the superior document.<sup>74</sup>

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<sup>72</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, page 21.

<sup>73</sup> *Clevedon Cares Incorporated v Manukau City Council* [2010] NZEnvC 211 at [50].

<sup>74</sup> *Clevedon Cares Incorporated v Manukau City Council* [2010] NZEnvC 211 at [50].

104. The section 42A report says that the NPS-FM directs regional councils to set objectives for the state their communities want for freshwater bodies in the future. It concludes that (emphasis added):
- a. The community has set the water quality level through the adoption of a TLI of 4.2 to achieve the water quality levels of the 1960s.<sup>75</sup>
  - b. The setting of the TLI in Objective 11 of the RWLP and nitrogen limit of 435t in the RPS **aligns** with the NPS-FM National Objectives Framework.<sup>76</sup>
  - c. All matters described in Objective 1 and Policy CA2(a)-(f) of the NPS-FM have been taken into account by Council even though the TLI and nitrogen limit setting process were completed prior to the NPS-FM becoming operative.<sup>77</sup>
  - d. The TLI, RPS nitrogen limit and subsequent Plan Change 10 uphold Objectives AA1, AA2 and Policies AA1 to AA3 by providing a regulatory framework that upholds the limit and TLI.<sup>78</sup>
  - e. Nitrogen is only one attribute of the NPS-FM. The other attributes will be identified through a separate process with the community between 2020 and 2025. It is anticipated that this will not change the objectives, TLI, RPS, RWLP and Plan Change 10 because these have been in place since the 1990s and have been agreed by the community and **uphold the intent** of the NPS-FM.<sup>79</sup>
105. It is submitted that this analysis is flawed. On the basis of the analysis below, it is submitted that not only does the RPS and Plan Change 10 fail to give effect to the NPS-FM, but also Federated Farmers' proposal

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<sup>75</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 22, page 17.

<sup>76</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 24, page 18.

<sup>77</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 25, page 18.

<sup>78</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 25, page 18.

<sup>79</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 26, page 18.

provides a framework that anticipates and provides for the ongoing work necessary to give effect to the NPS-FM.

### **Case law**

106. Council's approach is essentially that the NPS-FM can be implemented in a piecemeal way that relies historic targets or measures and historic community engagement.
107. Counsel is not aware of any case that has dealt with the specific issue of whether the NPS-FM can be implemented in this way. Counsel is aware that anecdotally the approach adopted by councils to implement the NPS-FM 2014 has varied. Counsel is also aware that implementation of the NPS-FM has recently been reviewed and that the Government intends to make a series of amendments to the NPS-FM.
108. The Government published a "Clean Water" consultation document on 23 February 2017. That document includes proposals to amend the NPS-FM. One of those proposals is to make it clear that regional councils must consider the community's economic well being when deciding what level or pace of water quality improvements will be targeted.<sup>80</sup> Another is to reinforce community consultation in Policy CA2. However, at this stage the proposals do not provide assistance on the issue of whether the NPS-FM can be implemented in a piecemeal fashion constrained by historical decisions.
109. It is submitted that there is some authority for the proposition that the NPS-FM cannot be implemented in an ad hoc fashion and needs to be implemented as part of an action programme as anticipated by the NPS-FM. In *Horticulture New Zealand v Managwatu-Wanganui Regional Council*<sup>81</sup> the Court found that Council and the Court could not retrospectively amend the Proposed One Plan to give effect to the NPS-

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<sup>80</sup> MfE Clean Water Consultation Document 2017, page 20, Annexure R to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017

<sup>81</sup> *Horticulture New Zealand v Managwatu-Wanganui Regional Council* [2013] NZHC 2492.

FM because “implementation of the NPS-FM will need to be addressed in accordance with its own terms, and under Sch 1, separately.”<sup>82</sup>

110. There is also authority for the proposition that a decision maker on a plan change who does not properly consider the NPS-FM is likely to be directed to re-consider its decision in light of the NPS-FM. In *Hakwes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council*<sup>83</sup> the Board of Inquiry was directed to reconsider its decision on rule TT1(j) in light of the NPS-FM 2014, even though it was not in existence at the time of the original decision.

### **Analysis**

111. It is submitted that Council’s approach to implementing the NPS-FM for Lake Rotorua does not give effect to the NPS-FM and raises several issues. These are considered under the headings below.

### **Piecemeal approach**

112. The NPS-FM is predicated on integrated management of freshwater. Water quality issues cannot be considered in isolation from water quantity issues. Likewise particular water quality attributes cannot be considered in isolation. It is submitted that considering nitrogen in isolation from other attributes does not achieve Objective C1 and Policy C1 of the NPS-FM.
113. This is supported by the science which shows that the nutrients interact and need to be considered together in order to achieve the desired water quality.<sup>84</sup> It is submitted that solely focusing on nitrogen now will limit available options when the NPS-FM is implemented, and will potentially have adverse water quality effects. This results in an ad hoc and piecemeal approach.
114. A piecemeal approach would not necessarily be an issue if Plan Change 10 was a “hold the line” approach because changes in the science could

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<sup>82</sup> *Horticulture New Zealand v Managwatu-Wanganui Regional Council* [2013] NZHC 2492 at [102].

<sup>83</sup> *Hakwes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191.

<sup>84</sup> Statement of Evidence of Thomas William Stephens on Behalf of DairyNZ dated 21 February 2017 at [6.6] and Statement of Evidence of Andrew Charles Bruere on Behalf of Bay of Plenty Regional Council dated 16 January 2017 at [31].

be addressed by further plan changes. However, given that it will result in irreversible and drastic land use change, this cannot be corrected in future plan changes.

### **NPS-FM implementation guide**

115. The NPS-FM implementation guide anticipates a holistic consideration of the NPS-FM and an iterative process to “get it right.” In setting water quality limits under Policy A1, councils must give effect to all of the objectives in the NPS-FM. In particular, councils should also consider water quantity (Objectives B1 to B7), integrated management (Objective C1) and tangata whenua values and interests (Objective D1).<sup>85</sup>
116. The NPS-FM implementation guide specifically recognises that “limit setting, particularly for water quality, is an iterative process that may take a succession of plan changes to get right.”<sup>86</sup> As identified above, this would not be an issue if Plan Change 10 did not propose drastic and irreversible land use changes.
117. This is consistent with DairyNZ’s evidence that accessing robust, evidence based science at five yearly intervals, progressing towards the sustainable nutrient load limit, recalibrating predictive models and assessing the effects or ability for phosphorous reduction will enable an evaluation of the cost effectiveness of alternative approaches for sustaining a TLI of 4.2 for Lake Rotorua.<sup>87</sup>

### **Community process**

118. Council is currently implementing the NPS-FM for two WMAs (Kaituna/Pongakawa and Rangitaikei). Community groups have been established to assist Council to implement the NPS-FM by identifying their aspirations for the catchment and how these can be achieved by setting water allocation and quality limits. This involves identifying values for freshwater, translating those values into freshwater objectives and developing water allocation and quality limits for freshwater. A critical part

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<sup>85</sup> A guide to the National Policy Statement for Freshwater Management 2014 at page 36.

<sup>86</sup> A guide to the National Policy Statement for Freshwater Management 2014 at page 36.

<sup>87</sup> Statement of Evidence of Thomas William Stephens on Behalf of DairyNZ dated 21 February 2017 at [7.6].

of this will be assessing trade offs required to set water quantity and quality limits.<sup>88</sup>

119. It is submitted that constraining the community group process for Lake Rotorua to pre-existing water quality values, objectives and limits for the TLI and nitrogen will constrain the terms of reference and will not result in genuine community consultation. It is submitted that this is contrary to the process in section CA of the NPS-FM. Importantly, the science already indicates that this is likely to be contrary to achieving the best water quality outcome for the lake (as explained above).
120. It is submitted that the community involvement to date in setting the TLI and nitrogen limits has fallen well short of the process in section CA of the NPS-FM and the process described in the terms of reference for the two WMAs that are currently implementing the NPS-FM.
121. The Stakeholder Advisory Group (“STAG”) was established to provide advice on the development of rules for Lake Rotorua. While the purpose of the group was to provide oversight, advice and recommendations on rules and incentive options to achieve the nutrient reduction targets,<sup>89</sup> the reality was that due to Council’s narrow approach to the RPS (as described above). this was not an NPS-FM process. There was no ability to undertake a comprehensive water quality and quantity value assessment or objective setting process (there was no ability to influence or even consider the values or community aspirations).
122. A consequence is that there has not been the same community involvement as the WMA groups or as required by the NPS-FM.

### **Consultation**

123. In making any decision, Council has an obligation under section 82 of the Local Government Act 2002 to receive any views with an “open mind.” Council’s statement that consultation as part of the implementation of the

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<sup>88</sup> Terms of reference for Rangitaiki and Pongakawa WMAs, Annexure Q to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017

<sup>89</sup> Terms of Reference Lake Rotorua STAG Catchment Stakeholder Advisory Group, December 2012, page 1, Annexure E to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017



NPS-FM will not change the Lake Rotorua water quality target<sup>90</sup> indicates that it is not approaching this with an open mind.

### **Conclusion – NPS-FM**

124. In terms of giving effect to the NPS-FM, it is submitted that:

- a. The RPS does not give effect to the NPS-FM 2014 because it predates it and the NPS-FM community consultation and value setting process has not been undertaken.
- b. Plan Change 10 does not give effect to the NPS-FM because it simply adopts historic water quality objectives, requires irreversible land use change and constrains the implementation of the NPS-FM by imposing responsibility for achieving the 2032 nitrogen target on the rural community now.
- c. Federated Farmers' proposal gives effect to the RPS in a way that does not create an internal conflict in Policies WL 3B and 6B and does not require immediate changes to the RPS to give effect to the NPS-FM. In particular, with the retention of the rule 11 benchmark and requirement to adopt industry best practice, the downward trajectory in nitrogen is maintained until 2022 when the NPS-FM is implemented for the Lake Rotorua WMA.
- d. Federated Farmers' proposal provides for the implementation of the NPS-FM and any consequent changes to the RPS and RWLP. At that time a framework of methods and rules for achieving the community targets for 2032 and beyond can be adopted.

### **Fourth document: Part 2 of the Act**

125. It is submitted that the final consideration in the hierarchy of documents is Part 2 of the Act. A brief analysis of Part 2 is set out below. While consideration of Part 2 may not be necessary (on the basis of the analysis of the RPS and NPS-FM above), it is submitted that this adds to the context and supports Federated Farmers' position that a broad approach

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<sup>90</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, paragraph 26, page 18.

ought to be adopted (as opposed to Council's narrow approach of honing in on a 435t nitrogen limit).

126. Prior to the Supreme Court decision in *King Salmon*, the prevailing approach to Part 2 was to balance the various considerations with a view of achieving the Act's overall purpose. However, the majority of the Supreme Court in *King Salmon* concluded that policies 13 and 15 were so specific and clear in what they prohibited that they created environmental bottom lines and it was not correct to adopt an overall broad judgment approach.<sup>91</sup>
127. It is submitted that this is not the case for the present situation where, unlike the NZCPS, the NPS-FM does not have specific and clear directions, the RPS pre-dates the NPS-FM and is not a national direction, and Plan Change 10 takes a selective and exclusive approach that does not give effect to the RPS.
128. Section 5 of the Act involves balancing adverse effects against the benefits of economic and social wellbeing and the integrated management of the region's natural and physical resources to achieve sustainable management. Sections 6, 7 and 8 supplement the overarching objective in section 5 by stating the particular obligations of those administering the RMA.
129. The Supreme Court in *King Salmon* recognised the need to balance protection with development:<sup>92</sup>

At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect of course, but an aspect... We see this language [ss 6(a) and (b)] as underscoring the point that preservation and protection of an environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

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<sup>91</sup> *Man O' War Station Limited v Auckland Council* [2017] NZCA 24 at [57].

<sup>92</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [148].

Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management.

130. The Section 42A report identifies sections 6(a), (b), (c), (e) and 7(a), (aa), (b), (c), (d), (e), (g), (h) and 8 as being relevant. The focus of the analysis of Plan Change 10 against these sections is on reducing nitrogen from pastoral activities to achieve a sustainable lake load of 435t of nitrogen. The majority of the analysis considers the relationship of Te Arawa with the Lake.<sup>93</sup>
131. It is submitted that this analysis fails to take an integrated approach to the sustainable management of the lake. It fails to consider “what” or “who” is contributing to water quality issues in a particular catchment and it fails to consider all of the causes of water quality degradation. Importantly, it fails to give any consideration to the economic and social wellbeing of people and communities under section 5(2).
132. It is submitted that Federated Farmers’ proposal strikes a more appropriate balance of Part 2 matters. It is submitted that its proposal provides:
  - a. The improvement in lake water quality through rules and methods to encourage the continued downward trajectory of nitrogen.
  - b. An integrated management approach through the development of sub-catchment action plans to target all discharges (both sources and contaminants) to the Lake and the targeting of the “hot spots.”
  - c. An iterative and adaptive management process whereby the science is reviewed and advances made to ensure that efforts are effective, efficient and greatest gains in water quality are made.
  - d. All sectors of the community, not just pastoral land uses, are to adopt reasonable best management practices and do their part to improve water quality. This strikes an equitable balance across community groups and sectors.

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<sup>93</sup> Section 42A Report: Lake Rotorua Nutrient Management Rules Plan Change 10, section 4.1, pages 14 to 17.

- e. Economic and social wellbeing are respected by not loading the bulk of the burden of nitrogen reductions on farmers and by providing for the community to determine their values, what is reasonable, practical and affordable, and the appropriate split public and private costs through the implementation of the NPS-FM process.

133. The fundamental difference is that Federated Farmers' proposal achieves a balanced approach to Part 2 matters without the narrow and inflexible focus on nitrogen.

### **Section 32 report**

134. As with Part 2, the section 32 analysis is only considered briefly because many of the principles have been addressed in the context of the other analyses above.

135. The fundamental purpose of a section 32 report is to consider the proposed plan change and alternatives to conclude whether the proposed plan change is the most appropriate way to achieve the purpose of the Act. This has been interpreted as involving a value judgment as to what is the most suitable approach when measured against the relevant objectives.<sup>94</sup>

136. The section 32 report states that Plan Change 10 does not introduce new objectives and says that it relies on the objectives contained in the RPS and RWLP.<sup>95</sup> It is submitted that a fundamental flaw with the section 32 is that it then adopts a very narrow interpretation of Policy WL 6B(c) as the objective for the plan change "the purpose is to reduce the annual load of nitrogen to the lake from 755 tonnes to 435 tonnes by 2032."<sup>96</sup> As set out in the analysis above, this is not the objective of the RPS but it is instead part of one policy that has been interpreted out of context.

137. A further flaw is that Plan Change 10 then seeks to impose 270 tonnes on reductions in discharges from rural land. In doing so, Plan Change 10

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<sup>94</sup> *Rational Transport Soc Inc v New Zealand Transport Agency*[2012] NZRMA 298 at [45] and [46].

<sup>95</sup> Section 32 Evaluation: Lake Rotorua Nutrient Management Rules Plan Change 10 page 27.

<sup>96</sup> Section 32 Evaluation: Lake Rotorua Nutrient Management Rules Plan Change 10 page 27.

solely regulates discharges of nitrogen from pastoral land without further consideration of other discharges (both in terms of other sources and other contaminants contributing to the TLI).

138. It is submitted that without correctly identifying the objectives, any analysis against the stated objective will be inherently flawed. This flawed analysis leads to the conclusion that Plan Change 10 is the only appropriate means to achieve 435t of nitrogen by 2032. However, this does not achieve sustainable management nor does it give effect to the NPS-FM or the RPS.
139. It is submitted that if the objective of Plan Change 10 is instead as Federated Farmers proposes in its submission,<sup>97</sup> this will give effect to the RPS (by quoting all of the relevant objectives and policies) and achieve an integrated approach to the issue.
140. It is submitted that when considered against the expanded list of issues, as well as the above analysis of the RPS and NPS-FM, Federated Farmers' proposal is the most appropriate alternative.



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<sup>97</sup> RPS policies – pages 56 to 59 of Federated Farmers of New Zealand Submission, Annexure A to the Statement of Evidence of Elizabeth McGruddy on Behalf of Federated Farmers dated 6 March 2017